(1993) 11 BOM CK 0025

In the Bombay High Court

Case No : Writ Petition No. 1581 of 1985

Madhav Vinayak Rajwade APPELLANT

Vs

Mahanagar Telephone Nigam Ltd. and Another RESPONDENT

Date of Decision : 04-11-1993

Acts Referred:
Telegraph Act, 1885 — Section 7

Citation : (1994) 2 BomCR 687 : (1994) MhLj 264

Hon'ble Judges : Sujata V. Manohar, J;M.C. Chaudhari, J

Bench : Division Bench

Advocate : Mr. P.M. Patel, for the Appellant; Smt. S.I. Shah and Mr. R.C. Master, for the Respondent

Judgement

Smt. Sujata Manohar, J.—The petitioner is a retired civil servant. He joined Government service in 1942. He worked with the Government of Maharashtra till 1974. Thereafter, the petitioner worked with the United Nations from May, 1974 upto March 1980. He returned to India in April, 1980 and thereafter he is residing at Bombay at 5, Lalit, Wodehouse Road, Bombay-400039. The family of the petitioner consists of himself, his wife, his daughter, son-in-law and niece. No other person resides at the said premises. The petitioner has a telephone at the said premises. Originally, the number of the telephone was 241605. It is now changed to 2021615. According to the petitioner, apart from his four family members no other person uses the said telephone.

2. At all times material to this petition, the telephone had an S.T.D. facility. After the return of the petitioner to India, the telephone calls metered at the said telephone for the bi-monthly period for which the telephone bills are issued by the respondents, did not exceed 951 calls for any of the bi-monthly periods during the period 1.7.1981 to 14.6.1982. For the bi-monthly period of 14.6.1982 to 14.8.1982, the telephone calls which were metered amounted to 1065. Thereafter, for the next three bi-monthly periods, lesser number of calls were metered.

3. According to the petitioner, in his telephone bill dated 1.5.1993 which pertains to the bi-monthly period of 14.2.1983 to 14.4.1983, there was a spurt in the telephone calls metered. The number of telephone calls recorded for this period was 1525. He, however, did not lodge any complaint because in the next bi-monthly period, the metered calls were again reduced to 620. Since then, for the bi-monthly period of 14.6.1983 to 14.8.1983 there was again an increase in the calls to 1241. For the next two bi-monthly periods, however, the calls metered were again reduced to 557 and 393.

4. However, from 14.12.1983 onwards, consistently high calls are being recorded on the petitioner''s meter. From 393 calls in the month of 14.11.1983 to 14.12.1983, the calls increased to 1966, for the bi-monthly period 14.12.1983 to 14.2.1984. The number of calls metered, thus more than doubled. The same high increase has persisted upto 10.10.1984. Ultimately, even from his high figure, there was a further spurt for the period 10.10.84 to 10.12.1984 when as many as 9801 telephone calls were recorded. During this period, however, the petitioner was busy attending to his 97 years'' old ailing mother who died on 23.3.1985. He was, therefore, required to be out of Bombay. He, however, on receipt of the bill for the period 10.10.1984 to 10.12.1984 in January 1985, lodged a strong protest by his letter dated 7.1.1985 with the Respondents and asked for an investigation into the calls metered on this telephone. The petitioner received a communication from the 1st respondent dated 15.1.1985 splitting up his bill for the said period. The bill for Rs. 4,720.50 was split into two bills, one for Rs. 842.50 being to the extent of maximum calls numbering 1607 recorded during the previous 3 preceding quarters and Rs. 3,877.70 for the remaining 7994 calls. He paid the sum of Rs. 842.50 and asked for a proper investigation.

5. In the meanwhile, the petitioner also received a bill for the period 10.12.1984 to 10.2.1985 which showed metered calls at 4167, the amount of the bill being Rs. 2,003.50. He received another bill for the period 10.2.1985 to 10.4.1985 showing metered calls as 4220, the amount of the bill being Rs. 2,053/-. He received the third bill for the period 10.4.1985 to 10.6.1985 showing metered calls as 7181, the amount being Rs. 3,510.50 and a bill for the period 10.6.1985 to 10.8.1985 showing metered calls as 1844 and the amount being Rs. 1,031.50. According to the petitioner, all these bills are excessive and do not correctly show the calls actually made by him or his family members from his said telephone. To avoid dispute, however, he has paid out of the above bills, two bills namely the one for Rs. 2,003.50 and the other for Rs. 2,053/-.

