(1987) 01 CAL CK 0007

In the Calcutta High Court

Case No : Civil Order No''s. 3937 (w) , 12259 (w) and 15030 (w) of 1983 and 3629 (w) and 4919 (w) of 1984

Naresh Chandra Roy APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 01-01-1987

Acts Referred:
Telegraph Act, 1885 — Section 7
Telegraph Rules, 1951 — Rule 412(2), 436, 443

Citation : AIR 1987 Cal 147

Hon'ble Judges : Satish Chandra, C.J

Bench : Single Bench

Advocate : Tarun Roy, Altamas Kabir, Kazi Mohd. Ali, Anupam Chatterjee and Paramananda Jalan, for the Appellant; Anwar Hossain, Sardar Amjad Ali and Stanley James, for the Respondent

Judgement

Satish Chandra, C.J.—In this group of writ petitions the grievance of the petitioners is that their telephone line went out of order but in spite of repeated complaints the telephone authorities have not rectified the line, but have been sending bills for it.

2. In C.O. 12259(w) of 1983, Sk. Abdul Rahim, it has been stated that since January, 1983, the telephone became out of order intermittently and since March 1983 the telephone remained completely dead and inoperative. The petitioner made repeated complaints to the respondent on various dates stated below :

Date Complaint No.

11-1-83 A 225

22-1-83 A 238

14-2-83 A 40

1-3-83 A 490

8-3-83 A 409

21-3-83 A 196

29-3-83 A 179

14-5-83 A 272

19-5-83 A 476

20-5-83 A 70

6-6-83 A 176

28-6-83 A 152

6-7-83 A 33

29-8-83 A 455

30-6-83 A 33

1-9-83 A 268

9-9-83 A 353

16-9-83 A 32

3. In spite of these complaints, no steps were taken by the respondent to restore the telephone connection but bills are being regularly sent towards rental of the telephone, for the period after the telephone became dead. The petitioner paid all the bills under protest. Ultimately he on 10th August, 1983 gave a legal notice to the respondents demanding restoration of the line within 48 hours failing which he will be compelled to move this Hon''ble Court. But this also evoked no response. At the admission stage this Court passed an order on 4-10-83 directing the respondents to restore the petitioner''s telephone connection. The telephone connection was restored immediately. The respondents have not filed any affidavit-in-opposition in this case.

4. In C.O. 15030(W) of 1983, Chiranji Lal Murarka, the uncontroverted allegation is that the petitioner''s telephone went out of order on 20th April, 1983. He made numerous complaints particularly on 9th June, 1983, 18th June, 1983, 18th August, 1983 and 30th August, 1983 but the telephone was not restored. On the other hand, the petitioner was served with bill for rental of Rs. 200/-each in October and December, 1983. These bills were not paid by the petitioner. The petitioner gave legal notice on 12th December, 1983 requesting restoration of the telephone within 7 days. This also had no effect. On 23rd December, 1983, this court passed an order directing the respondents/telephone authorities to restore the telephone line by 31st December, 1983. The Divisional Engineer was directed to submit his report. He submitted a report stating that the telephone line has been restored.

5. In C.O. 3629(W) of 1984, Deb Gum Ghosh, the uncontroverted allegation is that the petitioner''s telephone became dead and is out of order since 27th July, 1983. He lodged complaints with the respondents and thereafter personally met the respondent authorities on 4th August, 1983 and on subsequent dates. He again lodged a written complaint on 8th September, 1983 and thereafter sent the reminder on 28th November, 1983 but all these evoked no response. The telephone line remained out of order. The respondents, however, continued to send bills for the period subsequent to July 1983. Since the telephone is out of order, he did not pay the said bills. The petitioner''s case is that the respondents are not entitled to charge rental for the period during which the telephone remained out of order, for no fault of the subscriber. He also alleged that the respondents have no system for maintaining the records correctly. In this case also, this Court on 30th January, 1984 directed the respondents to restore the telephone connection. It was immediately restored.

