
(1995) 11 KL CK 0029
In the High Court Of Kerala
Case No : O.P. No. 7180 of 1993-D

Rajiv Kesavan

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 22-11-1995

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227
Telegraph Act, 1885 — Section 4, 7

Citation : AIR 1996 Ker 229

Hon'ble Judges : K. Sreedharan, J

Bench : Single Bench

Advocate : P.B. Sahasranaman, for the Appellant; C.A. Majeed, for the Respondent

Final Decision : Dismissed

Judgement

K. Sreedharan, J.—Short question that arises in all these Original Petitions relates to the quantum of commission payable to licencees, who operate S.T.D. public telephone booths. According to petitioners, they are entitled to 20% of unit call charges without any slab system. In other words, they contend that they are entitled to 20% of Rs. 1.25, which is the tariff per unit call metered in the exchange and there cannot be any reduction in the commission, even if the number of unit calls go beyond 10,000 a month. On this basis, they pray for the issue of a writ of mandamus directing the respondents to give a commission of 20% of unit call charges on S.T.D./ I.S.D. calls.

2. Since learned counsel representing the petitioner in O.P. No. 7180/93, led the argument in this batch of cases and counsel representing the petitioners in the other Original Petitions adopted the same contentions, I consider it advantageous to refer to the facts in O.P. No. 7180/93. Petitioner is maintaining a public call office from 1990 onwards. Department of Telecommunications invited voluntary organisations and private agencies to establish and work pay-phones on certain conditions. Operating agency was authorised to charge Re. 1/- per call. In case

of local pay-phones, out of Re. 1/-, 0.40 paise per call was allowed to be retained by the agency and 0.60 paise to be paid to the Department. In the case of S.T.D. pay-phones, Department's share per unit call was 0.80 paise. From this, petitioner contends that the Telecommunications Department authorised to collect 40% of the call charges in the case of local call pay-phones and operators of S.T.D. public pay-phones have been authorised to retain 20% of the call charges. It is so notified as could be seen from Ext. P2. Pursuant to the notification and publications made by the Department to that effect, petitioners took up the job of running call offices. While so, Government of India increased call charges from Re. 1/- to Rs. 1.25. There was no corresponding increase in the commission to the operators/ franchisees. According to the petitioners the above stand taken by the respondents, is contrary to the terms of the agreement and arbitrary. It is also their contention that petitioners got the booths on the basis of the promise that they are entitled to 20% of the call charges realised from customers, who operate S.T.D. public telephones. Consequently, the Department is estopped from reducing the commission without the sanction or consent of the petitioners. Hence these Original Petitions.

3. Respondents have filed a detailed counter-affidavit. Contentions raised therein, are to the following effect: Petitioners were given permission to operate S.T.D. public call offices in accordance with the agreement executed between the petitioners on the one hand and the Department on the other. That agreement was subject to the terms and conditions laid down in the Government of India Notification No. 31-10/88-PHB, dated 6-7-1988. As per that notification, licensee was permitted to charge Re. 1 /- per unit call, from the public made from the pay-phones. Licensee was to pay to the Department 0.80 paise per metered call unit in the case of S.T.D. pay-phones and 0.60 paise per metered call unit for local call pay-phones. Thus, the licensees can retain 0.20 paise and 0.40 paise for each metered call unit respectively. Thereafter, Government of India, by Notification No. 6-5/89/PHB, dated 1-9-1989, revised the tariff of local/ S.T.D. public telephones. That underwent further change as per Notification No. 6-1/90-PHB, dated 2-5-1991. At no point of time, Department, contracted with petitioners allowing them to retain 20% of the call charges in the case of S.T.D. public telephones and 40% of the unit call charges in the case of non-S.T.D. public telephones. Licensees were allowed to retain 0.20 paise per unit call in the case of S.T.D. public telephones and 0.40 paise per unit call in the case of non-S.T.D. public telephones. The question of percentage of unit call charges does not arise under any of the notifications issued by the Government of India or under the agreement entered into between the operators and the Department.

