

(2012) 07 BOM CK 0197
In the Bombay High Court
Case No : Arbitration Petition No. 571 of 2008

M/s. Kansan Communications Pvt. Ltd.	APPELLANT
Vs	
Mahanagar Telephone Nigam Ltd. and Others	RESPONDENT

Date of Decision : 30-07-2012

Acts Referred:

Consumer Protection Act, 1986 — Section 9
Monopolies and Restrictive Trade Practices Act, 1969 — Section 5
Telecom Regulatory Authority of India Act, 1997 — Section 11, 14, 14(b), 15, 34
Telegraph Act, 1885 — Section 7B

Citation : (2012) 07 BOM CK 0197

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Chirag Balsara with Ms. Usha Gadagkar instructed by M/s. Divya Shah and Associates, for the Appellant; M.P.S. Rao, with Ms. S. I. Shah instructed by y M/s. S.I. Shah and Co., for the Respondent

Judgement

Anoop V. Mohta, J.—The Petitioner has challenged an award dated 3 September 2008, signed and validated on 18 September 2008, passed by the Sole learned Arbitrator, thereby while rejecting the claim of the Petitioner stating it beyond the scope and barred by Section 15 of the Telecom Regulatory Authority of India Act, 1997 (for short, "TRAI Act, 1997"), as it falls within the jurisdiction of Telecom Regulatory Authority of India to the Appellate Tribunal (for short, "TRAIAT"), but at the same stroke, granted the counterclaim of the Respondents, as prayed in terms of clauses (b) (d) and (e), and awarded interest at the rate of 12% p.a. thereon. The learned Arbitrator has recorded the basic facts which are as under:

The present dispute has been referred to Arbitration by the Hon'ble Supreme Court of India vide order dated 28th February, 2005 in SLP Nos. 13305 of 2003 and 16521 of 2003 filed by MTNL. Messrs Kansan Communications Private Limited, the Claimants herein, have claimed recovery of various amounts specified in Annexures "Z1" to "Z5" (pages 205 to 214 of the Statement of Claim). The said claim sets out the amount paid by the Claimants to the

Respondents at the rate of Re.1.10 Ps. Per metered call. The same further sets out that the Respondent is entitled to the sum representing Re.0.90 per call meter. The balance is accordingly calculated by reducing the earlier amount calculated at Re.1.10 Ps. Per metered call by Re. 0.90 Ps. Per metered call. The Claimants have stated their prayer in the Statement of Claim at pages 23 and 24 of the Statement of Claim. The Claim pertains to difference of flat rate between Re. 1.10 Ps. Charged by the Respondents and Rs.0.90 which is collected by the Claimants from the end users

2. The Respondents in turn have filed their Written Statement and Counterclaim. According to the Respondents, under Telecom Tariff Order ("tto") dated 9th march, 1999, the Claimants were liable to pay the Respondents at the rate of Rs.1.10 Ps. Per unit call charges. The Respondents have claimed payment of 20 Paise per call being the difference between 90 Paise per call paid by the Claimants after the final order dated 21st October, 2002 passed by the Bombay High Court in Writ Petition No. 2132 of 2002 (page 189 of the Statement of Claim) and Rs.1.20 per call. The same are claimed by the Respondents in its counterclaim. According to the Respondents, it has been directed to charge at the rate of Rs.1.10 Ps. Whereas the Claimants were charging at Rs.0.90 Ps. for first 500 calls made by end user

3. the Claimants had instituted Writ Petition No. 2132 of 2002 in the Bombay High Court. According to the Claimants, the Respondents should have charged at the rate of Rs.0.90 Ps. Under TRAI Notification dated 9th November, 2000. According to the Respondents, the Claimants should also charge at the rate of Rs.0.90 for the first 500 calls and at the rate of Rs.1.10 Ps. Per call beyond 500 calls to its end users. Based on certain statements made before the High Court the aforesaid Writ Petition came to be disposed of. This was followed by a Review Petition and a Contempt Petition being instituted by the Respondents and Claimants respectively. The Respondents thereafter carried the matter to the Supreme Court by filing a Special Leave Petition. By an order dated 28th February 2005 the Supreme Court was pleased to appoint me as Arbitrator to resolve the disputes arising between the parties.

4. At this stage, it'll be useful to peruse the Minutes of the Arbitration Meeting held on 29th April 2006. Paragraph 1 of the Minutes provides as under:

1 It is common ground that the charges for the first 500 calls is at the rate of 0.90 Paise per call and for calls above 500, the charge will be at the rate of Rs.1.10 per call. Parties are however not ad idem as to the number of calls which each of the end users of the Claimant has made and the billing to these end users has been made at the above rates.

The aforesaid Minutes would, therefore, make it clear that the parties were ad idem in regard to the charges of Rs.0.90 Ps. Per call for the first 500 class and Rs.1.10 per call for calls above 500.

