
(2012) 04 SC CK 0044

In the Supreme Court Of India

Case No : Writ Petition (Civil) No. 285 of 2010 (Under Article 32 of the Constitution of India)

Avishek Goenka

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 27-04-2012

Acts Referred:

Telecom Regulatory Authority of India Act, 1997 — Section 11

Citation : AIR 2012 SC 2226 : (2012) AIRSCW 4578 : (2012) 3 JCR 51 : (2012) 2 LJLR 447 : (2012) 3 LW 334 : (2012) 2 MPJR 1 : (2012) 4 SCALE 611 : (2012) 5 SCC 275 : (2012) 3 Supreme 554

Hon'ble Judges : S.H. Kapadia, C.J.; Swatanter Kumar, J; A.K. Patnaik, J

Bench : Full Bench

Advocate : Gaurab Banerji, ASG, Harish N. Salve, A.M. Singhvi, Ramji Srinivasan, Vikas Singh, T.A. Khan, S.A. Haseeb, B.K. Prasad, for A.K. Sharma, Manjul Bajpai, Navin Chawla, Monika Singhal, Sanjay Kapur, Rajiv Kapur, Anmol and Ashmi Mohan, for the Appellant;

Final Decision : Dismissed

Judgement

Swatanter Kumar, J.—The Petitioner is a businessman engaged in the business of distribution of pre-paid virtual and tangible calling value for mobile phone subscribers and also sells new customer acquisition packs and follows it up, by collection of customer application forms and executing tele-calling, to verify customer credentials. In this Public Interest Litigation, the Petitioner has attempted to highlight the grave issue of non-observance of norms/Regulations/guidelines related to proper and effective subscriber verification by various service providers. In fact, according to the Petitioner, there is rampant flouting of norms/Regulations/guidelines relating to this subject matter and there is no proper verification of the subscribers prior to selling of the pre-paid mobile connections to them.

2. The Telecom Regulatory Authority of India (for short, "TRAI") is the regulatory body for the telecommunications sector in India and the Union of India has

responsibility to issue guidelines and frame Regulations and conditions of licence, in consultation with the TRAI, to ensure coordination, standardization and compliance with the Regulations, as well as protecting the security interests of the country.

3. It is the averment of the Petitioner that the telecom sector has witnessed the most fundamental structural and institutional reforms since 1991. This sector has grown significantly in the last few years. As per the Annual Report for 2009-2010 of the Department of Telecommunication, Ministry of Communications and IT, Government of India (for short "DoT"), as on 31st December, 2009, the Indian telecom sector had about 5622.11 million connections. The tele-density per hundred population, which is an important indicator of telecom penetration in the country, has increased from 2.32 per cent in March, 1999 to 47.88 per cent in December, 2009. The Eleventh Five Year Plan for 2007-2012 had provided a target of 600 million connections, but the industry has already provided around 700 million connections, thus far exceeding the target. Different random studies in relation to pre-paid Subscriber Identity Module (SIM) cards show widespread violation of guidelines for Know Your Customer (KYC) and even other common guidelines. The SIM cards are provided without any proper verification, which causes serious security threat as well as encourages malpractices in the telecom sector. It appears that 65 per cent of all pre-paid SIM cards issued in Jammu & Kashmir and 39 per cent of all pre-paid SIM cards in Mumbai, may have been issued without verification; which means that 1 out of every 6 pre-paid SIM cards is issued without proper verification. The averment is that such unverified SIM cards are also used in terrorist attacks.

4. This Court, in the case of State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru, had, with some caution, referred to a large number of calls which had been made by terrorists from instruments containing unverified SIM cards. It is further averred by the Petitioner that around 80 per cent of the pre-paid SIM cards may be purchased in pre-activated form which is in violation of the notifications issued by the DoT, dated 22.11.2006 and 23.3.2009 respectively, banning the sale of pre-activated SIM cards. Another significant fact that has been brought out in this petition is that, pre-paid SIM cards, which are the most commonly issued without verification, constitute 96 per cent of the total SIM cards sold. This indicates the seriousness of the problem as well as the security hazard that emerges from the telecom sector.

