

JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

I.C.A No.1023 / 2013

Pakistan Telecommunication Company limited
versus
M/S Wireless Communications Interactive Incorporated.

Appellant by: Mr. Ghulam Adeeb, Advocate.

Respondent by: Nemo.

Date of Hearing: 07.12.2022

MOHSIN AKHTAR KAYANI, J: Through this *Intra Court Appeal*, which is in nature of *Regular First Appeal* filed under Section 96 CPC against judgment and decree, dated 02.10.2013, passed by the learned Single Judge in Chamber, whereby suit filed by the appellant for recovery of US\$ 1,680,180.66/- has been dismissed.

2. Brief facts referred in the instant appeal are that the appellant PTCL, public limited company has entered into an agreement for termination of additional international incoming traffic from USA and Europe to Pakistan through voice over Internet Protocol with the respondent vide agreement, dated 30.07.2002, under the terms of agreement, the respondent was under obligation to perform the services mentioned in the agreement in which, design, install, test and commission at its own cost and expense the Voice on Internet Protocol (hereinafter referred to as the "*VoIP*") platform at Karachi at the plaintiff's premises were included. The *VoIP* shall be free from all material defects and shall be capable of terminating international calls from USA and Europe within the performance parameters contemplated

in the agreement. The *VoIP* platform shall generate data that will present a complete and accurate picture of usage of *VoIP* for termination of international calls and lastly the respondent is under obligation to terminate traffic from USA and Europe through the *VoIP* platform only at least 3 to 5 Million minutes per month per location. The respondent is also responsible to submit Call Data Records (hereinafter referred to as the “*CDRs*”) generated in a platform installed in USA/Europe to the appellant/plaintiff and the same were to be compared with *CDRs* created in the appellant’s transit exchanges and in case of discrepancy, the figures of the appellant’s *CDRs* were to be considered as final and conclusive for the purposes of billing. The respondent was also under obligation to deposit and maintain in the designated account of the appellant a cash rolling advance to secure the amounts due from it under the terms of agreement, which was adjustable towards any outstanding amounts due from the respondent. After the expiry of first agreement, another agreement for a period of one year was executed between the parties on 1st September, 2004 containing similar terms as provided in the previous agreement. However, the respondent has failed to pay bill for the month of October, 2004 and also for the month of November, 2004, therefore, defaulting in paying to the tune of US\$ 1,120,293.80. However, before the termination of the agreement time was extended to respondent to pay the outstanding amount in three installments subject to furnishing of bank guarantee on account of outstanding amount and deficiency in rolling advance. The respondent has paid the 1st installment of US\$ 373,436.26 but failed to pay the remaining installments. Different notices were served but no response

was given by the respondent and finally in June, 2005 the agreement was terminated by the appellant. However, at that time the total outstanding amount accumulated was to the tune of US\$ 2,213,191.45 and after deduction of the rolling advance and discount, the respondent was under obligation to pay US\$ 1,37,959.66 as well as additional amount US\$ 308,221.00 on account of circuits billing.

3. The suit was contested by the respondent company and it was specifically highlighted in the written statement that the respondent company had installed one of the top *VoIP* platforms built by CISCO at Karachi Exchange and the cost of the equipment which was installed in Karachi was more than 1.5 million US\$ with the assistance of the engineers from abroad and later on it revealed that the rates traded in the market was below and there was illegal traffic, therefore, it was not possible for the respondent to proceed further. The respondent has also highlighted the arbitration clause and admitted execution of 2nd agreement but the same was never implemented. The suit has been contested between the parties and issues were framed vide order, dated 24.03.2007. Both the parties have recorded their evidence through their single witness namely, Ameer Hussain, General Manager International Revenues PTCL as (Pw-1) and one Mr. Jihad H. Ajaltouni as (Dw-1) from respondent Wireless Communications Interactive Incorporated side, thereafter, the trial court has dismissed the suit in the light of available evidence, hence, this appeal.

4. The learned counsel for the appellant contends that the learned Judge in Chamber has not appreciated the evidence in proper manner. No CDRs and bills data required when there was no dispute,

qua the same among the parties neither any dispute was raised in the statement or in the respondent witness statement. It was also argued that there is no requirement to confront the document to the respondent as recorded by the trial court even the record was not objected.

5. Conversely, the learned counsel for the respondent submits written arguments, whereby, it was referred that the appellant has failed to discharge the onus and as such the learned Judge in Chamber has rightly dismissed the suit.