2. The learned Arbitrator has noted the provisions of the Act as under:

14. Mr. Arune Kathpalia, the learned Senior Counsel for the Respondents, has submitted that if one has regard to the provisions of Section 14 and Section 15 of the Telecom Regulatory Authority of India Act, 1997, the present arbitration proceedings will have to be held as barred for want of jurisdiction. Section 14 provides for establishment of Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal. Under clause (a) of section 14 the said Tribunal is established to adjudicate any disputes (i) between a licensor and a licensee; (ii) between two or more service providers, and (iii) between a service provider and a group of consumers. Section 14(b) provides for "hear and dispose of appeal against any direction, decision or order of the Authority under this Act". Section 15 states

15. Civil Court not to have jurisdiction :

No civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act"

15. Mr. Kathpalia, learned Senior Counsel for the Respondents, has drawn my attention to the Telecommunication Tariff Order, 1999 dated March 9, 1999."Annexure D" at page 53 of the Statement of Claim. He has relied on Definition clauses 2(c) and 2(g) in Section I, which provides as under:

2(c) "Basic Telecommunication Services" mean services derived from Public Switched Telephone Network (PSTN);

(g) "Forbearance" denotes that the Authority has not, for the time being, notified any tariff for a particular telecommunication service and the service provider is free to fix any tariff for such service

3. It is necessary to note that Chapter IV relating to the Appellate Tribunal, inserted by Act of 2 of 2000, Section 11 w.e.f. 24 January 2000. Admittedly, the Appellate Tribunal constituted in view of this chapter to adjudicate any disputes between the licensor and licensee and/or service providers. The original provision, before 24 January 2000 was as under:

14 Authority to settle disputes.(1) If a dispute arises, in respect of matters referred to in subsection (2) among service providers or between service providers and a group of consumers, such disputes shall be adjudicated by a bench constituted by the Chairperson and such bench shall consist of two members:

Provided that if the members of the bench differ on any point or points they shall state the point or points on which they differ and refer the same to a third member for hearing on such point or points and such point or points shall be decided according to the opinion of that member.

(2) The bench constituted under subsection (1) shall exercise, on and from the appointed day all such jurisdiction, powers and authority as were exercisable immediately before that date by any Civil Court on any matter relating to (i) technical compatibility and interconnections between service providers;

(ii) revenue sharing arrangements between different service providers;

(iii) quality of telecommunication services and interest of consumers:

Provided that nothing in this subsection shall apply in respect of matters relating to (

a) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under subsection (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969;

(b) the complaint of an individual consumer maintainable before a Consumer Disputes Redressal Forum or a Consumer Disputes Redressal Commission or the National Consumer Redressal Commission established u/s 9 of the Consumer Protection Act, 1986;

(c) dispute between telegraph authority and any other person referred to in subsection (1) of Section 7B of the Indian Telegraph Act, 1885.

4. Admittedly, pursuance to then existing policy, the first agreement was entered into between the Petitioner and the Respondents, on 28 November 1996. The tariff circulars were issued on 24 May 1999. Thereafter, other agreements for operation of DID Group EPABX were entered into from time to time, from 5 October 1999 upto 16 September 2004.

5. Therefore, the basic agreement, though amended from time to time, was entered into prior to January 2000. Therefore, in case of any dispute arise between the parties out of the said contract would govern by the then existing provisions as recorded, including tariff circular dated 9 March 1999 and/or 15 April 1999 or 24 May 1999. The fact remains that in view of the forbearance clauses and agreement, the parties were permitted to have their own tariffs/charges. As there was dispute with regard to the charges for the calls, the matter was contested.

6. In a Writ Petition filed by the Petitioner, the statement was recorded in the order dated 21 October 2002 which reads as under:

2. During the course of motion hearing, the learned counsel for respondent Mahanagar Telephone Nigam Ltd. made a categorical statement that petitioner is being charged for the calls as per DOTs guidelines and the notification. In that event, the petitioner should not have any grievance since petitioner's claim in the writ petition is that as per notification dated 9th November, 2000, the call charge per metered call unit upto 500 metered call units per month should only be at the rate of 90 ps. And for the calls over and above 500 calls per month, the

call charges should be at the rate of Rs.1.10. This is what is accepted by the learned counsel for respondent MTNL

7. The review against the same order was disposed of by order dated 17 April 2003 referring to the circular dated 24 May 1999 by observing as under:

We may quote the relevant clause of the tariff circular dated 24.5.99 which reads thus

CHARGES FROM FRANCHISEE"

(i) Monthly Rental per Junction Line:

(ii) Call Charges Call Charges will be Rs.1.10 per call unit."

3. The aforesaid tariff charges were amended vide notification dated 9th November, 2000 by providing thus

4. In (16.b.iv) in Schedule I of the Telecommunication Tariff Order (TTO), 1999 prescribing call charges, the existing entry is replaced as under

(a) Call charge per metered call unit upto 500 metered call units per month Rs.0.90 (b) For calls above 500 metered call Units per month, call charge per metered call unit Rs.1.10

4. Obviously, the applicants (original respondents in the writ petition) have to charge as per amended call charges noted in clause (iv) of the notification dated 9th November, 2000

8. The parties ultimately, taken the matter to the Supreme Court. After hearing both the parties, the Supreme Court has passed the following order:

Delay Condoned.

