

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE ACTING CHIEF JUSTICE MR.THOTTATHIL B.RADHAKRISHNAN

&

THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

FRIDAY, THE 29TH DAY OF JULY 2016/7TH SRAVANA, 1938

WA.No. 1096 of 2016 () IN WP(C).32274/2015

AGAINST THE ORDER/JUDGMENT IN WP(C) 32274/2015 of HIGH COURT OF KERALA
DATED 27-10-2015

APPELLANT(S)/RESPONDENT:

BHARAT SANCHAR NIGAM LIMITED
505, BHARAT SANCHAR BHAVAN, JANAPATH,
NEW DELHI 110 001, REPRESENTED BY ITS CHAIRMAN

BY ADVS.SRI.P.J.PHILIP,SC,BSNL(BHARAT SANCHAR N
SMT.MANEESHA DHIR

RESPONDENT(S)/PETITIONER:

M/S.RELIANCE COMMUNICATIONS LTD.
HAVING ITS REGISTERED OFFICE AT H BLOCK,
1ST FLOOR, DHIRUBHAI AMBANI KNOWLEDGE CITY,
NAVI MUMBAI-400 710, AND HAVING ITS DELHI OFFICE AT :
RELIANCE CENTRE, 3RD FLOOR, A-WING,
MAHARAJA RANJI SINGH MARG, NEW DELHI 110 002,
REPRESENTED BY ITS AUTHORISED SIGNATORY,
MR.ARUL KUMAR PUTHUKUDI.

R1 BY ADV. SRI.A.KUMAR
R1 BY ADV. SRI.P.J.ANILKUMAR
R1 BY ADV. SMTG.MINI

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 29-07-2016,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**THOTTATHIL B.RADHAKRISHNAN, Ag.CJ.
&
ANU SIVARAMAN, J.**

W.A.No. 1096 of 2016

Dated this the 29th July, 2016

JUDGMENT

Thottathil B.Radhakrishnan, Ag.CJ.

Though this writ appeal is listed for admission, on consent of parties, the matter is taken up for further hearing treating it as admitted.

2. We have heard the learned counsel for the appellant BSNL and the learned Senior Counsel appearing for the respondent Reliance Communications Ltd.

3. Under challenge is the judgment of the learned single Judge interfering with the conditions imposed by the Telecom Disputes Settlement and Appellate Tribunal constituted under the provisions of the Telecom Regulatory Authority of India Act, 1997.

4. The Tribunal considered a bunch of matters, all instituted by the Reliance Communications Ltd. and issued Exhibit P7 whereunder different issues relating to demands by BSNL were dealt with. In so far as the subject matter in the writ petition is concerned, it is suffice to say that the matter relates to claim for a period which is described as P-3 period and the claim of BSNL for that period is normal Inter Connect User (ICU) plus Access Deficit Charges (ADC). As per

Exhibit P7 decision, in so far as the matter relating to P-3 period is concerned, the Tribunal ordered as follows:

“.....However, the parties should reconcile their accounts with regard to P-3 period.

(3) Article I contained in Schedule appended to the Limitation Act, 1963 is not applicable in the instant case.

(4) Clause 6.4.6 of the interconnect agreement, having regard to the prayers made by the petitioner cannot be declared ultra vires.

(5) Keeping in view the contention raised by the learned counsel for the respondent that with a view to achieve 'level playing field' Clause 7.5 of the agreement should be read down and so read, both the parties would be entitled to the same rate of interest subject to just exceptions, and in that view of the matter Clause 7.5 of the interconnect agreement need not be struck down.”

5. It is submitted that Exhibit P7 is subjected to proceeding before the Honourable Supreme Court of India in so far as it relates to P-1 period while P-3 period is not a subject matter of challenge. Thereafter, on the basis of the direction contained in Exhibit P7 in so far as it relates to P-3 period, the BSNL held its meetings with representatives of the Reliance Communications Ltd. and drew up Exhibits P11 and P11A whereunder demand for interest was raised on the strength of the contents of the decision rendered by the Tribunal

through Exhibit P7, in so far as it relates to P-3 period. That was carried in appeal to the Tribunal by the Reliance Communications Ltd. Whatever be the quality of the appeal and grounds raised before the Tribunal on that issue, and even if there is any concession or otherwise on such issues, the fact of the matter remains that Exhibit P14 order was issued by the Tribunal on 7.10.2015 on M.A.No. 349 of 2015 in Petition No.205 of 2015 whereby the Tribunal held that there is no case made out for any interim direction in the matter and dismissed the application, however with the direction that the payment of the demand amount before the Tribunal shall be without prejudice to the petitioner's rights and contentions and shall be subject to the final outcome of the matter pending before the Tribunal. Thereafter, the respondent requested for enlargement of time to make payment of the demand and accordingly the Tribunal granted the Reliance Communications Ltd. four weeks time to effect the payment.

