TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI
Dated: 03/04/2019

CYBER APPEAL/1/2010

Petitioner Name: ICICI BANK LIMITED

Versus

Respondent Name: MR UMASHANKAR SIVASUBRAMANIAN AND OTHERS

BEFORE

HON'BLE MR. JUSTICE SHIVA KIRTI SINGH ,CHAIRPERSON
HON'BLE MR. A.K. BHARGAVA ,MEMBER

For Applicants/Appellants/ Petitioners Advocate

MR. KARUN MEHTA, ADVOCATE
MR.YUGAMTANEJA

For Respondents Advocate

MR. N.A. VIJAYASHANKAR, A R

Amicus Curiae:

For Impleader(Pet.):

For Impleader(Res.):

ORDER

Heard the parties in respect of Review Application No. 2 of 2019 preferred by the respondent/applicant.

The applicant is aggrieved by the final judgement and order of this Tribunal dated 10.1.2019. It is relevant to note at the outset that there are two typographical errors in the final judgement. The year shown against the date of the judgement has been wrongly typed as 2018 in place of 2019. The same is corrected. The date of the order shall be read as "10.1.2019" instead of 10.1.2018. It further appears that the Information Technology Act 2000 has been wrongly typed as Information Technology Act 2002. 2002 shall be read as "2000".

The prayers made in the Review Application are contained in paragraph 17 of that application which reads as follows:

" a. That total compensation as decreed by the Adjudicating Officer at Rs. 12.85 lakhs be retained in full.

b. Interest at 12 % p.a. be paid on Rs. 12.85 lakhs from 12.4.2010 to the date of payment after the TDSAT decision.

The prayers nos. "a" and "c" in fact require re-consideration of amount of cost that has been allowed by this Tribunal in the final judgement. It was after noticing the relevant facts and after full application of mind that we held that the cost of Rs. 6 lakhs as incidental expenses appears to be clearly excessive. Against that we allowed a consolidated cost of Rs. 50,000/-. This was in addition to upholding the grant of Rs. 27,850.00 which was paid as Ad Velorem and Application Fee.

We are in agreement with the statement advanced on behalf of the respondent that if a fresh exercise is undertaken for the purpose of prayer "a" and "c" , it would amount to sitting in appeal over the final judgement for which this Tribunal has no powers. The same submission has been

advanced in respect of prayer no. "b" also. But we do not agree with the submission so far as the issue of interest is concerned.

We have been informed that at the initial stage of the appeal, the then Cyber Appellate Tribunal had passed an order of interim stay in respect of execution proceedings on 7.6.2010. That order is Annexure-3 to the Review Application. It shows that the execution was stayed on the condition that the appellant shall deposit a sum of Rs. 5,50,000/- before the Adjudicating Officer within a period of one month. We have been given to understand that the appellant has complied with that direction and the money is lying in deposit and it also appears that it may be earning interest. This much is clear from the submissions made by learned A.R. of the applicant that the amount of Rs. 5 lakhs, which the appellant was permitted to withdraw, has not been withdrawn so far.

In our considered view, the aforesaid amount of Rs. 5,50,000/- alongwith interest, if any, must be made available to the appellant towards the satisfaction of the judgement and order passed by this Tribunal in appeal.

On a perusal of the earlier final judgement and order, we find that although we have concurred with grant of interest over Rs. 4,95,829.00 at 12% simple interest p.a. amounting to Rs. 1,60,648.00 till the date of judgement by the Adjudicating Officer, the issue of award of interest for the subsequent period when the appeal remained pending with this Tribunal has escaped our attention. That has neither been allowed nor rejected.

In the aforesaid situation, we are persuaded to accept the submission advanced on behalf of the applicant/respondent and allow interest at the same rate for the subsequent period i.e. from the date of judgement by the Adjudicating Officer till the judgement of this Tribunal. Such interest shall be over the entire amount allowed by this Tribunal i.e. Rs. 4,95,829.00, Rs. 1,60,048.00 and Rs. 27,850.00. These were the amounts which were found payable by the Adjudicating Officer. So far as consolidated cost of Rs. 50,000/- in place of Rs. 6 lakhs awarded by this Tribunal is concerned, it ought to have been paid within two months as permitted by the final judgement and order. Interest will be calculated at the same rate in respect of this cost but only for the period after two months from the date of the judgement of this Tribunal.

It is clarified that the liability of the appellant bank/non applicant shall be reduced by the amount of Rs. 5,50,000/- along with interest, if any, as soon as the same is made available to the applicant in view of our final judgement and this order, towards satisfaction of the judgement and decree of this Tribunal. The balance amount alone, which may include the principal amount as well as interest, shall be further payable by the appellant. Such payment of the deposited amount in favour of the applicant should be made at the earliest, preferably within one month from today. The Review Application is thus allowed in part and accordingly stands disposed of.