6. The learned counsels for the parties have been heard and the record perused with their able assistance.

7. Perusal of the record reveals that the entire case in this appeal revolves around the billing dispute based upon an admitted document i.e. agreement, dated 30.07.2002 (Ex-P2) executed between the appellant and the respondent M/S Wireless Communications Interactive Incorporated in USA. The very purpose of the agreement is to arrange for termination of additional international incoming traffic from USA and Europe to Pakistan through *VoIP*. Under the terms of agreement *VoIP* platform based upon hardware and software system was to be installed at PTCL premises at Karachi and connected at level of transit exchange by the contractor for or on behalf of PTCL to enable international traffic terminated on a fixed line or mobile subscriber through PTCL network anywhere in Pakistan. There is no denial that duration of the agreement was for one year but the obligation of the contractor i.e. the respondent have been explained in Clause 6.1, 6.2 & 6.3 in detailed. Though it has not been denied that billing and payment mechanism provided in clause 11 with a specific formula, which is as under:-

11. BILLING & PAYMENT

The Contractor Shall:

- i. Keep accurate and systematic accounts and records in respect of revenues generated from sale of VoIP service to Customers in accordance with internationally accepted accounting principles. For avoidance of doubt it is clarified that CDRs will be generated on per second basis, however, will be charged on the basis of cumulative minutes. (e.g. if the total number of cumulative seconds in a billing period is 106,800,261, then the total number of minutes to be billed at the Termination Rate will be 1,780,004 minutes).
- ii. (a) Submit CDRs generated in a platform installed in USA/Europe to PTCL under Clause 10 above. Such CDRs will be compared with records created in the PTCL transit exchanges. PTCL will generate bills based on figures at PTCL transit exchanges. However, the CDRs supplied by the Contractor must be in a format readable by PTCL billing centers. Subject to provisions of sub clause (b) below, in case of any variation between the Contractor's CDRs and the figures generated through CDRs of PTCL transit exchanges/VoIP Platform, the PTCL CDRs figures shall (subject to

paragraphs (b) and (c) below) be considered as final and conclusive for the purpose of billing under this 'Agreement'. Amount so determined and billed shall be binding on the Contractor.

- (b) In case of any discrepancy in CDR's reconciliation (where PTCL CDR shows more minutes terminated than the Contractor's CDR) up to 0.75% or less of the relevant CDR, the Contractor shall not make the same a basis for dispute and shall pay the same. However, the contractor will be given due opportunity to highlight any discrepancy in PTC's CDR for correction and if, such discrepancy is accepted by the PTCL the contractor shall be entitled for the credit. In case, the discrepancy exceeds the aforesaid figure of 0.75%, the Contractor shall pay the undisputed amount and the parties will resort to mutual negotiations, reconciliation and settlement for the disputed amount.
- (c) If the settlement is not arrived at amicably within four weeks, the dispute may be resolved through the dispute resolution mechanisms provided in this agreement or as may otherwise be agreed between the parties.
- iii. be billed fortnightly for the number of minutes multiplied by the agreed rate which is US\$ 0.19 (US cents nineteen) per minute at present. The bill

will be emailed and faxed to the Contractor or its designated agent, which shall be the valid document for the purpose of payments. However, for the purposes of record and fulfillment of other contractual requirements, the hard copies of such invoices shall later on be provided to the contractor by the PTCL.

iv. solely be responsible for the payment within seven days of the confirmed issuance/transmission of the invoice through e-mail and fax. The date and time for the payment shall be calculated from the date of issuance/transmission of such invoices. For avoidance of any doubt it is hereby clarified that only the date of credit of payment into the 'Designated Account' shall be considered as payment receipt date.

v. solely be responsible for the suspension of service at the discretion of the PTCL for such period of time till the payment is not made within stipulated period of time. PTCL shall have the right to terminate the 'Agreement' if the service is suspended due to non-payment.

8. The contract also contains the termination clause, its procedure and settlement dispute and arbitration in terms of clause 18, 19 & 22 respectively. The appellant has represented its case with the help of Ameer Hussain, General Manager who has appeared as (Pw-1) and

reiterated his stance provided in the body of the plaint and also refers the 2nd agreement, dated 1.09.2004 (Ex-P3) comprising of 27 leaves, which is extension of earlier agreement (Ex-P2). (Pw-1) acknowledges the due execution of agreement (Ex-P2) and (Ex-P3) regarding VoIP traffic business. There is no denial by (Pw-1) that the entire issue relates to the subsequent agreement and as per stance the respondent has failed to pay PTCL dues in accordance with the terms of agreement. Even the respondent company has not objected to the accuracy of PTCL bill and its receivable, even similarly the formula and rates given in schedule 4 of both the agreements were also not disputed neither there was any confusion about the rates but respondent WCI has failed to improve its payment mechanism and unfortunately the same was detonated with passage of time, therefore, the appellant has issued notices through letter, dated 22.10.2004 to 15.07.2005 (Ex-P4 to Ex-P17) in shape of letter and notices but the payments were not cleared and finally PTCL dues receivable from WCIR are US\$ 1,680, 181 and Rs.1,407,851/-, which have been explained in (Ex-P19). The appellant witness was cross examined at length who acknowledged the due execution of the agreements as well as purpose and obligation referred in terms of the agreement. He explained that the outstanding bills relate to period starting from October 2004 to November 2004 and 16.02.2005 to June 2005 except April 2005. He also admitted this fact that the bills were prepared on the basis of CDRs, which contained number of calls, number of minutes consumed and the destination of call termination but he has not produced any record of the CDRs.

