

**(2000) 01 BOM CK 0033**

**In the Bombay High Court**

**Case No : Writ Petition No. 1425 of 1993**

Abdul Aziz Moherbaksh and another

APPELLANT

Vs

Mahanagar Telephone Nigam Ltd. and others

RESPONDENT

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**Date of Decision : 29-01-2000**

**Acts Referred:**

Arbitration Act, 1940 — Section 33, 34  
Telegraph Act, 1885 — Section 7

**Citation :** AIR 2000 Bom 260 : (2000) 2 ALLMR 23 : (2000) 3 BomCR 164 :  
(2000) 2 BOMLR 496 : (2000) 3 CivCC 54 : (2000) 3 MhLj 120

**Hon'ble Judges :** V. C. Daga, J;B. P. Saraf, J

**Bench :** Division Bench

**Advocate :** R. Narula with Anuj Narula, for the Appellant; S.I. Shah, for the Respondent

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## **Judgement**

V. C. Daga, J.—This writ petition is directed against an award passed by Shri Vinod Kumar, Deputy General Manager (M.K.I.G. & P.R.), an arbitrator having been appointed by the Chairman and Managing Director, Mahanagar Telephone Nigam Ltd. Bombay, (M.T.N.L. for short) vide order dated 18-1-1993 in exercise of powers conferred u/s 7-B of the Indian Telegraph Act, 1885 (13 of 1885) for determination of dispute resulting from the disconnection of the telephone on the ground that the petitioner had failed to pay a sum of Rs. 44,740.00 pursuant to the demand note sent by the respondent No. 1.

2. The controversy involved in this writ petition centres around the problem of excess billing and failure on the part of the respondent No. 1 (M.T.N.L) to provide relief to the subscriber after making proper investigation.

3. As narrated by the petitioner, he is a sole proprietor of M/s. Bharat International having his office at 6/8 V.S. Road, Bombay 16. Respondent No. 1 is a Government of India owned and controlled undertaking and was formed to take over infer alia the conducting of telephone services in Bombay from Bombay Telephones which was functioning as a department of Government of India and

now vested with the monopoly of providing Telephone services. The petitioner had obtained the telephone connection in their above commercial premises and is a subscriber of telephone which bears No. 453882.

4. The petitioner initially in the month of August 1990 received a Bill dated 1-8-1990 without any mentioning of the metered calls, free calls, debit or credit or other chargeable calls etc., and as such the bill was only for rental charges of Rs. 330/-. The said bill was again followed by a similar bill dated 2-10-1990 showing the rental charges only for Rs. 330/- without any mention of the metered calls etc. Consequently petitioner approached the Telephone Department and requested for correct and proper bill with all details and particulars thereof. The Telephone Department failed and neglected to send proper and correct bill. Thereafter, the petitioner by his letter dated 17-11-1990 called upon the Department to issue "No dues" certificate in respect of his telephone in dispute. The respondent department, however, on receipt of the said letter dated 17-11-1990 sent a reply dated 13-11-1990 enclosing therewith a supplementary bill dated 7-11-1990 for Rs. 44,740/- for the alleged 41,137 calls chargeable for the period from 10-5-1990 to 10-9-1990. The petitioner on receipt of the bill immediately lodged a protest and complaint by letter dated 26-11-1990 and strongly disputed this bill and contended in his representation-cum-complaint that the bill does not disclose the correct number of calls made by the petitioner and the same are excessive and inflated. The petitioner further pointed out that at his instance S.T.D. facility of this telephone has been removed with the result that the petitioner was unable to make S.T.D. calls from this telephone. The petitioner had also pointed out to the respondent No. 1 that average bill for the year preceding the period of disputed bill had been about Rs. 500.00 and that considering the impugned bill it is shockingly excessive. The petitioner therefore, requested the department to make investigation into the excessive billing.

5. The petitioner further brought on record that the subsequent bill for the period 10-9-1990 to 10-11-1999 received by him did not show any arrears of previous dues although the supplementary bill dated 2-11-1990 remained unpaid. It seems respondent No. 1 neither undertook any investigation in pursuance of the complaint dated 26-11-1990 nor bothered to reply the same. The petitioner in view of the threats of disconnection by the respondents No. 1 filed a suit being Arbitration Suit No. 3628 of 1991 in the Bombay City Civil Court at Bombay, wherein the City Civil Court directed that the dispute be decided in pursuance of section 7-B of the Indian Telegraphic Act by a Single Arbitrator to be appointed by the Chairman and Managing Director of respondent No. 1. Accordingly one Shri Vinod Kumar, Deputy General Manager (MKING & P.R.) was appointed as an arbitrator to decide the dispute in question.

6. The learned arbitrator delivered his award on 10-6-1993 directing the petitioner to pay the disputed bill. This award is a subject matter of challenge in this petition.