(S.K.SINGH)
CHAIRPERSON

(A.K. BHARGAVA)
MEMBER

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 10th January, 2018

Cyber Appeal No. 1 of 2010

ICICI Bank … Appellant

Versus

Mr.Umashankar Sivasubramanian & Ors. … Respondents

BEFORE:

HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON
HON'BLE MR. A.K. BHARGAVA, MEMBER

For Appellant : Mr.Vikas Mehta, Advocate
Ms. Yugam Taneja, Advocate
Mr. Vasanth Bharani, Advocate
Mr. Adith Nair, Advocate

For Respondent No. 1 : Mr. N.A. Vijayashankar, A R

ORDER

By S.K. Singh, Chairperson – This appeal under Section 57 of Information Technology, 2002 (IT Act 2002) is directed against order dated 12.04.2010 passed by Mr. P.W.C. Davidar, IAS, Adjudicating Officer (A.O.) under the IT Act 2002 at Chennai in Petition No.2462 of 2008. The petition arose from an application filed by the petitioner/respondent No.1 herein, under

Section 43 read with Section 46 of the IT Act, 2002. Under the impugned order the appellant has been directed to pay to the petitioner/respondent No.1 a compensation of Rs.12,85,000/- on the basis of findings recorded in the order against the appellant. The appeal was preferred before the then Cyber Appellate Tribunal in the year 2010. Since that Tribunal remained largely non-functional, no judgment was delivered although the matter was heard in 2011. Ultimately it has been placed under the jurisdiction of this Tribunal on account of the provisions in the Finance Act, 2017.

2. On notice to the appellant and respondents, only respondent No.1 has appeared and has been heard afresh. Respondent No.1/petitioner has relied upon documents filed earlier including written submissions whereas learned counsel for the appellant has advanced detailed submissions.

3. The respondents Nos.2, 3 and 4 are in fact officers of the appellant, ICICI Bank and have no interest other than that of the appellant. Respondent No.5, M/s Uday Enterprises is an account holder in one of the branches of the appellant Bank at Mumbai and admittedly the money wrongfully withdrawn from the account of respondent No.1 was transferred to the account of respondent No.5. The total fraudulent debit was of Rs.6,46,000/- which was transferred to the account of respondent No.5, M/s Uday Enterprises. Out of that, only Rs.1,50,171/- was re-credited to the account of respondent No.1 by the Bank. A large amount of Rs.4,60,000/- was withdrawn on behalf of

respondent No.5 as cash across the counter and a sum of Rs.35,000/- was adjusted by the Bank itself against the overdraft dues of respondent No.5. Thus, the net financial loss to respondent No.1 in this case is Rs.4,95,829/- debited from his account on 06.09.2007. The Adjudicating Officer has granted 12% simple interest per annum (i.e. minimum bank interest rates for loans) till the date of judgment and has also allowed compensation for cost and expenses.

4. The facts relating to respondent No.1 and his averments in the petition have been recorded in detail in paragraphs 2 to 7 of the impugned judgment. From those facts it is evident that respondent No.1 as a customer of the Bank had approached the Banking Ombudsman and has also filed a complaint at Tuticorin Police Station and the Cyber Crime Police Station registered an FIR under Section 66 of the IT Act 2002. According to petitioner/respondent No.1, the fraud was on account of failure of the Bank to have proper security procedures so that nobody should have been able to use the official website of the Bank or its exact copy without timely detection and action. In other words, the Bank failed to have an alert system by way of precaution in respect of its official website and it was for that reason that respondent No.1 was misled to treat the Email of the fraudster as genuine Email from the Bank for the purposes of security update and hence he complied with the request and disclosed the confidential information such as password. Respondent No.1 has also alleged negligence on the part of the Bank in allowing respondent No.5 or its

representative to withdraw a large amount in cash from a dormant deficit account. The failure of the Bank to file a criminal complaint after it detected the fraud on the next day which was confirmed by respondent No.1 in response to a phone call from the Bank is also evident. In fact, respondent No.1 has gone to the extent of alleging that some employee of the Bank may be acting under the cover of respondent No.5 because no criminal case was filed by the Bank and on the plea of 'in-house investigation', the Bank allowed the CCTV footage to be erased by causing a delay of one month on such pretext.