9. On the other hand, the respondent side has produced Mr. Jihad H. Ajaltouni as (Dw-1) who admitted the execution of the

agreement and contends that the agreements were executed with the appellant PTCL for introducing VoIP to the Pakistan market and to help PTCL to fight gray/illegal traffic coming into Pakistan depriving the country from lot of revenue. As per respondent witness they have installed VoIP platform built by CISCO with the cost 1.5 US\$, which was paid by the respondent company under the terms of the agreement. It is the case of the respondent that WCI had to terminate 5 million minutes per month per location and they were entitled to receive discount of 15% of bilateral rates to become competitive which help them to recover a lot of revenue hijacked by illegal operators in Pakistan. Dw-1 stated in the witness box that PTCL offered the VoIP operators rate at higher side then the current market rate. The respondent WCI paid 84000US\$ by way of security and also paid rolling advance for every next month projected traffic for the purpose to secure the PTCL against negative exposure. WCI worked up to September 2004 and WCI is not able to work due to loss sustained in the project though WCI had paid millions of dollars to PTCL during the project irrespective of the fact that whether it has received anything from the market or not. During the course of cross examination Dw-1 has admitted execution of the agreements with the PTCL as well as its obligation at its own expense to provide VoIP platform at Karachi, even admitted the functioning of VoIP platform. He has also admitted the obligation of WCI to submit CDRs generated at its platform installed in US/Europe to PTCL, which have to be reconciled with PTCL CDRs but no such CDRs were submitted nor any record has been submitted to substantiate the billing dispute. Dw-1 in particular acknowledges that WCI paid an amount of US\$373436.26 on account of regular billing and confirms that WCI has terminated minutes on PTCL network up to September 2004.

10. While considering the above referred admitted evidence the primary issue is regarding the payment of outstanding bill based upon the CDRs generated by PTCL in terms of issues No.1 & 8 being primary issues. There is no cavil to the proposition that multiple letters have been issued by the appellant PTCL (Ex-P4 to Ex-P13) even the correspondence of negotiation were also highlighted in (Ex-P14) and final notice (Ex-P15) was issued to the respondent for payment but all the notices and letter (Ex-P15 to Ex-P19) were not acted upon. There is no denial to the proposition that billing calculation mechanism has been settled in terms of clause 11 (ii) (a) in which CDRs generated in platform installed in USA/Europe to PTCL will be compared with the record created in the PTCL transit exchangers and in case of any discrepancy or variation the figures provided and generated in PTCL transit exchange/VoIP platform shall be considered as final and conclusive for the purposes of billing under the agreement. But surprisingly this aspect was not settled in shape of any concrete evidence under Article 117 of the Qanoon-e-Shahdat Order, 1984 nor supportive CDRs was produced by each party to settle the claim if there was any discrepancy in the amount and invoices. Though the primary issue has to be discharged by the appellant but the same was not justified based upon the primary document of the CDRs. The learned Judge in Chamber has rightly observed that the copies of bills were without any CDR being a supportive document for the purposes of calculation of amount. As a result whereof, the appellant company has failed to establish its case through any cogent evidence. Similarly there is no denial that the respondent witness was not confronted with any document nor the same was admitted whereby the appellant is under obligation to discharge the onus and prove the contents of those letters but no effort

was made to perform such an obligation. In such scenario, we are in agreement with the learned Judge in Chamber where billing payments strategy has not been justified even the appellant company has not initiated the process of alternate dispute resolution. Though at this stage it has not been denied that the VoIP platform worth 1.5 million dollars is with the PTCL Company and they have received thousands of dollars from the respondent but there are certain discrepancies among the implementation parameters to handle the great traffic.

11. In view of above, no interference is required in the judgment and decree passed in this case and the appeal is meritless and, therefore, the same is hereby *dismissed*.

(ARBAB MUHAMMAD TAHIR)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in the open Court on: _____

JUDGE

JUDGE

Asif Mughal/-