6. In view of the excessive calls recorded on his telephone, the petitioner requested disconnection of the S.T.D. facility on his telephone. Accordingly, from 8.7.1985, S.T.D. facility has been discontinued. The petitioner received a letter dated 27.2.1985 from the 1st Respondent stating that in respect of his complaint-letter of 7.1.1985, the meter and associated equipment have been checked and found to be all right. The respondent contended that the calls recorded against his number were actually made from the petitioner''s telephone. It was also

observed that the S.T.D. facility has been used very often and hence it was regretted that no rebate could be granted to the petitioner.

7. The petitioner has challenged the above excess billing. The bills challenged are :

These are the figures we have found from the bills annexed as the petition is somewhat slipshod and contains many errors relating to figures. It is the contention of the petitioner that no investigation has been carried out in respect of his complaint. He has also stated that at no point of time was he called in connection with any investigation of his complaint nor was any explanation on any point asked for by the respondents. He contends that the so-called investigation carried out by the Respondents leaves much to be desired. As a result, he is being compelled to pay heavy telephone bills which, as a retired person, he cannot afford. He is compelled to do so on the threat of his telephone being liable to disconnection for failure to pay these exorbitant bills. The petitioner has also challenged Rule 443 of the Indian Telegraph Rules, 1951 in the present petition.

8. The complaint of slipshod investigation made by the petitioner is amply born out by the affidavit filed on behalf of the respondent in this petition. The respondent has stated in the affidavit of one Haridev Khosla, Divisional Engineer, Coperage Telephone Exchange, Bombay-21, that the investigation merely consisted of keeping the petitioner''s telephone under observation after the receipt of the complaint for six days from 9.1.1985 to 15.1.1985. The calls recorded on the meter in the telephone exchange concerned are set out at Ex. ''1'' to their affidavit. The petitioner was neither shown this observation report nor was his explanation asked for, nor was even an attempt made to ascertain whether the calls were in fact made from the telephone/instrument at the residence of the petitioner.

9. The observation report even for a period of six days, shows long S.T.D. calls made to Lucknow and Calcutta at specific telephone numbers. According to the petitioners, none of these S.T.D. calls have been made by him or any of his family members and he does not know who the parties in question are. The respondents have made no enquiry in connection with these calls. The petitioner has pointed out that only the two S.T.D. calls to Akola have been made by him since his mother was at that time ill and he was required to enquire from the doctor at Akola about his mother''s health, since his mother was residing there. The petitioner has also pointed out in his affidavit that there are several local calls recorded during these six days period of observation which also have not been made from his telephone instrument and he does not know who these parties are. The specific telephone calls have been pointed out by the petitioner. Unfortunately, this observation report was disclosed for the first time to the petitioner only when it was annexed to the affidavit of Khosla. This affidavit was filed only in September, 1985. The petitioner in his rejoinder of 13.9.1985, has made specific averments in respect of the observation report. Even so from

September, 1985 onwards the respondents have made no attempt to check any of these disputed calls. This kind of investigation can hardly be termed as investigation. When a specific complaint is made by a subscriber, it is the duty of the respondents to investigate whether the meter which is in the custody of the respondent and to which the petitioner has no access, is correctly registering calls or not or whether there are other reasons for excess calls being recorded on the meter which is assigned to the telephone in question.

10. The fact that such wrong excess billing is possible is amply born out by a subsequent circular dated 9.4.1986 issued by the Telecom Board. Under clause 4 of the said circular, the Board itself has set out how an excess billing complaint can arise in respect of a telephone having S.T.D. facility. The relevant part of the circular is as follows :

"4.1 (a) The subscriber, his family, friends and employees having used STD and not being conscious of the extent to which they have used it, or