5. The appellant on the other hand has denied the allegations of negligence or connivance. It has pleaded that at the time of opening of account with Internet Banking Services, the customer agrees to various conditions imposed by the Bank which include an undertaking to keep the User ID confidential and in case of failure to do so the Bank shall not be liable for any unauthorised transaction. According to the Bank, it is the complainant/respondent No.1 who was negligent in disclosing the confidential information such as the password and thereby it has fallen prey to a phishing fraud. According to the Bank it has adopted good practices by educating and informing the customers and also has proper security policies and guidelines for safeguarding the interest of its customers. It has denied the allegation that it did not comply with KYC requirement while permitting respondent No.5 to open an account with the Bank. It has justified the adjustment of Rs.35,000/- from respondent No.5 on

account of an outstanding credit facility. The Bank also denied that they use the password as the only source for authentication and asserted that they have other sources of authentication such as mobile alerts, SMS confirmation etc. The Bank also took the stand that the occurrence involved a criminal offence which was under investigation of the Police and therefore, the Adjudicating Officer has no jurisdiction under the IT Act 2002.

6. The Adjudicating Officer has considered the stand of the parties and rival submissions from paragraph 15 onwards in the impugned order and found that it has jurisdiction to decide the claim in view of Sections 43 and 85 of the IT Act 2002. On account of appellant this finding has been challenged on the basis of provisions in the aforesaid two Sections of the IT Act, 2002. It was submitted that Section 43 creates liability only upon the person who does any of the acts described in clauses (a) to (j) and if the charges are proved, such person alone is liable to pay damages by way of compensation to the person so affected. It was further pointed out that clauses (i) and (j) have been inserted through a subsequent amendment of 2009 and therefore, relevant clauses in this connection for the purpose of present case are clauses (a) to clause (h). His submission is that the appellant Bank has not even been charged with any of the misdeeds described in clause(a) to (h) nor there is any finding to that effect and therefore, there was no scope or ground available for the Adjudicating Officer to impose penalty on the appellant Bank as compensation to respondent No.1.

Section 85 has been referred to and it has been commented that that this Section comes into play only when it has been found that contravention of any of the provisions of the Act or any rule etc. has been committed by a company. On such finding any person who was in-charge of and was responsible for the conduct of the business of the company as well as the company shall be deemed to be guilty of contravention and shall be proceeded against and punished accordingly. Of course, the person charged can take the defence and escape the liability by proving that he had no knowledge of the contravention or that he exercised all due diligence to prevent such contravention. Even the Directors, Managers, Secretary or other officers of the company shall be deemed to be guilty of the contravention made by the company if it is proved that it was with their consent and connivance or attributable to any negligence on their part. It has been rightly submitted that this provision is not attracted until the factum of contravention of the provisions of the Act etc. by a company is established. Only, thereafter, not only the company but other persons described in Section 85 may also be held liable for such contravention.

7. In the present matter the Adjudicating Officer has not held any natural person guilty of contravention with the aid of Section 85. The primary issue in this matter is whether there is any allegation and material to prove that the Bank has violated any of the clauses of Section 43 and whether the Adjudicating Officer has at all given such a finding after discussing the case of the parties and

the materials available on record. The arguments require a close scrutiny of Section 43 of the IT Act.

8. In the facts and circumstances of the present case, admittedly the only clause which can fasten the liability on the Bank under Section 43 is clause (g). It reads as under:

> "provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulations made thereunder."

The other contraventions covered by various other clauses of Section 43 are definitely not attracted against the Bank either on the basis of case of the petitioner/respondent No.1 as made before the Adjudicating Officer or even from the other materials including the FIR of the criminal case. The Bank, in the facts of the case, can only be charged for having provided assistance to the fraudster so as to facilitate access to the computer system related to the banking transaction and that such access by the assistance of the Bank was in contravention of the IT Act, 2002, rules or regulations made thereunder.

9. Learned counsel for the appellant has, at the outset, referred to Section 43A which provides for compensation for failure to protect data and has pointed out that this Section was inserted in the Act with effect from 27.10.2009 only when many cases of present nature came to the notice of the concerned authorities, but at the time of the occurrence or the incident there was no such provision providing for compensation if the Bank failed to maintain reasonable

security practices and procedures leading to wrongful loss or wrongful gain. The submission is that in absence of such provision at the relevant time the finding of the Adjudicating Officer must be tested only on the rigours of Section 43(g) and according to learned counsel in this case the finding is, at best of 'negligence' by the Bank and not of any assistance to the fraudster. According to learned counsel, assistance would require some positive act and an intention to cause unlawful harm to the respondent/petitioner and unlawful gain to the fraudster.

