(2003) 06 KL CK 0080

In the High Court Of Kerala

Case No : O.P. No''s. 15016, 15198 of 2003 and Contempt Case (c) No. 520/03

Stephen George, M.L.A. APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 23-06-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1
Constitution of India, 1950 — Article 14, 19, 21, 226, 32
Telecom Regulatory Authority of India Act, 1997 — Section 11, 11(2), 14, 18, 3
Telegraph Act, 1885 — Section 4, 5, 6

Citation : (2003) 06 KL CK 0080

Hon'ble Judges : Jawahar Lal Gupta, C.J;A.K. Basheer, J

Bench : Division Bench

Advocate : K. Ramakumar and T. Rampraсad Unni, in O.P. 15016/03 and T.M. Mohamed Youseff and Molly Jacob, in O.P. No. 15198/03, for the Appellant; P.S. Sreedharan Pillai, S.C.G.S.C., for the Respondent

Final Decision : Dismissed

Judgement

Jawahar Lal Gupta, C.J.—Does the impugned revision of tariff, which fixes the pulse rate at sixty seconds for a call from landline phone to a mobile phone, violate Articles 14 and 19 of the Constitution? And (ii) Is the revision calculated to help the private providers of service and thus, mala fide? These are the basic issues that arise in the two writ petitions. The Petitioners in these two cases are Members of the Kerala Legislative Assembly. They question the validity of the notifications issued by the Telecom Regulatory Authority of India and the Bharat Sanchar Nigam Limited. The counsel have referred to the averments in O.P. No. 15016 of 2003. These may be briefly noticed.

2. The Petitioners allege that the Bharat Sanchar Nigam Limited thereinafter referred to as the Nigam) has the monopoly in providing telephone services in the country. Initially, the service was being provided by the Central Government through the Department of Telecommunications. In pursuance to the policy of liberalization, the Government "surrendered even the basic service industries to

the private sector". The Nigam was formed as a Corporation. It continues to be under the control of the Central Government. The telephones are installed under the provisions of the Indian Telegraph Act, 1885. u/s 6(a), the power to fix the rates was vested in the Central Government.

3. In the year 1997, the Telephone Regulatory Authority of India Act, 1997, was promulgated. u/s 3 of the Act, a provision for the establishment and incorporation of the ''Authority'' has been made. Section 11 provides for the functions of the Authority.

4. The 1997 Act does not repeal the 1885 Act or the Rules framed thereunder. The Central Government or the Nigam are not bound to accept the recommendations of the Regulatory Authority.

5. The Nigam had announced rates vide its circular dated 13th April 1999. These were fixed under the new Telecom Policy of 1999. This policy introduced a distinction between the rural and the urban subscribers. The rates as fixed under this Policy remained applicable till 30th April 2003. With effect from 1st May 2003, the new rates were introduced.

6. After the year 1999, a number of changes were made. One of these was the decision to grant permission to the private sector to enter the field of telecommunication. Thus, Air Tel, BPL, Escotel and Reliance etc. were given the right to provide mobile telephone services. Though belatedly, the Nigam also entered the field of mobile telephone service. Nevertheless, "the rendering of service remained through the network of the BSNL as the privates mobile operators did not have their own facility to offer to the caller". They depended on the infrastructure provided by the Nigam itself. Crores of rupees are due to the Nigam from the private operators.

7. The mobile phones have become popular. However, "for the common people of India who cannot afford a mobile phone, the landphone remains the only means of communication". For this facility, the Nigam has the monopoly. A large number of landphones have been installed in the State of Kerala. Today, "even commoners have started using mobile phones". Resultantly, there has been a spurt in the business of selling mobile phones, particularly by the private companies. These companies "have tremendous influence over the Government and in particular, the Honourable Minister in charge of Telecommunication Department. The influence commanded by the Reliance Group of Industries on the present Central Government is no longer a secret."

8. On January 24, 2003 the Telecom Regulatory Authority of India issued two notifications Nos. 306-2/2003/Econ. and 311-1/2003/Econ. By these notifications new tariff along with alternative packages were introduced. In pursuance to these notifications, the Nigam issued an order dated 11th April 2003. With this circular a tariff card was enclosed. The new tariff rates were notified. These were to be implemented with effect from 1st May 2003. A copy of the circular has been produced as Ext.P-1. The tariff card effective from 1st May 2003 is at

Ext.P-2. Thus, a new tariff had come into force "increasing the charges per pulse geometrically and reducing the number of free calls from landphones". By this, the pulse rate was reduced from 3 minutes to 30 seconds. As a result, the "caller will have to pay six times the previous rate" for a call to a mobile telephone. Along with this, the free calls were reduced to 50 per month in rural areas and 30 in urban areas. This will necessarily "lead to less use of the landphones and more use of mobile phones".