6. In C.O. 4019(w) of 1984, Gangadhar Bajaj, the uncontroverted allegation is that the petitioner''s telephone went out of order since 29th June, 1983. In spite of complaints reminder, requests and representations, the telephone line has not been restored. On the other hand, the telephone authorities continued to send bills for rental regularly. The petitioner paid the bills in the hope that the telephone will be restored but the same remained out of order. The petitioner claimed that he is entitled to get refund of the money paid by him. The respondents had been negligent in discharging their duty to restore the telephone connection. The further allegation is that the other telephones installed in different flats of the same building are still in working order. In this case it has been alleged in paragraph 9 that the respondent No. 3 (The Divisional Engineer, "34" Exchange, Calcutta Telephones) ultimately told the petitioner to obtain order from the Court without which nothing would be done. In this case, the Court passed an order on March 16, 1984 directing the telephone authorities to restore the telephone line of the petitioner. The telephone line was thereupon restored.

7. Similar allegations have been made in the various other writ petitions in this group. It is unnecessary to multiply the instance.

8. It appears that when the telephone line goes out of order, complaints are made repeatedly but they are not attended to, with any degree of seriousness or promptness. The telephone line may remain out of order for months and months. When the subscriber approaches the Court and the Court passes an interim order, the telephone line is, as if by magic, restored quickly. This has happened in each of the cases in this group.

9. In C.O. 8937(w) of 1983, Naresh Chandra Roy v. Union of India, the respondents have filed an affidavit-in-opposition. They have also filed a supplementary affidavit. They have annexed a copy of an order dated October 31, 1985 issued by the Director of Phones of Telecommunication Board, Government of India. It states that the matter has been considered by the Telecommunication Board and it has been decided that rebate in rental would be

admissible when the telephone or other service of a subscriber remains interrupted continuously for 30 days or more. The free calls allowed in the billing cycle for the telephone will be reduced proportionately for the period for which rebate is granted.

Paragraph 3 of this order is relevant and material. It states :

"In order to prevent any abuse of this concession or difficulties to the subscribers, General Manager/District Managers should ensure that fault cards and fault registers showing the nature of fault, the time of reporting and restoration of the fault, are properly maintained. Attention is particularly invited to instructions contained in Directorate letters No. 7-6/82 PHM dated 16-9-1982 and 23-4-1983 on prompt clearance of faults and fixing of responsibility for delay in clearance. These instructions, inter alia, enjoin that the Junior Engineer in charge of an outdoor section should enter all faults pending for more than six hours in a register and take necessary action to rectify the faults in shortest possible time. In case the fault persists for more than 24 hours, the concerned Assistant Engineer-in-Charge should be informed, apart from continuing his efforts for fault rectification. The Assistant Engineer should keep a watch on all such cases and would be responsible to get the faults cleared with due promptitude. If the fault is not cleared within 48 hours, the concerned Divisional Engineer should take necessary action for rectifying the fault. All long pending faults beyond 3 days should be monitored by the General Manager/District Manager through weekly returns from Divisional Engineers. Responsibility has to be fixed by the General Managers in all cases of negligence. In case a fault has continued for 30 days or more, an officer of the rank of Director or above should decide on the basis of available information whether this has been due to negligence or genuine reasons beyond control."

10. In none of the writ petitions of this group, the respondents made any effort to indicate whether they have followed the instructions contained in the Directorate letters dated 16th September, 1982 and 23rd April, 1983. They have not indicated as to what steps were taken by the Divisional Engineer, General Manager/District Manager. There is no indication whether General Manager has fixed the responsibility in any case of negligence. There is no allegation that the Director had in any case decided whether the fault had continued for 30 days or more due to negligence or for genuine reasons beyond their control. There is strict silence on the part of the respondents on these aspects.

11. On the other hand, in affidavit-in-opposition as well as in the supplementary affidavit filed in the case of Naresh Chandra Roy, the stand is that Section 7B of the Telegraph Act provides for arbitration for cases of disputes. Hence, a writ petition is not maintainable. The subscriber enters into an agreement with the telephone department. He is bound to abide by the provisions of the Indian Telegraph Act and the Rules. It has been stated in the affidavit-in-opposition that the road space in Calcutta is only 6% of its total area as comparable to 30% and above as in other major cities in India. Due to acute shortage of road space all

utility services are to lay cables, pipes and construct drains, manholes etc. either in the same alignment or criss-crossing each other vying for space. Digging of road for maintenance and developmental work causes damage to these cables and pipes. It has been alleged that the equipment of most of the exchanges have outlived their lives and require replacement for efficient service. The solution of the problem lies in replacement of the old equipment, laying of additional cables, utilisation of modern sophisticated equipment like digital exchanges, PCM cables, optical fibres, Microwave systems, ducting for cables etc. These require huge investment of money. It has been further alleged that the approximate cost per line for installation of the telephone is nearly Rs. 20,000/-. The cost of maintenance is Rs. 3000/- per annum but only Rs. 1200/- is collected from the subscriber as fixed rental. It has been further alleged that the telephone often goes out of order because of digging of the road by various Government departments.