5. Thus, the Petitioner has prayed that there should be strict implementation of subscriber verification guidelines, physical verification be compulsory in future and physical reverification of existing subscriber base be conducted in a transparent manner. He also seeks the prevention of inflated subscriber base. On all matters in relation to these prayers, he pleads for issuance of appropriate writ, orders or directions. Upon notice, the DoT as well as the TRAI had put in appearance and placed on record the guidelines issued by the DoT, as well as the comments of TRAI, respectively.

6. The Petitioner, during the pendency of the petition, filed an Interim Application, I.A. No. 6 of 2012, wherein he referred to a circulation containing the draft norms prepared by the Government of India (DoT) in relation to:

? Re-verification of existing customer base.

? Verification process as followed in Assam, J&K to be extended across country.

? Mail of SIM card and activation details to the address of the subscriber, both being sent separately. This method is similar to that of delivery of debit, credit cards.

? Refuse to recognize government ID cards as sufficient proof, etc.

7. According to the Petitioner, these norms have not been adhered to and in fact, the present instructions / guidelines formulated by DoT are at variance to the norms, ignoring essential precautions for verification of subscriber identity and safe distribution of pre-paid SIM cards.

8. We have already noticed that the rapid expansion of the telecom sector and its impact on development, both, equally impose responsibility on the Government of India, the regulatory body and the various stakeholders in the telecom sector to carry out proper verification of the pre-paid SIM cards and ensure national safety and security. To achieve this object, it is primarily for the expert bodies and the Government of India to act and discharge their respective functions.

9. In terms of Section 11 of the Telecom Regulatory Authority of India Act, 1997 (for short, 'the Act'), it is a statutory obligation upon the TRAI to recommend a regulatory regime which will serve the purpose of development, facilitate competition and promote efficiency, while taking due precautions in regard to safety of the people at large and the various other aspects of subscriber verification. Similarly, the DoT is responsible for discharging its functions and duties as, ultimately, it is the responsibility of the Government to provide for the safety of its citizens. The TRAI has to regulate the interests of telecom service providers and subscribers, so as to permit and ensure orderly growth of telecom sector. The Government of India and TRAI, both, have to attain this delicate balance of interests by providing relevant instructions or guidelines in a timely manner and ensuring their implementation in accordance with law.

10. While referring to the guidelines issued by DoT and the comments of TRAI thereupon, the Petitioner has raised, inter alia, but primarily, the following objections:

(i) Despite clear guidelines and decision to complete re- verification of existing customer base, scheduled to be completed between 1st November, 2009 to 31st October, 2010, which time was further extended to 31st December, 2010, no effective steps have been taken to complete this exercise.

(ii) Re-verification has been left in the hands of the interested stakeholders, i.e., the service providers themselves, who are not taking appropriate and effective

steps to complete the re-verification exercise.

(iii) The delivery of the pre-paid SIM card to the prospective subscribers should be effected by registered post and home delivery process, so as to provide basic verification of the address of the subscriber.

(iv) There should be no relaxation of requirement for photograph of the subscriber in the Customer Acquisition Forms (CAF).

(v) Lastly, that there should be heavy penalty for violation of the guidelines and particularly, for providing pre-paid SIM cards to subscribers whose identity and addresses are unverified.

11. Before this Court, the DoT filed its instructions dated 14th March, 2011, relating to various aspects involved in the present case and specifically, on the manner of verification of new mobile subscribers (pre-paid and post-paid). These instructions, inter alia, dealt with the verification and activation of mobile connections, special guidelines for issue of mobile connections to foreigners and outstation users, bulk mobile connections, change in the name of subscriber, disconnection, lodging of complaints and even imposition of penalties. Clause 3(vii) of these instructions provided that pre-activated SIM cards are not to be sold. In case of sale of pre-activated SIM cards, a penalty of Rs. 50,000/- per such connection shall be levied upon the service provider/licensee, in addition to immediate disconnection of the mobile connection.