9. The action of the Nigam was criticized by the public as a part of an attempt to help the "influential mobile telephone manufacturers". Even the ruling party members had raised objections. The people of Kerala will be adversely affected by the increase in the rates.

10. As an elected Member of the Kerala Legislative Assembly, the Petitioner raised the issue and called upon the Nigam to reduce the increased rate. It is alleged that the revision in rate is "patently violative of the fundamental rights enjoyed by the Petitioner and other citizens which guaranteed rights to communicate, right to information, right to receive the same and the fundamental right to freedom of expression". The revised rates are "exorbitant and disproportionate with the existing rates". It has adversely affected the Petitioner. It is bound to affect "the budget of numerous families of Keralites ... and completely upset the monthly expenditure pattern". It is violative of Articles 14, 19 and 21". On these premises, the Petitioner had initially made a prayer that the notification No; 306-2/2003/Econ. dated 24th January 2003 as well as the circular at Ext.P-1 and tariff card at Ext.P-2 be quashed.

11. A counter-affidavit was filed on behalf of Respondents 3 and 4 viz., the Nigam and its Principal General Manager at Thiruvananthapuram. It was inter alia averred that "the economic policy of the State/matters of price fixation etc. are not normally subject to judicial review under Article 32/226 of the Constitution of India". A public interest litigation could not be initiated to challenge the economic decisions unless there was violation of Article 21 and the persons who were adversely affected were unable to approach the court. Still further, the principles governing Order XXXIX, Rule 1 CPC were involved. It was pleaded that an interim relief should not be granted. On merits, it was submitted that u/s 11 of the 1997 Act, the Regulatory Authority can notify the rates. In exercise of the statutory power, the Authority had issued the notification. On the basis of the notification, the Nigam had prescribed tariff vide circular dated 11th April 2003. u/s 14 of the Act, an appellate tribunal had been established to "adjudicate disputes". The provision provided an effective alternative remedy to the aggrieved person. Still further, appeal could be filed u/s 18 against the order of the appellate tribunal to Hon''ble the Supreme Court. It was also pointed out that the notification at Ext. P-2 had been reconsidered. A modified order had been issued "reducing the rates substantially in all the services". A copy of the notification was produced as Ext. R-3(a).

12. During the pendency of the case, C.M.P. No. 25582 of 2003 was filed to place

on record the revised tariff order issued by the Nigam on 13th May 2003. By this the pulse rate in the rate of basic to cell was changed from 30 seconds to 60 seconds. A copy was produced as Ext.P-3. An additional prayer for quashing this rate was also made.

13. On 26th May 2003 an additional counter-affidavit was filed on behalf of the Respondents by the General Manager, Thiruvananthapuram. In view of the fact that a more detailed counter-affidavit was filed on behalf of Respondent Nos. 3 and 4 on 2nd June 2003, it is not necessary to notice the averments in this affidavit in detail.

14. In the counter-affidavit, the Respondents have averred that the Nigam is a private limited company owned by the Central Government. It is one of the premier agencies providing various facilities. Besides the Nigam, the Mahanagar Telecom Nigam Ltd., Bharathi Tele Net, HFCL Infotel, Tata Tele Service, Maharashtra, Reliance Infocom Ltd., and Shyam Tele Link are also providing landlines in various parts of the country. According to the statistics published in the Tele Net Magazine in the issue dated 1st March 2003, the total number of landlines provided by the private operators is 683,955. Thus the suggestion that the Nigam has a monopoly has been controverted.

15. It is not disputed that prior to the promulgation of the 1997 Act, the rates for telephone services were being fixed by the Central Government under the 1885 Act. However, in view of the growth in the telecommunication sector as well as the advances in technology and the entry of private operators, it was considered essential to constitute a statutory body for regulating the services. With this object in view, the 1997 Act was promulgated. It is a special law. The Act governs all matters covered by its provisions. It is not contrary to the 1885 Act or the Rules framed thereunder. Section 11 begins with a non obstante clause. Still further, relying upon the decision of Their Lordships of the Supreme Court in S. Narayan Iyer Vs. The Union of India (UOI) and Another, , it is contended that "the courts have no jurisdiction under Article 226 to go into the reasonableness of telephone tariff rates". So far as the present case is concerned, it has been pointed out that the Regulatory Authority had initially issued "the Telecommunication Tariff Order, 1999". On 24th January 2003, the 24th amendment to the Tariff Order, 1999 was issued. A copy has been produced as Ext.R-3(a).