(b) a fault in the metering circuit, or some transient fault in the system and

(c) possible deliberate mischief by other subscribers in league with our staff". Unfortunately, complaints on the last count are notoriously rampant. The circular also prescribes the manner in which it is necessary to take proper action. For example, para 4.4 of the said circular deals with ground (c). It says, "We must ensure that all possible points at which such mischief can take place are suitably guarded. D.Ps. must be locked. Access to unauthorised person to sensitive areas in the Exchanges should be avoided and in case of any suspicion about a particular member of the staff, suitable action must be taken." Paragraph 5 lays emphasis on advance action in case of possibility of an excess billing complaint. It provides for (a) Meter readings being taken every fortnight; (b) Identifying all subscribers whose current fortnightly readings show a sudden spurt; and (c) in case of such sudden spurts being noticed, placing the telephone line on observation and deputing responsible staff to the subscriber''s premises to check up that there has been no special occasion which might have given rise to such spurts. The circular gives two important guidelines in paragraphs 5.5 and 5.6. It says that as far as possible all telephone lines showing a sudden spurt should be put on observation. For this purpose immediate steps must be taken to provide suitable observation equipment in all exchanges having STD facilities, so that once a spurt is noticed, the line is actually put on observation, and paragraph 5.6 says that in case of sudden spurts being noticed, a suitable officer should be deputed in inspect the installation as well as to ensure that there was no special occasion, which could have given rise to a genuine spurt. Paragraph 6.5 very fairly observes that no useful purpose is served by undertaking such investigations after an excess billing complaint has been received. This investigation should be carried out as soon as certain spurts are noticed. Paragraph 7.2 says that if it is found that there had been in fact spurt for reasons unknown or there is a reasonable doubt as to the possible faults on the metering circuit or the subscribers'' equipment or a reasonable doubt exists about the possibility of some mischief, the competent officer may grant suitable rebate. Undoubtedly, this circular was issued after the period which is covered by the disputed bills. But it does throw light on the kind of investigation which can be carried out in respect of the complaints by the respondents. The investigations set out in the circular are prescribed by the telephone department itself. The affidavit of the respondents shows that no such steps were taken by the respondents at all. In fact even after receiving a complaint they did nothing further than putting the telephone under observation for six days. This can hardly be termed as investigation. The petitioner was given no opportunity to comment on the observation report nor was he given any opportunity to co-operate with the department in trying to trace the source of mischief nor was he even heard in the matter. Looking to the specific disputed calls now pointed out by the petitioner in his affidavit after he saw the observation report, it is clear that had proper investigation been done at the relevant time, the complaint of the petitioner could have been easily verified and further misuse of the telephone could have been prevented. But no such investigation was done. The letter therefore of the respondent No. 1 dated 27.2.1985 deserves to be rejected.

11. The petitioner has also challenged Rule 443 of Indian Telegraph Rules 1951 which have been framed under the Indian Telegraph Act, 1885. Rule 443 is as follows :

"443. Default of Payment. - If, on or before the due date, the rent or other charges in respect of the telephone service provided are not paid by the subscriber in accordance with these rules, or bills for charges in respect of calls (local and truck) or phonograms or other dues from the subscriber are not duly paid by him, any telephone or telephones or any telex service rented by him may be disconnected without notice. The telephone or the telex so disconnected may if the Telegraph Authority thinks fit, be restored, if the defaulting sub-scriber pays the outstanding dues and the reconnection fee together with the rental for such portion of the intervening period (during which the telephone or telex remain disconnected) as may be prescribed by the Telegraph Authority from time to time. The subscriber shall pay all the above charges within such period as may be prescribed by the Telegraph Authority from time to time."

In the present petition, we are only concerned with the provision of this Rule dealing with disconnection without notice of a telephone in respect of any bill which has not been paid by a subscriber. There are other Rules which deal with disconnection of the telephone line in circumstances other than non-payment of a telephone bill, such as Rule 421 with which we are not here concerned, not are we concerned in the present petition with the question whether any other telephone of the subscriber can be disconnected for non-payment of a telephone Bill in respect of another telephone. We are concerned with the narrow question of disconnection without notice in case of non-payment of telephone bills. Is this provision arbitrary and unreasonable and therefore violative of Article 14 ? Secondly, is this provision violative of principles of natural justice ?