7. When this petition came up before this Court for admission, the petitioner was, however, directed to deposit balance sum of Rs. 42,740/- and reconnection charges and on such deposit, the respondents 1 & 2 were directed to restore the connection of the telephone to the petitioner. However, we were informed by the parties that this order dated 2-8-1993 has not been complied with as the petitioner failed to deposit the above balance amount.

8. The arbitrator in his award only recorded rival submissions made by the parties without considering or recording any positive findings on the dispute referred to him and reached to the conclusion in a most perfunctory and casual manner in the following words :

"..... Having given due consideration to the claims of the claimant and counter claim of the respondent and having gone through the documents produced and oral arguments in the course of hearing, I have come to the conclusion and make my award as under ;

#### AWARD

"The claimant is liable to pay the disputed bill

....."

The aforesaid award holding petitioner liable to pay entire disputed bill is seriously criticised by the petitioner on the following grounds :- (a) The award has been passed in a most perfunctory manner without application of mind to the facts and circumstances brought on record; (b) The arbitrator has not taken into consideration the fact that the bi-monthly bills received during the previous year were not more than Rs. 500/-; (c) The arbitrator omitted to take into account the fact that the petitioner was unable to make S.T.D. calls from his telephone as the said facility had been removed at the request of the petitioner and (d) The award thus suffers from an error apparent on the face of the record.

In the aforesaid backdrop submission was made to quash and set aside the impugned award.

9. On being noticed, the respondents did file appearance through Counsel, but did not file any return and/or counter affidavit denying the factual allegations made in the petition. Consequently, we are left with no other alternative but to treat the allegations made in the petition as uncontroverted and deemed to have been admitted by the respondents Nos. 1 and 2. However in order to find out the defence of the respondent No. 1 (M.T.N.L.) we have gone through the written statement filed on behalf of respondent No. 1 before the learned arbitrator; wherein it was not disputed that the average bi-monthly bill of the petitioner used to be in the region of Rs. 500/-. The respondents went on to plead in general terms that the Exchange to which petitioner's telephone was attached was a strawager exchange in which the telephone could give different line to a S.T.D. call from S.T.D. barred line if S.T.D. Code number is dialed immediately for number of times at a stretch. In other words on account of repeated dealing of

S.T.D. number from the telephone attached in strawager exchange from S.T.D. barred line, the resistance gets heated up and the same gives out to a S.T.D. calls as soon as the said part becomes ineffective and meter starts recording calls as per pulse rate. It was also mentioned in the said written statement that barred circuit was found tampered with. However, while putting this defence no where any act or any clandestine use for the purpose of S.T.D. has been attributed to the petitioner.

10. It is the case of the petitioner that there was some fault with the S.T.D. barred circuit together with meter or some error with recording of calls and therefore, in no event during the relevant period of two months such massive number of calls giving rise to enormous bill amounting to Rs.44,740/- could have been given. In para 8 of the petition it has been mentioned that average bimonthly bill always has been in the sum of Rs. 500/- and telephone was also not working properly being most of the time held up. It is also the case of the petitioners that the S.T.D. facility on this telephone was not available to him as the same had been removed at his instance with the result he was unable to make S.T.D. calls from this telephone. All these facts have not been taken into account by the arbitrator while deciding the dispute. As such, it is the contention of the petitioner that the impugned award seriously suffers from an error apparent on the face of the record. Further, the award in question being perfunctory in nature, can hardly be said to be an award determining any dispute between the parties.

11. The petitioner also relied upon a judgment of this Court delivered in the case of Rao and Co. Vs. The Accounts Officer, D.E.T. Officer, Panaji and Others, , wherein it has been held as under:

"that it was fit case where rebate ought to have been given to subscriber in view of the undisputed statement that average meter reading was about 500 calls for a period of two months. In the absence of the material it could not be said that there was clandestine use for purpose of S.T.D."

It is true that the aforesaid aspect of the matter has not been taken into account by the learned arbitrator. It is nobody's case that in a clandestine manner the petitioner used S.T.D. facility on his telephone. No material has been placed to attribute misconduct on the part of the petitioner. There is a considerable substance in what the learned Counsel for the petitioner argued before us that once S.T.D. facility is removed, there is no question of making S.T.D. calls from the petitioner's telephone. In this connection, it may be mentioned that once S.T.D. facility is removed then the possibility of making S.T.D. calls is ruled out. We do not understand how the petitioner's telephone could still be used for the purpose of making S.T.D. calls. As already stated hereinabove, there is no return or counter affidavit filed in this petition. Barring bald and general statements made in the written statement filed before the arbitrator no material has been placed before us so as to implicate the petitioner for having used the S.T.D. facility in a clandestine manner or otherwise. We are not inclined to accept the

said bald and general statements made in the written statement filed before the arbitrator and pressed in service to defeat the petition.