10. Learned counsel for the appellant is correct in submitting that Section 43A has been inserted in the Act at a later date and therefore, appellant cannot be held liable for paying damages by way of compensation only for failure to protect any sensitive personal data or information available in appellant's computer resource. With the aid of Section 43A such failure alone is sufficient for imposition of liability to pay damages provided it is found that the concerned body corporate has been negligent in implementing and maintaining security practices and procedures of reasonable standards and that has caused wrongful loss or wrongful gain. The relevant terms, for the purposes of Section 43A, have been defined through the Explanation and therefore, "reasonable security practices and procedures" and "sensitive personal data or information" have a definite defined meaning. For the purpose of Section 43(g), there is no help available through Explanation because the word "assistance" is not

explained. Hence, it will have to be understood in its natural sense as per dictionary meaning and the context. Literally, the provision treats all such assistance to be a misfeasance which is rendered by the charged person without permission of the owner or in-charge of the computer, computer system or computer network, to any person so as to facilitate access to such gadgets "in contravention of the provisions of this Act, rules or regulations made thereunder".**(Emphasis added)**. Read with the emphasis attached to some of the terms noted above the word "assistance" gets sufficiently qualified. Lack of permission of the owner or any other person who is in-charge clearly means that the person guilty of the charge of assistance has indulged in certain acts or omissions without permission or authorization. When such unauthorized action or omission amounts to providing assistance to another person so as to facilitate access and that too in contravention of the provisions of the Act, rules or regulations, the charge under Section 43(g) would stand proved so as to attract the liability to pay damages as compensation to the affected person.

11. Learned counsel for the appellant has attempted to add to the provision by insisting that there must be an added element of "*mens rea*" in providing such assistance and unless there be such element of intention to facilitate access in contravention of the provisions of the Act, rules or regulations, no liability should be fastened so as to attract the penalty of damages by way of compensation. This contention has to be rejected because the provision does

not suffer from any infirmity or vagueness so as to require clarification/addition. The power to adjudicate vested in the Adjudicating Officer is a quasi-judicial power to hold an inquiry in a summary manner for which the Adjudicating Officer has been vested with some of the powers of civil court under the Code of Civil Procedure (CPC) available while trying a suit. The criminal intent for *mens rea* if found to exist in the action of person charged under Section 43 may make such person guilty of some offences which are covered by Chapter XI of the Act which has to be investigated by a Police Officer not below the rank of Inspector as provided under Section 78. The power of the criminal courts has not been taken away or affected by any of the provisions of the Act. On the other hand, the jurisdiction of the Adjudicating Officer has been given an overriding status. As per Section 61 of the Act, Civil Court will not have jurisdiction of entertaining any suit or proceeding in respect of any matter which an Adjudicating Officer is empowered by or under this Act to determine. No injunction can be granted by any court or other authority when the Adjudicating Officer is entitled to take an action in pursuance of any power conferred by or under the Act. Hence, Section 43(g) does not require a separate charge or proof as to *mens rea* because criminal offence is not within the jurisdiction of the Adjudicating Officer and is not the subject matter of Section 43 or other proceedings under Chapter IX.

12. Although the respondent has submitted that the Bank was under a legal obligation to insist on digital signature of its customers for all E-banking transactions, in our considered view there is no such obligation arising under any law. The only obligation upon the Bank is to have a safe, secure and foolproof system which may consist of various security layers including provisions for user ID, passwords and CVV in addition to the basic details like customer ID, registered mobile number, Email ID etc. These features must be supplemented by a general responsibility upon the Bank to have a reasonably reliable security system so that its computer system and network cannot be accessed unauthorisedly and may not be misused so as to deceive the customers. Terms and conditions governing Internet Banking appearing on the website of the Bank in fine prints cannot absolve the Bank from its liability of providing adequate security measures so that requirements of the Act, the rules and regulations made thereunder are met satisfactorily and the customers' interests are well protected. The bargaining powers of the Bank and the customer are not equal. Liabilities created by the statute may be compounded during the course of legal proceedings through permissible means but the Bank cannot get over such statutory liabilities by relying upon standard terms and conditions of a so-called agreement and moreso on clauses which are one sided and take away rights of customers without any justification or any consideration worth the name.