4. Before dealing with the arguments advanced by counsel representing the petitioners, it is worthwhile to refer to the statutory provisions governing establishment of telephone booths. Section 4 of the Indian Telegraph Act (Act 13 of 1885) (hereinafter referred to as "the Act") provides that within India, the Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs. The said provision is subject to two

provisos. First proviso states that the Central Government may grant licence to any person to establish, maintain or work a telegraph subject to such conditions and in consideration of such payment as it thinks fit. As per the second proviso, the Central Government may, by rules made under the Act, permit the establishment, maintenance and working of wireless telegraphs on ships and on aircraft within or above India or Indian territorial waters, and telegraphs other than wireless telegraphs within any part of India. Clause (2) of Section 4 of the Act, authorises the Central Government to delegate to the Telegraph Authority all or any of its powers under the first proviso to Sub-Section (1). Telegraph has been defined, inter alia, to mean any appliance Instrument, etc. used or capable to use for transmission or reception of signs, signals, etc. Telegraph Authority, as per the definition in the Act, means the Director-General of Posts and Telegraphs and includes any officer empowered by him to perform all or any of the functions of the Telegraph Authority under the Act. In exercise of the powers under clause (2) of Section 4 of the Act, Government of India issued Notification No. R-11014/7/86-LR, dated 27-2-1987. By that notification, the Central Government delegated to the Telegraph Authority the powers to grant licences to any person to establish, maintain or work a telegraph within any part of India. Thus, by virtue of the notification issued by the Central Government, Telegraph Authority was given the power to grant licences to any person to establish a telegraph on such conditions and in consideration of such payment as it thinks fit.

5. Section 7 of the Act deals with power of the Central Government to make rules consistent with the provisions of the Act. Clause (2)(h) of that Section authorises the Central Government to frame rules relating to the time at which, the manner in which, the conditions under which and the persons by whom the rates, charges and fees mentioned shall be paid and the furnishing of security for the payment of such rates, charges and fees. Invoking the said power, Government of India changed the rules regarding the call charges, whereby the call charges were enhanced from Re. 1/- to Rs. 1.25. Clause (4) of Section 7 of the Act, inter alia, states that nothing in the said Section or the Rules precludes the Central Government from entering into an agreement with a person for the establishment and maintenance of any telegraph line, appliance or apparatus for the purpose of affording means of telegraphic communications.

6. The policy of the Central Government and the Telegraph Authority, to begin with, was to provide unattended coin box public call offices. The policy regarding opening of local public call offices was reviewed as per Notification No. 31-11/76-PHB, dated 13-4-1977. As per that, public call offices were directed to be opened liberally. Private public call offices were allowed on certain terms and conditions. The hirer will have to dial local call for the public. He was allowed to collect not more than 0.50 paise per call (at the relevant time, the call charge per unit was only 0.50 paise). Out of 0.50 paise realised by him, he should pay to the Department 0.30 paise per call as per the meter reading. In conformity with this revised policy, revised agreement form was prescribed as per Notification No. 31-11/76-PHB, dated 30-4-1977. Clause 10 of that agreement provided that the

person, who runs public call office, should pay to Government call charges as per the number of calls metered at the local call rate (0.30 paise at present) or as amended from time to time. That agreement went on to state that that public call office will have S.T.D. facilities and trunk call facilities barred.

7. Policy regarding the opening of public telephones was further liberalised by Notification No. 31-5/84-PHB, dated 16-6-1984. According to the liberalised policy, public telephones were to be established at places where Department found inability to provide telephones. Physically handicapped persons and other categories of person are allowed to open new public telephones. When the local call charges were changed from 0.50 paise to Re., 1/-, revised tariff of attended time public telephone was revised as per Notification No. 6-5/87-PHB, dated 10-3-1988. As per that notification, persons, who had local public telephones, were to deposit 0.60 paise per call to the Department and 0.40 paise per call to be retained by the attendant in respect of public telephones having local call facility only. In the case of private attended S.T.D. public telephones, having local call plus S.T.D. or S.T.D. alone, 0.80 paise per unit call metered was to be paid to the Department and 0.20 paise to be retained by the attendant. The above commission; which was allowed to telephone operator, was found to be on the high side. So, as per Notification No. 6-5/87-PHB, dated 1-9-1989, a slab system was introduced. For the first 10,000 calls in a month, commission payable was 0.20 paise per unit call, for the calls between 10,000 and 15,000, commission was 0.10 paise per unit call and for the calls beyond 15,000 in a month, commission was 0.05 paise. In order to have a uniform rate of commission, Government of India, as per Notification No. 6-1/90-PHB, dated 2-5-1991, franchisees/ hirers were allowed to get 0.20. paise per unit call up to 10,000 calls in a month and 0.20 paise per unit call-thereafter. That rate came into force with effect from 1-6-1991. Eversince 1-6-1991, commission payable to the operators of public telephones having S.T.D. facility, is 0.20 paise per unit call up to 10,000 calls in a month and 0.10 paise per unit call thereafter. While so, the tariff, i.e., call charge payable by subscriber per unit call, was enhanced from Re. 1/- to Rs. 1.25. Petitioners want 20% of the tariff rate per unit call as their commission.