After hearing the learned counsel for the parties, we direct that all the disputes arising for decision in this case shall stand referred to Justice (Retd.) Ashok C. Aggarwal of Bombay High Court for arbitration. The fee and expenses shall be in the discretion of the learned Arbitrator

Once the Arbitrator has given an award, it shall supersede the judgment of the High Court.

Until the arbitrator has given an award, interim or final, the telephone connection of the respondent shall not be disconnected.

Contempt proceedings pending in the High Court shall also stand closed and notice discharged. However, in terms of the order dated 24.4.2003 passed by the High Court, the Petitioner shall continue to charge the respondent at the rate of 90 paise unless otherwise ordered by the learned Arbitrator.

The special leave petitions be treated as disposed of in the abovesaid terms

9. Admittedly, therefore, the Hon"ble Supreme Court directed to settle all the

dispute arising between the parties through the sole Arbitrator, as appointed. The interim order, already granted as recorded, was continue including the permission to charge at the rate of 90 paise call, by the Arbitrator.

10. The Arbitrator, as recorded above, proceeded with the matter but inspite of the clear directions from the Hon''ble Supreme Court, dismissed the claim of the Petitioner on the ground of jurisdiction, at the same stroke awarded the counterclaim of the Respondents.

11. In my view, once the Hon''ble Supreme Court has directed to get the dispute resolved through the Arbitrator and knowing fully the disputed facts between the parties, including fixation of tariff, if any, and the provisions of the law, there is no reason that the Arbitrator could have rejected the claim of the Petitioner on the ground of jurisdiction, as done in the present case. The provisions include the orders so referred and the existence of Appellate Tribunal u/s 14 and 15. Therefore, now to dismiss the claim of the Petitioner on the ground of jurisdiction, in my view, is contrary to the express directions given by the Hon''ble Supreme Court. It is not that the Hon''ble Supreme Court has kept all points open, including the point of jurisdiction.

12. Both the parties knowing fully the fact that the agreement was prior to 1999 and the tariffs in question were based upon the circulars prior to 2000, which at the relevant time as agreed and directed by the Supreme Court to be adjudicated by the Tribunal, based upon the then provisions. It is relevant to note that, that time the provision of settlement was available prior to January 2000 and therefore, the submission that the Petitioner ought to have got the matter clarified from the Supreme Court and therefore, there is no reason now to interfere with the award passed by the Arbitrator, is unacceptable. After hearing both the parties, the Supreme Court, has directed to resolve their disputes and appointed the Arbitrator knowing fully the provisions of the TRAI Act, 1997, as well as, the regulations and the relevant orders.

13. Admittedly, the learned Arbitrator has not considered all these facts including the order passed by the Supreme Court and proceeded to decide the matter afresh as if the parties have themselves based upon the agreement, appointed the Arbitrator to proceed in accordance with the law.

14. In my view, in the present facts and circumstances, as the Hon''ble Supreme Court has directed to resolve the matter through the Arbitrator and based upon the agreement between the parties and the basic circulars which were admittedly prior to 2000, that were before the establishment of TRAIAT, as the chapter itself is introduced in January 2000, directed the parties to resolve the dispute. Therefore, the rejection of the claim of the Petitioner solely on the ground for want of jurisdiction, without considering the directions issued by the Supreme Court in my view, is contrary to the order passed by the Supreme Court. The Arbitrator has granted counterclaim of the Respondent. It appears that both the parties, not pointed out and/or agitated this issue.

15. The Arbitrator, in my view, ought to have considered the agreements between the parties and so also the dispute which was going on and as referred in the orders passed by the High Court from time to time and which ultimately culminated in SLP in the Supreme Court, wherein after hearing both the parties, the Supreme Court has directed to resolve their dispute through the Arbitrator. There are no reasonings, whatsoever, given by the learned Arbitrator on these issues, which goes to the root of the matter basically when the claim of the Petitioner was rejected on the sole ground of the jurisdiction, while granting the counterclaim of the Respondents.

16. The Court's power u/s 34 is quite limited, but the clear order of the Hon''ble Supreme Court, passed in the matter between the parties, binds all. It is difficult to approve the award, by overlooking the apparent error on face of record and as in my view, it amounts to the award contrary to the Supreme Court order in question, therefore, there is no option but to set it aside on all counts. The claim and the counterclaim are interconnected and therefore, cannot be separated. The whole award needs to be set aside. The learned Arbitral Tribunal needs to rehear the matter. All points are kept open. As the Hon''ble Supreme Court has appointed the Arbitrator, the remand and rehearing by the same Arbitrator is a must. In view of above, I am inclined to set aside the award so passed. However, the matter is remanded back for rehearing on all issues.

ORDER

- 1 The impugned award dated 3rd September 2008, signed and validated on 18 September 2008, is quashed and set aside.
- 2 The matter is remanded back for rehearing on all issues.
- 3 The parties to take steps for earlier hearing.
- 4 The learned Arbitrator to dispose of the matter expeditiously.
- 5 There shall be no order as to costs.