12. The affidavit-in-opposition thus gives a long lecture on the above aspects of the problem, but it scrupulously avoids any statement as to whether they have complied with instructions in the Directorate letters dated 16th September, 1982 and 23rd April, 1983 with regard to the rectification of the faults and restoration of the line as quickly as possible.

13. The burden of the respondents appears to be that they were helpless in rectifying the telephone line early because of reason beyond their control. But it is significant that the telephone lines of the petitioners in this group were restored immediately after the Court had passed an interim order.

14. In this situation it is difficult to believe that the respondents actually made any effort to carry out their duty as enjoined in the Directorate letters mentioned above. One would have expected them to produce records and registers etc. in which the complaints are entered and the necessary entries made in respect of the actions taken, to corroborate their case. But nothing has been done.

15. The irresistible conclusion appears to be that the respondents slept over the complaints. They did nothing to rectify the fault but continued to send the bills to the subscribers, they woke up only when this Court made an interim order. Then the telephones were restored at once.

16. The respondents'' case is that under the Rules the subscriber is liable to pay the rental fee even though the telephone may be out of order. There is no provision for refund of the rental. In this situation it is apparent that the claim of the petitioner for refund of the rental or the complaint that the respondents are not entitled to charge rental for the period when the telephone is out of order, cannot adequate alternative remedy by way of arbitration. The writ petition is maintainable.

17. Let us have a look at the Rules framed under the Indian Telegraph Act. Rule 412 in Part 7 "Rules for telephone" is headed "supply and maintenance of equipment". It provides :

"1. The Divisional Engineer, Telegraphs, shall install and subject to the observance of these rules by the subscriber, maintain in good working order the equipment and apparatus provided by the Department and when necessary, substitute a different apparatus with all reasonable dispatch"

Thus, the Divisional Engineer is liable to maintain the telephone connection in working order. It appears that in pursuance of this Rule, the Directorate had issued instructions contained in the letters dated 16th September, 1982 and 23rd April, 1983 laying down the procedure for prompt clearance of faults and fixing the responsibility for delay in clearance.

18. Rule 434 provides for fees and other charges. Section III deals with the scale of charges for departmental exchange connections :

(1) Within the local area.

(a) Measured rate system:

Rates of Bimonthly Rental & Call fees

Telephone Exchange System Rental Number of call units allowed free of charges during 2 months Fees per call unit for calls in excess of those allowed free of charges

From 201 to 3000 In excess of 3000

1 2 3 4 5

1.

Exchange system of less than 1000 lines

Rs. 125 200 40 P. 50 P.

2.

Exchange system of 10000 lines & above but below 30000 lines

Rs. 150 200 40 " 50 "

3.

Exchange system of 30000 lines and above but below 100000

Rs. 175 200 40 " 50 "

4.

Exchange system of 100000 lines and above

Rs. 200 200 40 " 50 "

(W.E. from 1-3-82)

19. A fixed rental of Rs. 200/- is charged for two months, during which period

200 calls are allowed free of charge.

20. Under Rule 436 the subscriber shall pay the charges for installation or shift or the rent for a telephone connection or similar service for such periods and at such times as may be prescribed by the Telegraph Authority.

21. Rule 443 deals with default of payment. It says : "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 trunk) 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."

This rule deals with two situations. It says that the rent in respect of the telephone service shall be paid on or before the due date. In the next place, bills for charges in respect of calls or phonograms or other dues shall be duly paid. The rent is to be paid for the telephone service provided. Bills for calls etc. actually made are to be paid when presented. The noticeable point is that the rent is payable for "telephone service provided". If the telephone goes out of order, it cannot be said that the telephone service is provided. Free calls is only a part of the telephone service. Trunk calls, phonograms, receiving the calls, morning alarming calls, time service etc. are also telephone services which are provided to a subscriber.

This rule contemplated that if the rent or the bills are not paid, the telephone may be disconnected without notice. The power to disconnect arises when there is a default by the subscriber in paying legitimate dues : for instance, in not paying rent, even though the telephone service is being provided. This rule does not authorise disconnection for non-payment of a bill for rental in a case where, for the period for which rental is being charged, the telephone service was not provided, inasmuch as the telephone was dead or out of order.