16. Section 36 empowers the Authority to make regulations "to carry out the purposes of the Act". In exercise of this power, the Authority had issued "the Telecommunication Inter Connection Usage Charges (IUC) Regulations, 2003" on 24th January 2003. A copy of the regulations, has been produced as Ext.R-3(b). Under these regulations it has been inter alia provided that "when a call is made from the land line to a mobile, the land line operator will collect charges and will reimburse both the transit call carrying operator as well as the terminating call operator". The manner and method has also been provided for. It has been pointed out that a call of 180 seconds from a BSNL landphone to a mobile phone

will now cost Rs. 3.60. Out of this, an amount of 60 paise per minute has to be reimbursed "to the transit call operators and the terminating call operators for use of their network". Prior to 1st May 2003 "instead of originating call operator collecting the charges for usage of a network as indicated above, the mobile operator was collecting charges for incoming calls from his own customer". It was on consideration of the entire issue that the Authority "which is comprised of experts in the field of Telecommunications took considered decision afterconsultation with all interested including representatives of the users ... that no charge is to be levied by the mobile operators for incoming calls". On this basis, it is maintained that the charges levied by the Nigam are not exorbitant and that there is no violation of Article 14.

17. The allegation that the private operators have got tremendous influence over the Government "is absolutely incorrect and made without any basis". The averments are "vague and uncertain". No specific material has been placed on record to substantiate the suggestion. The person against whom mala fide is alleged has not even been made a party in the petition. The grounds as raised in the petition have been controverted. It also has been asserted that the rates as revised by the Nigam had been approved by the Authority vide its letter dated 13th May 2003.

18. The Petitioner has filed affidavits in reply to the counter-affidavits. In the affidavit dated 16th May 2003, it was inter alia alleged that the Respondents were acting in violation of the interim order passed by the Vacation Bench. In the subsequent affidavit dated 27th May 2003 the Petitioner had reiterated his earlier averments. Still further, an additional affidavit was filed on 30th May 2003 by the Petitioner. It was alleged that despite the interim order the Nigam was charging at the revised rate. A large number of people were surrendering their landphones, as the rate for making calls was exorbitant. Newspaper reports had been published in, various local papers. The intention of the Nigam "is to subvert their own phones and subserve the interests of the mobile operators like Reliance, Escotel, BPL and Air Tel etc. etc." The Nigam should not be permitted to lay down a steep rise and fix exorbitant rates of tariff. A copy of the advertisement issued by Escotel was produced to show that the subscribers were surrendering their landphones.

19. These are the pleadings of the parties.

20. The arguments in these cases were heard on June 10, 2003. The order was reserved. However, during the course of arguments, learned Counsel for the Respondents had contended that the Petitioner had not challenged the notification No. 311-1/2003/Econ. dated 24th January 2003. Thereupon, I.A. No. 3985 of 2003 was filed for amendment of the prayer in the petition. Notice of this application was given. The Counsel for the parties were heard on June 16, 2003. The applications for amendment of the petition were allowed. However, the Counsel did not raise any additional argument.

21. On behalf of the Petitioners, the case was primarily argued by Mr. Ram Kumar. It was contended that the rates as fixed by the Nigam were arbitrary and exorbitant. The differential in tariff was based on the use of an instrument. The rates placed an unreasonable restriction on the freedom of communication and information. The Regulatory Authority had not followed the prescribed procedure. Thus, the impugned orders deserve to be annulled.

22. On the other band, Mr. Sreedharan Pillai, learned Counsel for the Respondents submitted that the revision of rates was not arbitrary or unfair. The reasons have been duly disclosed. The fixation of rates was primarily a question of policy. There was no violation of law. The rates have been fixed in accordance with the directions of the Regulatory Authority. Thus, the petitions are not maintainable. In any case, even on merits the Petitioners have no cause to complain. It was also submitted that an aggrieved patty has an effective remedy under the Act. Thus, the counsel contended that the petitions deserve to be dismissed.

23. After hearing learned Counsel for the parties, We find that the following questions arise for consideration:

1. Is the impugned action arbitrary and violative of Article 14 of the Constitution?

2. Is the impugned action violative of Article 19 of the Constitution?

3. Does the impugned action suffer from the vice of mala fides?

Regarding (1):

24. Mr. Ram Kumar contended that the rates arc exorbitant. The differential in rates is based on the kind of instrument used by the subscriber. Thus, the action suffers from the vice of discrimination. The counsel also submitted that the tariff is arbitrary. Thus, it violates Article 14. Consequently, it deserves to be annulled. Is it so?