12. Most of the grievances raised by the Petitioner have been appropriately dealt with under these instructions. But, however, some of the issues have not been comprehensively provided for. The TRAI filed an affidavit dated 14th March, 2012, dealing with the instructions of the DoT, dated 14th March, 2011. In the said affidavit, however, TRAI suggested certain variations as provided in Annexure R-I to their affidavit. According to TRAI, the verification of identity is dealt with differently in different countries, some have provided stringent standards of documentation of identification while others have not issued any guidelines and left it to the discretion of the service provider. In India, TRAI recommended that the Customer Acquisition Form (CAF) have a "unique" number, which may be affixed at a central warehouse, rather than prior to distribution. TRAI also recommended that the CAF form should be simpler in its content as the form presently in use is not serving its purpose adequately. TRAI has annexed to its affidavit, as Annexure I, the sample form which should be adopted as a regular form to be filled in by the subscriber. According to TRAI, in a manner similar to bulk users, even individual users should disclose all the SIM cards and connections in the name of such individual, with due verification by the licensee. Also differing with the instructions of DoT on the issue of manner of conversion from pre-paid to post-paid connections and vice-versa, as well as regarding the transferability of mobile connections, TRAI submits that the both should be permissible, the former being treated as a change in tariff plan (not as a fresh or a transferred connection) and the latter as a new mobile connection,

subject to consent of the existing owner of the mobile connection.

13. The other issue on which DoT and TRAI differed is, whether the employees of the licensee/service provider should be required to personally update the subscriber details in the database. While according to DoT, this should be carried out by the employees of the licensee itself, however, according to TRAI, it can be done by their authorized representatives, keeping in view various factors, like expense, time, efficiency and practicability. Both TRAI and DoT are agreeable that such a database of all the registered subscribers should be maintained by the licensee and the same be made accessible to the security agencies. Giving an example of the Nigerian Communication Commission, which maintains a similar database of all registered subscribers, TRAI concludes that even the general evidence demonstrates that such database makes verification and tracing of the identity of the subscriber easier, particularly in absence of the Unique ID cards. Some of the licensees and service providers intervened in the present writ petition and have taken a stand that they are, in fact, maintaining database details of all registered subscribers. Such information is also made available to the Government Department or security agencies on demand and in accordance with law.

14. If one examines the powers and functions of TRAI, as postulated u/s 11 of the Act, it is clear that TRAI would not only recommend, to the DoT, the terms and conditions upon which a licence is granted to a service provider but has to also ensure compliance of the same and may recommend revocation of licence in the event of non-compliance with the Regulations. It has to perform very objectively one of its main functions, i.e., to facilitate competition and promote efficiency in the operation of the telecommunication services, so as to facilitate growth in such services. It is expected of this regulatory authority to monitor the quality of service and even conduct periodical survey to ensure proper implementation.

15. What emerges from the above discussion is that the stakeholders DoT, TRAI and the licencees are ad idem in regard to most of the issues in terms of the instructions prepared by the DoT. However, there are certain points on which there is a difference of opinion between the DoT and the TRAI. This limited divergence is required to be resolved by further clarification and issuance of more specific instructions. These issues fall under two categories: - firstly, what has been pointed out by the Petitioner and secondly, where the DoT and the TRAI hold different opinion as noticed above. Proper deliberation between the stakeholders possessed of technical knowhow can resolve such issues usefully and effectively.

16. The abovementioned points of divergence between TRAI and DoT are matters which will have serious ramifications not only vis-?-vis the regulatory authorities and the licensees but also on the subscribers and the entire country. These aspects demand serious deliberation at the hands of the technical experts. It will not be appropriate for this Court to examine these technical aspects, as such

matters are better left in the domain of the statutory or expert bodies created for that purpose. The concept of 'regulatory regime' has to be understood and applied by the courts, within the framework of law, but not by substituting their own views, for the views of the expert bodies like an appellate court. The regulatory regime is expected to fully regulate and control activities in all spheres to which the particular law relates.