13. On behalf of the appellant, it has been repeatedly submitted that the appellant Bank was not negligent, rather it was diligent in taking required safety measures both pre-fraud and post-fraud periods. It had provided PIN as well as password for transactions through internet banking and the respondent had acted negligently in disclosing of the security credentials. The Bank had placed a limit of Rs.5 lakhs per day as a security measure to avoid fraudulent transactions. It has also claimed that in 2007, the Bank was using a secured server for Email transmission which did not allow any third party to use its domain. After the instant incident was confirmed due to Bank contacting the respondent on 07.09.2007, the Bank froze the account of respondent No.5 to prevent further withdrawal of money. It also completed an inquiry within a month and on that basis respondent could file a police complaint against respondent No.5. According to learned counsel for the appellant, the respondent is clearly guilty of at least contributory negligence and hence the Bank should not be burdened with the entire loss of respondent. Further, as noted earlier, the stand of the Bank is also that mere negligence, as found by the Adjudicating Officer, cannot amount to "assistance" unless there be some positive acts showing positive assistance.

14. No doubt the finding is only of negligence but in Para 25 of the order passed by the Adjudicating Officer, it is recorded further – "The respondent Bank has failed to put in place a foolproof internet banking system with

adequate levels of authentications and validation which would have prevented the type of unauthorized access in the instant case that has led to a serious financial loss to the petitioner customer." The detailed discussion of relevant facts as to Bank's Emails sent regularly through internet contained in Para 19 justifies the finding in Para 25 that "the basic loophole in ensuring that a customer recognizes an Email as from the Bank was a glaring error on the respondent's part that would have prevented this incident". In reply to our query as to which server was being used by appellant Bank in 2007 and how did the Bank ensured that no third party can use its sub-domain and send fake Emails to its customers, the Bank has replied through written notes that the Bank was using SMTP Server for mail transfer. It has no doubt asserted thereafter that the Bank had secured its system against any possible misuse but what was the security arrangement or apparatus has not been revealed at all. There is no reply that the alleged Email by the fraudster dated 02.09.2007 was from a sub-domain of icicibank.com. There is also no reply as to how a web page under its domain name could be created. The Bank, may be unwittingly, enabled and assisted the entire transaction of fraud by opting for a Server and a system which permitted, in all probability, the use of Bank's own domain for fraudulent transactions and as a result the respondent/petitioner became a victim and suffered unlawful loss of money which was entrusted to the Bank for safe keeping. Since the respondent was tricked by the use of a sub-domain of the Bank's web domain, he is not found guilty of contributory negligence.

15. The argument that something more than mere negligence is required for being charged with the act of providing "assistance" to the fraudster is, in our view, an attempt to create a technical issue which does not exist in reality. A watchman can assist a thief by being "negligently" absent from the place of duty or by switching off the security light at the time of the occurrence. The word "assistance" has to be understood in the ordinary sense and does not require any additional prefix or adjective such as "active" or "positive" assistance. Civil liability by its nature has to be determined on the basis of preponderance of probability. It would be wrong to insist for the test of proof beyond reasonable doubt which is required for proving a criminal charge.

16. Although Section 43A creates a special responsibility to protect sensitive personal data or information in a computer resource and creates a liability to pay compensation for certain kind of negligence, the definition of the word "computer" existing from before in the Act is wide enough to include all input, output processing, **storage**……(emphasis supplied). The Bank's electronic records in a computer are required to have a safe and secure procedure of access. Under Section 14 it would fall under the term "secured electronic record" and hence, unauthorised access to such records should not have been facilitated by the Bank by assistance through negligence which is also described in detail by the Adjudicating Officer. We find no good reasons to take a

different view. The Bank has failed to show by way of defense that it had taken all the required precaution and that the SMTP Server which it was using in 2007 was the most technically advanced Server then available but even then the Bank failed to secure its Email system against misuse. Hence, we find no good reasons to reverse or in any way interfere with the finding and order of the Adjudicating Officer in so far as compensating the respondent for the loss of his money amounting to Rs.4,95,829/- (Rupees Four Lakhs Ninety Five Thousand Eight Hundred and Twenty Nine only) is concerned. The award of further amount of Rs.1,60,048/- as interest till the date of impugned judgment is also upheld along with the grant of Rs.27,850/- which was paid as *ad valorem* fee and Application Fee.

17. But the cost of Rs.6,00,000/- (Rupees Six Lakhs only) as incidental expenses appears to be clearly excessive. We are of the view that a consolidated cost of Rs.50,000/- would be sufficient. To this extent, the relief granted vide paragraph 26(d) of the impugned judgment is modified. The appellant Bank would thus be liable to pay to the respondent only Rs.7,34,327/- (Rupees Seven Lakhs Thirty Four Thousand Three Hundred and Twenty Seven only). The appeal succeeds only to this extent and is disposed of accordingly. The modified decretal amount, if not paid, must be paid by the appellant within a period of two months from today failing which it shall carry an enhanced

interest of 10% per annum with annual rest, from two months hence and till the date of realization.

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(S. K. Singh, J)
Chairperson

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(A.K. Bhargava)
Member

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