7. Thereafter, the writ petition from which this writ appeal arises was filed challenging Exhibit P14 interlocutory order refusing interim direction pending proceedings before the Tribunal. The learned single Judge looking into the materials has granted an order trimming down payables to 50% as condition for operation of stay of the direction to pay. This means that in terms of the judgment of the learned single

Judge, the Reliance Communications Ltd. has to pay only 50% of the amount which it ought to have paid, on the basis of Exhibit P14 the time for payment of which was extended as per Exhibit P15 order of the Tribunal.

8. The learned counsel for the BSNL submitted that sufficient opportunity was not accorded by the learned single Judge to contest the proceedings to point out that the situation leading to Exhibit P15 clearly demonstrates that Reliance Communications had acquiesced to the contents of Exhibit P14. In fact, the argument was that Exhibit P14 was a consent order. It was argued relying on the decision of the Apex Court in ***Dhiwani Central Co-operative Bank Ltd., Haryana v. Registrar, Co-operative Societies*** [2010(15) SCC 517] that the learned single Judge ought not to have acted in exercise of writ jurisdiction and interfered in matters which are regulated by interlocutory orders of the Tribunal. Certain submissions have also been made touching the contentions on merits of the disputes pending before the Tribunal.

9. *Per contra*, the learned Senior Counsel appearing for the respondent argued that it would be uncharitable to say that there was no opportunity before the learned single Judge in as much as the impugned judgment reflects the submissions made on behalf of the

BSNL and the consideration of those submissions by the learned single Judge. We stand advised by the fundamental principle of law that affidavits of acquiescence as to what had transpired in a Court; particularly when it relates to matters not reflected in the judgment rendered by that Court or in contradistinction to what emanates out of that judgment ought not to be entertained by superior courts. We, therefore, decline to decide any issue as to whether there is any consent expressed by BSNL or on its behalf before the learned single Judge during the course of the writ petition.

10. The learned Senior Counsel for the respondent Reliance Communications Ltd. further argued that in the ultimate analysis, all that has happened is to put the parties to the same situation and conditions under which they were governed in relation to proceedings in the earlier rounds before the Tribunal. This argument stands on the footing that during the pendency of Exhibit P7 as well, there was no compulsion to make the payments.

11. On the whole, we need to note that Exhibit P7 decision of the Tribunal rendered on 19.4.2012, has become final in so far as P-3 period is concerned. We say so because, there is no appeal on that issue by either of the parties before any superior court. This means that what has to be worked out is the directions contained in Exhibit P7

as regards P-3 period. Keeping aside the question as to whether there was any consensus arrived at between BSNL and Reliance Communications Ltd., in the discussion that followed Exhibit P7, it is certain that BSNL has made a quantified claim through Exhibits P2 and P3. That reflects only the interest component at PLR rate which, according to BSNL, remains unpaid. In that view of the matter, when the Tribunal was requested to stay the enforcement of that claim, the Tribunal, though it has entertained the petition filed by the Reliance Communications Ltd., had ordered that the payment be made without prejudice to its contentions and rights and such payment would be subject to the final outcome of the petition pending before it. The request for deferring payment was refused by the Tribunal. Notwithstanding the question whether Exhibit P15 order granting extension of time at the mentioning of the Reliance Communications Ltd. could be treated as an order which would result in expression of acquiescence by the Reliance Communications Ltd. as regards Exhibit P14 order, the fact of the matter remains that it is the firm condition between the parties that there cannot be any claim for interest on interest. If that be so, it would not be an appreciable proposition in commercial jurisdiction to keep interest unpaid. The interest component has to be paid because funds in the hands of any such

operator is essentially required to carry out its activities. We say so because, the Tribunal has made all such payments to be made without prejudice to the contentions of the Reliance Communications Ltd. and to its rights and also subject to the final outcome of the petition pending before it. We are, therefore, of the view that the learned single Judge could not have imposed any restriction on the amount to be paid once Exhibit P14 order was issued by the Tribunal.

12. However, we notice that the appeal was entertained after condoning the delay of 109 days and before the institution of the appeal, 50% of the amount as covered by the judgment of the learned single Judge was actually remitted by the Reliance Communications Ltd. Under such circumstances, we think that the entire outstanding amount can be ordered to be paid subject to the result of the matter pending before the Tribunal in two instalments.

13. In the result, this writ appeal is allowed and the impugned judgment is vacated and it is directed that the directions contained in the Tribunal's order Exhibit P14 dated 7.10.2015 would stand complied with if the respondent Reliance Communications Ltd. remits the remaining 50% in two equal instalments payable on or before 31.8.2016 and 30.9.2016 subject to the outcome of the proceedings pending before the Tribunal.

14. Before parting, we may record the anxiety expressed by both sides that further proceedings in the Tribunal cannot now be carried in view of the vacancy of the office of its Chairman.

The Writ Appeal is ordered accordingly.

**THOTTATHIL B.RADHAKRISHNAN
ACTING CHIEF JUSTICE**

**ANU SIVARAMAN
JUDGE**

vgs