8. Petitioner's main argument is that as per Notification No. 31-10/88-PHB, dated 6-7-1988, out of Re. 1/- realised from the subscriber, 0.50 paise is to be paid to the Department and 0.20 paise is to be appropriated by them, which according to them, would amount to fixing a percentage of the share due to the Department and the operator, 80% to the Department and 20% to the operator. In that view, they want to get 20% of the call charges realised from the customer to be given to them as commission.

9. Clause 2(vi) of the notification on which reliance was placed by petitioners is in the following terms:

"In case of STD pay-phones, Which will permit local, national and International Subscriber Dialing facilities, 80 paise per unit call will be payable to the

Department of Telecommunication/ Mahanagar Telephones Nigam Limited and 20 paise per unit will be retained by the operating agency."

Sub-Clause (vii) further provided :

"In case of pay-phones installed for purely local facility the operating agency will be entitled to charge Re. 1 per local call from the public; it will pay 60 paise per call unit to the Department of Telecom and retain the balance of 40 paise per unit....."

Pursuant to that notification, an agreement was to be executed by the operator called as licensee in the manner indicated in annexure to that notification. Clause 6 of that agreement states:

"The licensee will be permitted to charge Re. 1/- per unit from the public for the calls made from the pay-phone. The licensee will pay to the Department @ 80 paise per meter-ed call unit in case for STD pay-phone and @ 60 paise per metered call unit for local call pay-phone (on the basis of calls recorded in the exchange). The licensee can retain 20 paise and 40 paise for each metered call unit respectively."

Thus, it is beyond any doubt that operating agency was permitted to charge Re. 1/- per unit call from the public and he should deposit 0.80 paise to the Department and 0.20 paise to be retained by him in the case of S.T.D. pay-phones and 0.60 paise to the Department and 0.40 paise to him in the case of pay-phones installed purely for local calls. This commission was fixed as per the tariff fixed by the Central Government for metered call unit. Tariff so fixed by the Central Government is payable by the customer, who avails of the telephone facility. Commission of 20 paise and 40 paise were fixed at a time when the call tariff was Re. 1/-. Licensees were directed to collect from the callers the prescribed charges at the rate prescribed by the Central Government, from time to time. This is clear from the form of the agreement, which is annexed to the notification mentioned earlier. Clause 12 of that agreement, inter alia, provided that the licensee shall-collect from the callers the prescribed charges for the calls at the rates prescribed from time to time by the Government.

9-A. Now, the short question that arises for consideration is whether the commission fixed by the agreement referred to earlier is 0.20 paise or whether it is 20% of the call charges. Commission so fixed right from 1977 (vide Notification No. 31-11/76-PHB, dated 30-4-1977) remains unchanged. So, the argument advanced by counsel representing the petitioners that the commission due to the public telephone operators has been reduced to their detriment and limited to 0.20 paise, is devoid of any factual basis and has only to be rejected. I do so.

10. One another contention raised by telephone operators is that there was no slab fixed for the commission depending on the number of unit calls. Fixation of slab and reducing their commission from 0.20 paise to 0.10 paise per call about

10,000 calls a month, is arbitrary and not supported by any statutory provisions. In this view, it is argued that the authorities are not entitled to reduce their commission in relation to call units above 10,000.