22. The respondents invited my attention to Rule 474 which provides :

"474. Maintenance of Circuits :

While the Posts and Telegraphs Department shall make every endeavour to keep the circuits (including local leads) free from interruptions, the Department shall not be responsible for any loss, damage or inconvenience caused to the user as a result of interruptions nor shall any rebate be allowed in the charges for circuit failures.

Provided that where the user complains about the interruption in the circuit, the Posts and Telegraphs Department, may wherever practicable substitute a spare circuit."

This Rule 474 occurs in Part VIII of the Rules which is headed "Rented Telegraph & Telephone Circuits General Provisions". This has nothing to do with the local telephones which are dealt with in Part V. Similarly, Rule 519A which occurs in

Chapter IX relating to Telex is equally not material. Rule 519A provides :

"(1) No rebate or refund shall be admissible to a subscriber by reasons of breakdown, disrepair, interruption, disturbance, stoppage of communication or of any other cause whatsoever.

(2) The Telegraph Authority shall on a written notice received from the subscriber that his Telex line is not in working order, repair and restore the communication with all reasonable despatch and the subscriber shall render all reasonable assistance for the purpose."

This rule lays down reciprocal responsibilities : "The Telegraph Authority with all reasonable despatch shall repair and restore the communication" and then no rebate or refund shall be admissible.

23. The respondents have pleaded that since the subscriber has entered into an agreement the relationship between the subscriber and the telephone authorities is contractual in nature. Assuming this so, it is evident that in view of Rule 412(2) the Telegraph authorities are bound to maintain the telephone connection in working condition. If the telephone line goes out of order the officials are liable to rectify the telephone line with reasonable despatch as laid down in the Directorate letters mentioned above. If they failed to do so, they are clearly guilty of breach of contract. In that event, they cannot claim payment of the rental for the period for which the telephone remained out of order. The rental is for providing telephone service; else it would amount to a case of unjust enrichment of a party in breach. Such a situation is not favoured by the law of contract. A party in breach cannot claim enforcement of the duties of the other party. It cannot take advantage of its own wrong.

24. By its order dated October 31, 1985 the Telecommunication Board has provided for grant of rebate of rental if the telephone service of a subscriber remained interrupted for 30 days or more. It has been argued by learned counsel for the respondents that the order is not retrospective. This is correct. This order cannot be enforced retrospectively. No relief can be granted under this order in cases where the telephone service remained interrupted or inoperative prior to October 31, 1985.

25. The rental is charged for telephone service provided. Ex hypothesi, there seems no liability to pay when telephone service is not provided at all. This is all the more so when the telephone authorities do not do their duty. In spite of repeated complaints, they just sit tight. They act with alacrity when this Court directs them to restore the telephone. Then they forget their complaint about lack of space, constant diggings etc. and restore the telephone almost immediately. In such cases to allow them to demand payment of rental appears to be gross violation of all notions of justice and fair play and also of the true import of the Rules. It will only whet their appetite for callous disregard of statutory duties no doubt. The telephone department will suffer loss of revenue. The department will be free to compensate the loss by directing recovery from

the salary payable to the negligent officers of the department. It is time some such action is taken. It may then inspire them to take their duties seriously.

26. If the telephone became dead during the course of the cycle, only the proportionate rental for the period the telephone was in working order would be chargeable. For the rest period or for cycles during which the telephone remained dead, the telephone authority will not be entitled to charge rental. In cases where payment has been made for such periods it will be liable to be refunded or adjusted against future bills. In case there is a refund or adjustment for any broken period of cycle the number of free calls will be reduced proportionately. In case where there is a dispute whether the telephone became dead and continued out of order for a particular period, the same may be decided by arbitration u/s 7B of the Indian Telegraph Act. The telephone will not be disconnected for non-payment of rental for a period when it was dead.

27. The respondents submitted that the "usual order" made by a learned single Judge was not justified. One of the directions given was that if the telephone goes out of order in future, it will be restored in three days. With respect it is difficult to agree to such a position. It is unnecessary to examine it any further, because an interim order lasts during the pendency of a case and it comes to an end with its final disposal. The "usual order" made in the present group of cases was an interim order. It comes to an end now.

28. In the result, the applications are allowed in terms of the directions laid down above no order as to costs.