12. It is submitted by Miss Shah, learned Advocate for the respondents, that this provision of Rule 443 must be read with the Post and Telegraphs Manual. Paragraph 434 in Volume XIV of the Manual sets out the various reasons why there could be excess telephone billing. The reasons are similar to those set out in the subsequent circular of 1986 referred to earlier. In that paragraph, there is a provision that in case of a complaint regarding excess charges, the highest calls recorded during the preceding three quarters should be taken into account and if the disputed bill has recorded more than 100% of these calls (provided there is an STD facility) then enforcement of recovery should be deferred until completion of investigation, and the bills should be split into two bills so that initially the subscriber may be asked to pay on the basis of an average number of calls metered during the past six bi-monthly periods plus 10%. A second bill should be prepared for the balance amount.

13. Section VI of paragraph 434 provides that on completion of the investigation, if the second bill is still found to be payable it may be asked to be paid by the party within 15 days from the date of intimation to the party to this effect. Disconnection may be enforced in the event of non-payment after observing due formalities. It is submitted by Miss Shah that the provision for disconnection without notice will apply provided there is no dispute regarding the telephone bill. If there is a dispute which is not decided in favour of the subscriber as a result of an investigation, then 15 days'' notice for payment is to be given before disconnection. Hence, this Rule cannot be considered as arbitrary or unreasonable.

14. In the case of Santokh Singh Vs. Divisional Engineer, Telephones, Shillong and Others, , Dr. B. P. Saraf who was then a Judge of the Assam High Court, has observed at paragraph 25 that the power of disconnection of a telephone is a very drastic power and it should not be exercised lightly. It should not be forgotten that telephone service is one of the most essential services today and disconnection thereof may put a citizen to extreme hardship and inconvenience and cause irreparable harm or injury. It may have far-reaching ramifications on his day to day living as well as on his means of livelihood. We respectfully agree. We may also add that in case of retired people, especially those who may be aged or infirm, telephone service is even more essential than in the case of others. There may be several reasons for non-payment of a telephone bill such as illness, absence for a temporary period, non-receipt of the bill etc. It is, therefore, essential that if a telephone bill is not paid, notice should be given to the subscriber specifying time within which he should pay failing which the telephone may be disconnected. We do not see any prejudice to the respondents in giving an opportunity to a subscriber to pay an undisputed bill. In case of a disputed bill, it is true that Posts and Telegraphs Manual provides for 15 days'' notice after completion of the investigation. There is nothing however, in Rule 443 of the Indian Telegraph Rules, 1951 which is a statutory rule, which requires such notice being given, nor does the rule itself make a distinction between a disputed bill and an undisputed bill. It is, therefore, necessary that the Rule

should make a separate provision in the case of a disputed bill. In the absence of any such provision, Rule 443 becomes even more arbitrary and unreasonable where there is a general dispute relating to the bill. Secondly, even when there is no dispute about the telephone bill disconnection, without notice, of a telephone for non-payment of a telephone bill would be arbitrary and unreasonable and contrary to the principles of natural justice. As stated earlier, there can be several genuine reasons for non-payment of a telephone bill. In such cases adequate notice before disconnection would enable the subscriber to pay the bill and avoid considerable harassment resulting from disconnection and subsequent reconnection involving overcoming of much red tape. On this ground alone, Rule 443 requires to be struck down.

15. The petitioner''s contention that Rule 443 is contrary to the principles of natural justice in as much as neither a notice is required nor any enquiry is prescribed even for a disputed bill, before a subscriber''s telephone is disconnected for non-payment of a telephone bill, therefore has considerable force. Non-payment of telephone bills may be on account of several reasons. It is necessary that at least some notice should be given to a subscriber of a proposed disconnection so that he may be able to either pay or make a suitable representation. In a case where investigation is made pursuant to the complaint made by a subscriber, it is also necessary that a reasoned order be served on the petitioner so that he may have an opportunity to consider any further steps that he may be required to take. It is pointed out by Miss Shah that under paragraph 434A of the Posts and Telegraphs Manual, Volume XIV, an appeal is now provided from the order which is passed on investigation. With great difficulty this Manual was made available to us by Miss Shah who said that there are no other copies of the Manual available. Rule 434A is written in this Manual in ink. It is not clear when this provision was inserted in the Manual. The petitioner was not even informed about his right of appeal. In fact, he has now learnt for the first time that any such right exists. It would be futile now to urge that such a right was available to the petitioner. In any case, if a right of appeal is available to a subscriber, there is all the more reason why there should be a reasoned order given.