11. Slab system in quantifying commission due to the public telephone operators/ franchisees was introduced as per Notification No. 6-5/87-PHB, dated 1-9-1989. That notification stated :

"It has been pointed out that the amount of commission payable to hirers of STD public telephones becomes rather too large with the present rate of commission prescribed. The matter has, therefore, been considered and it has been decided that the commission payable to the hirers of public telephones which provide STD call facilities or STD plus local call facilities will be revised as under -

(1) For the first 10,000 calls in a month ... 20 paise/unit call (2) For calls between 10,000 and 15,000 ... 10 paise/unit call (3) For calls beyond 15,000 in a month ... 5 paise/unitcall"

The above rate was subsequently modified by notification dated 2-5-1991. It was so done on the basis of the several representations received by the Ministry of Communications, Department of Telecommunications, New Delhi. After a proper consideration of the entire facts and circumstances of the case, Government of India decided to pay a uniform rate of commission to the franchisees and refixed the commission at 0.20 paise per unit call up to 10,000 calls in a month and 0.10 paise per unit call thereafter. This rate came into existence from 1-6-1991. In some of these cases, the correctness of the increase in the tariff from Re. 1/- to Rs. 1.25 has been questioned as having been done by the Central Government without jurisdiction. This contention, I am afraid, cannot be countenanced in view of the Constitution Bench decision of the Supreme Court in *Section S. Narayan Iyer Vs. The Union of India (UOI) and Another*, . Three principles relied on by their Lordships for rejecting the said attack as not maintainable, are (1) when any subscriber to a telephone enters into a contract with the State, the subscriber has the option to enter into a contract or not. If he does so, he has to pay the rates which are charged by the State for installation. A subscriber cannot say that the rates are not fair. No one is compelling one to subscribe, (2) Telephone Tariff is subordinate legislation and a legislative process. Under the Indian Telegraph Act, Section 7 empowers the Central Government to make rules inter alia for rates. These rules are laid before each House of Parliament. The rules take effect when they are passed by the Parliament, (3) the question of rates is first gone into by the Tariff Enquiry Committee. The Committee is headed by non-officials. The tariff rates are placed before the House in the shape of Budget proposals. The Parliament goes into all the Budget proposals. The rates are sanctioned by the Parliament. The rates, therefore, become a legislative policy as well as a legislative process. For the above reasons, fixation of tariff for call unit cannot be an aspect to be gone into by this Court in exercise of the power under Article 226 of the Constitution.

12. Commission payable to franchisees or telephone booth operators was fixed right from 1977, at the rate of 0.20 paise per unit call. That rate has not been varied till date. Variation that has been effected is only in respect of calls beyond 10,000 in a month. If [the unit calls happen to be above 15,000 in a month, then in respect of calls above 10,000, commission is reduced to 0.10 paise per call. This decision was taken by the Central Government taking into consideration the quantum of commission derived by the telephone operators. Government considered the entire aspect of the matter and decided to reduce it to 0.10 paise per unit call above 10,000 calls in a month. That decision is a policy decision, which cannot be subject to judicial review in exercise of the powers under Article 226 of the Constitution.

13. As noted earlier, the Central Government have the right to vary the rates, charges and fees payable by the subscribers. So also by notification make rules for the conduct of telegraph, established, maintained or worked by persons licenced under the Act. Supreme Court in *Section Narayan v. Union of India*, in very clear terms, held that Courts have no jurisdiction under Article 226 of the Constitution-to go into reasonableness of telephone tariff rates, for those rates are decided as policy matter in fiscal planning. Central Government delegated their authority in many matters to telegraph authority. The Central Government and the delegated authority as per notifications fixed the tariff rates and the commission payable to franchisees of public call offices. Procuring; highest income for the State while giving equal opportunity to all public telephone operators is undoubtedly in public interest. The amount so collected goes to the public fund. All public telephone operators are treated alike in the matter of commissions payable to them. When the unit calls from their public telephones exceed 10,000 per month, the commission is reduced to 0.10 paise per unit call. This reduction is also in public interest, since the amount so reduced goes to the public fund. This reduction takes, place only after assuring the franchisee a, monthly income of Rs. 2,000/-. Only when the income exceeds Rs. 2,000/- the rate of commission is reduced to 0.10 paise per unit call. The slab system thus introduced is not to be interfered with by this Court in exercise of the powers under Article 226 of the Constitution.

14. Rights of the petitioners in these cases are only as licensees under the licence granted by the Department. That licence does not give them any vested right to claim any percentage of commission on the basis of call charges. Nor are they entitled to question the slab system of commission fixed by the Government.

15. In view of what has been stated above. I do not find any ground to interfere with the action taken by the respondents. Original Petitions fail. They are accordingly dismissed. No costs.