17. We have clearly stated that it is not for this Court to examine the merit or otherwise of such policy and regulatory matters which have been determined by expert bodies having possessing requisite technical knowhow and are statutory in nature. However, the Court would step in and direct the technical bodies to consider the matter in accordance with law, while ensuring that public interest is safeguarded and arbitrary decisions do not prevail. This Court in the case of Delhi Science Forum and others Vs. Union of India and another, while dealing with provision of licences to private companies as well as establishment, maintenance and working of such licences under the provisions of the Telegraph Act, 1885, applied the 'wednesbury principle' and held that 'as such the Central Government is expected to put such conditions while granting licences which shall safeguard the public interest and the interest of the nation. Such conditions should be commensurate with the obligations that flow while parting with the privilege which has been exclusively vested in the Central Government by the Act'. It is the specific case of the Petitioner and some of the affected parties in the present proceedings that certain very important aspects, including security, have not been appropriately dealt with in the instructions dated 14th March, 2011.

18. Some divergence on certain specific issues of the regulatory regime has been projected in the instructions and comments filed by TRAI and DoT. They need to be resolved but, in absence of any technical knowhow or expertise being available with this Court, it will not be appropriate to decide, by a judicial dictum, as to which of the views expressed by these high powered bodies would be more beneficial to the regulatory regime and will prove more effective in advancing the public interest. Essentially this should be left to be clarified and the disputes be resolved by the expert bodies themselves. It is a settled canon of law that in a regulatory regime, the terms and conditions imposed thereunder should be unambiguous and certain. It is expected that the authorities concerned would enforce the regulatory regime with exactitude. Therefore, it is not only desirable but also imperative that TRAI and DoT seriously cogitate on the issues where divergence has been expressed between them and bring unanimity in the terms and conditions of licences which would form an integral part of the instructions dated 14th March, 2011.

19. It may be noticed here that, as interveners, some of the licensees and/or service providers had criticized some of the terms and conditions of licence proposed under the instructions dated 14th March, 2011. These interveners not only made some suggestions with regard to the ambit and scope of the guidelines and instructions by TRAI or DoT but also intended to raise certain

disputes vis-?-vis DoT in the capacity of licensees subject to the impugned instructions. Without any reservation, we make it clear that we are not directly or indirectly entering upon the adjudication of any dispute or even differences between the service provider/licensee on the one hand and TRAI or DoT on the other. If they or any of them have any claim or dispute with the other, they should resolve the same by taking recourse to independent proceedings in accordance with law.

20. In view of our above discussion, we partially allow the writ petition. The instructions dated 14th March, 2011 issued by DoT be and hereby are accepted by the Court subject to the following conditions:

(i) We hereby direct the constitution of a Joint Expert Committee consisting of two experts from TRAI and two experts from DoT to be chaired by the Secretary, Ministry of Communications and Information Technology, Government of India.

(ii) This Committee shall discuss and resolve the issues on which TRAI in its affidavit has given opinion divergent to that declared by DoT in its instructions dated 14th March, 2011. Following are the points of divergence that require examination by the Joint Expert Committee:

(a) Whether re-verification should be undertaken by the service provider/licensee, the DoT itself or any other central body?

(b) Is there any need for enhancing the penalty for violating the instructions/guidelines including sale of pre-activated SIM cards?

(c) Whether delivery of SIM cards may be made by post? Which is the best mode of delivery of SIM cards to provide due verification of identity and address of a subscriber?

(d) Which of the application forms, i.e., the existing one or the one now suggested by TRAI should be adopted as universal application form for purchase of a SIM card?

(e) In absence of Unique ID card, whether updating of subscriber details should be the burden of the licensee personally or could it be permitted to be carried out through an authorized representative of the licensee?

(f) In the interest of national security and the public interest, whether the database of all registered subscribers should be maintained by DoT or by the licensee and how soon the same may be made accessible to the security agencies in accordance with law?

(iii) The above notified Committee shall resolve the above specified issues and any other ancillary issue arising therefrom and make its recommendations known to the DoT within three months from today.

(iv) The DoT shall take into consideration the recommendations of the Joint Expert Committee. The instructions issued by DoT dated 14th March, 2011 shall

thereupon be amended, modified, altered, added to or substituted accordingly. They shall then become operative in law and binding upon all concerned.

(v) Composite instructions, so formulated, shall positively be issued by the DoT within 15 weeks from today and report of compliance submitted to the Registry of this Court.

21. The writ petition is disposed of with the above directions. There shall be no order as to costs.