12. At this juncture, it would be useful to refer to a judgment of Gauhati High Court in the case of Santosh Singh v. Divisional Engineer, Telephones, Shillong & others AIR 1990 Gau. 47, to which one of us, (namely Dr. Justice Saraf) was a party. In this judgment the Gauhati High Court has gone in depth and laid down certain guidelines which the Telecom Department of the Government of India was and is expected to follow. In this judgment the Division Bench noticed that even if no defect is found in the meter, possibility of false metering cannot be ruled out, We cannot do better than reproducing the text of the judgment as under:-

"12. From a reading of the aforesaid provisions contained in the Manual and the Circular it is clear that the Government is aware of the serious problem of excess billing as also of its causes. It also knows that even if no defect is found in the meter, possibility of false metering cannot be ruled out. In technical terms, it is conscious that there may be false metering "due to landing of the subscriber on an engaged switch train upto the point of outgoing carrier channel relays set on which S.T.D. calls is in progress". It is aware that in some cases on account of some short circuit in the line or due to faulty operation of the hook switch the subscriber's line after making a S.T.D. call might be held up and alt this may result in the meter's recording local calls enormously in excess of the normal calling rate for local subscribers. It is also the admitted position that excess billing may occur on account of deliberate mischief by some other subscribers in league with the staff of the telephone department.

13. As to relief in such situations, the following position emerges from the aforesaid provisions. Immediately on receipt of complaint regarding excess charge for local calls where the calls are found to exceed the highest one obtaining during the six preceding quarters by more than 100% at S.T.D. stations, the officer concerned is required to defer enforcement of recovery of the amount of the disputed bill till investigation of the complaint is completed, and a decision as to whether some rebate for the excess charge is justified or not is taken. There is also provision for cancellation of the disputed bill and preparation of two bills-one to include charges which are correctly payable by the subscriber including local calls, local call charge being computed to be equal to the average number of calls metered during the six bimonthly periods (one year) immediately preceding the disputed periods plus 10% over the average. Such a bill is called "split bill". Another bill may be prepared for the balance and marked as "part local call bill (disputed)". Though the subscriber is required to pay the first bill within 7 days, the officers have been directed not to insist on the payment of the second bill till final decision is taken on the complaint lodged by a subscriber after making proper investigation on the lines indicated in the Manual and in the Circular.

14. We are constrained to note that despite all the elaborate safeguards provided in the Manual and the Circular and the guidelines issued in regard to dealing with

the complaints of excess billing, issue of revised bills immediately on receipt of a complaint, instruction to keep the disputed excess demand in abeyance till disposal of the complaint after proper investigation, the officials of the department at the field levels and their higher ups at the Telecom Circle and District level are taking the subscribers for a ride. Either they are blissfully ignorant of all these relevant provisions or they are intentionally ignoring the same for reasons best known to them."

From the facts of the instant case, it is evident that there was abnormal spurt in the number of calls. The average bi-monthly bill used to be not more than Rs. 500.00. However, during the period in dispute bill reached astronomical figure considering the average bill of the preceding year. No ostensible reason for such spurt in the bill nor any such specific reason vis-a-vis present petitioner has been brought on record. A fault in the metering circuit or some transient fault in system cannot be ruled out. For that petitioner cannot be held responsible. Even the arbitrator has not applied his mind to these aspects of the matter and delivered perfunctory award. In these circumstances, we have no option but to hold that the impugned award has been vitiated by non-application of mind and an error apparent on the face of record and needs to be quashed and set aside.

13. Coming to the question of grant of relief to the petitioner, we find from the judgment in AIR 1986 Bom. 226, that the department does give rebate in appropriate cases when the department thinks that such rebate is justified. The statement made by the petitioners in para 8 of the petition that average bimonthly bill used to be in the region of Rs. 500/- and that his telephone was also not working properly being most of the time held up has not been controverted on behalf of the respondents by filing return or counter affidavit. Once we hold that these allegations are deemed to have been admitted and that S.T.D. facility was not available to the petitioner and at any rate no nexus has been established between the alleged misuse of S.T.D. facility and the petitioner, we feel that this is a fit case wherein it can be held that the petitioner ought to be given rebate and for that purpose undisputed statement of the petitioner that average bill used to be not more than Rs. 500/- for the period of two months can be accepted. The facts and circumstances of the case justify this course.

14. In this view of the matter we quash the award dated 10-6-1993 incorporated at EX.. K to the petition and consequently set aside demand dated 7-11-1990 incorporated at Ex. G to the extent it exceeds Rs. 500/-. The respondents Nos. 1 and 2 are directed to reconnect the petitioner's telephone No. 453882 upon payment of Rs. 500/- without insisting on payment of reconnection charges within one week from today. The rule is made absolute in terms of this order, There shall however, be no order as to costs.