16. In the case of Santokh Singh (supra), Gauhati High Court has held [in paragraph 25 (1)] that before exercising the drastic power of disconnection of a telephone, the authority concerned must ensure that the bill and/or notice is served on a subscriber and a period of 15 days thereafter has expired and the subscriber has failed to make the payment within such period. (2) If the telephone authority is so satisfied, then it has to give a notice to the subscriber about the alleged non-payment and the proposed disconnection thereby giving opportunity to put forward his case, if any, against proposed action. The Gauhati High Court has also given directions about the manner of giving such notice.

17. Miss Shah however relied on a judgment of the Madras High Court dated 8.11.1990 passed by Raju, J. in Writ Petition No. 1151 of 1987 in the case of S.

M. Ayua v. Union of India & Ors. The learned Judge of the Madras High Court has held that disconnection of the telephone without notice is not violative of the principles of natural justice. He appears to have relied upon the doctrine of administrative convenience while justifying Rule 443. With respect to the learned Judge we differ from his findings. Undoubtedly, certain situations may warrant departure from the principles of natural justice. The doctrine of necessity is one such special doctrine which may justify departure from the principles of natural justice. In his "Judicial Review of Administrative Action" (4th edition) page 216 de Smith enumerates some such special situations where action without notice or hearing may be justified if there is any urgent need for protecting the interests of other persons. For example, the post office may retain and dispose of a dangerous postal communication or an authorised public officer may prohibit the driving of a goods vehicles which is dangerous, or food suspected as unfit for human consumption may be seized. Sometimes, in such a situation, there can be an ex-post facto hearing. But in the absence of any such special circumstances, one cannot justify an action such as immediate disconnection of a telephone without notice. There is no justification for departure from, the principles of natural justice here. We do not see any special circumstances which would warrant an immediate disconnection of the telephone without notice simply because a bill has not been paid.

18. The learned Judge of the Madras High Court also seems to have considered Rule 443 as a part of the contract between the parties; or at any rate as a part of the terms and conditions under which a telephone is given to a subscriber. The respondents, however, are an undertaking set up by the Union of India and have a monopoly of this essential service. Any subscriber who desires to avail of the telephone facility is bound by the terms and conditions which may be laid down by the respondents. There is all the more reason why terms and conditions should be fair and reasonable and not arbitrary or violative of the principles of natural justice. Rule 443 in our view fails to meet this test.

19. However, the decision of the Gauhati High Court in regard to Rule 443 is under challenge before the Supreme Court and the judgment in that connection has been stayed by the Supreme Court. Hence, we leave the question of validity of Rule 443 open. It is also necessary to note that neither the petitioner nor the respondents have contended that the dispute in the present case can or should be referred to arbitration u/s 7(d) of the Indian Telegraph Act, 1885.

20. Looking to the nature of investigation which is carried out in the present case, the action of the respondents in holding the petitioner liable for all the calls recorded on the telephone meter pertaining to telephone No. 2021615 (original telephone No. 241605) must be set aside. We would have ordinarily directed a fresh investigation in order to ascertain the number of telephone calls for which the petitioner should be billed in respect of these five disputed bills. Looking to the lapse of time, however, it is difficult to see what kind on investigation can now be carried out. Had the matter been investigated promptly and properly,

culprits guilty of any mischief in this connection could have been brought to book. Unfortunately, this was not done. In these circumstances, the respondents are directed to charge to the petitioner in respect of the periods which are covered by the said disputed bills, an amount on the basis of an average for the previous six bi-monthly periods excluding the disputed bills plus 10% of the average so arrived at. The respondent shall submit to the petitioner five bills for the said five periods or a combined bill for the said five periods on the above basis after giving him credit for the amount already paid in respect of the said five bills and/or the amount already deposited in Court in this petition. The petitioner shall pay the said amount within two weeks from the receipt of the Bill. If on representation of such bill or bills, the respondents are entitled to the amount deposited in this Court in this writ petition or to a part thereof, they will be at liberty to withdraw the same after notice to the petitioner. The balance, if any, to be refunded to the petitioner thereafter.

21. Petition is disposed of accordingly and the Rule is made absolute accordingly. No order as to costs.