25. First a peep into the legislative events. The Indian Telegraph Act of 1885 is the legacy of the English era. Under this Act, the Central Government had the "exclusive privilege of establishing, maintaining and working any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire visual or other electro-magnetic emissions...". u/s 5 the Government was even competent to "take possession of licensed telegraphs and to order interception of messages" on the occurrence of any public emergency or in the interest of public safety. In the very nature of things the Government which was providing the facilities was also entitled to fix the rates. It was in the year 1971 that Clause 6(A) was inserted to empower the Central Government to notify the rates and conditions at which messages shall be transmitted to any country outside India. The Central Government had the power to frame rules etc.

26. With the passage of time the 1885 Act had virtually become archaic and

obsolete. It was not designed to meet the advances in technology. The changing scenario necessitated the promulgation of a new law. Thus. the Parliament enacted the Telecom Regulatory Authority of India Act 1997. The basic object of the Act is "to provide for the establishment of the Telecom Regulatory Authority and Telecom Disputes Settlement and Appellate Tribunal to regulate the telecommunication services, adjudicate disputes or appeals and to protect the interests of service providers and consumers of the telecom sector, to promote and ensure orderly growth of telecom sector and for matters connected therewith or incidental thereto."

27. Section 3 of the Act deals with the establishment and incorporation of the Authority. It is a body corporate having perpetual succession. u/s 4, the Chairperson and the members have to be appointed by the Central Government "from amongst persons who have special knowledge of and professional experience in telecommunication, industry, finance, accountancy, law, management or consumer affairs". A person who is or has been in the service of the Government cannot be appointed as a member unless he has held a post of Secretary or Additional Secretary or any equivalent post in the Central or State Governments for a period of not less than three years.

28. Section 11 delineates the functions of the Authority. The provision entitles the Authority to make recommendations in respect of various matters including measures for the development of communication technology and efficient management of available spectrum. u/s 11(b)(iv) it is required to "regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services". Under Clause (c) it is competent to "levy fees and other charges on such rates and in respect of such services as may be determined by regulations". The Authority has power to call for information and issue directions. In Chapter V, provisions were also made for grants by the Central Government the creation of a fund, the maintenance and audit of accounts and furnishing of returns etc to the Central Government. Still further various other miscellaneous provisions necessary for the achievement of the object including the power to make rules and regulations were also made.

29. On January 24, 2003 a notification was issued. By this notification the Telecommunication Tariff (24th Amendment) Order 2003 was issued. A copy has been produced as Ext. R(a). This notification was issued in exercise of the powers u/s 11(2) of the Act. In this order, it was inter alia provided that the "tariffs as contained in Schedules I and II u/s 3 of the Telecommunication Tariff Order, 1999 shall stand deleted and submitted as specified in the schedule I and II hereto". An explanatory memorandum was attached to the order. It was inter alia mentioned that the Tariff Order "is an outcome of the deliberations carried out by the Authority through its consultation Papers and its Open house Discussion on Tariffs for basic services, tariff for Cellular Mobile services, Issues Relating to Inter-communication between access providers and National long Distance Operators and the Reference Inter-connect Offer (RIO). It also

synthesizes the various responses and inputs received through the Consultation Papers and suggestions from various quarters". It was noticed that "the competition in the market with the entry of additional service providers in both the national long distance and the international long distance segments, has led to a further, large decrease in the prices for these services While this has led to a drop in the above cost tariffs, the below cost or near cost tariffs could not increase because they were specified at particular levels to take account of the social objectives". In paragraph 3, it was pointed out that "the drastic reduction in long distance call charges implies that the source of cross-subsidy that was earlier available to cover the below cost tariffs, has been reduced to a major extent. This implies a need for two types of policy changes. One, to increase the below cost prices so that these cover at least some part of the uncovered costs, and the second that to the extent that costs of access are not covered by the tariffs, an Access Deficit Charge (ADC) should be given to the access provider who incurs access deficit". It was further stated that the Authority had taken into account all these factors and determined an Inter-connection Usage Charge (IUC) regime for basic and cellular mobile services'' service, which is given in a regulation notified separately. The note is self-explanatory.

30. Section 35 of the Act empowers the Central Government to make rules for carrying out the purposes of the Act. u/s 36 the Authority can by notification, made regulations consistent with the Act and Rules made there under to carry out the purposes of the Act. Such rules can provide for levy of fees and other charges also. Another fact which deserves mention is that in exercise of the powers u/s 11 of the Act, the Authority is made ''The Telecommunication Inter-connection Usage Charges Regulations (IUC), 2003''. These were published vide Notification dated 2003. The purpose was "to fix the terms and conditions of inter-connectivity between service providers to ensure effective inter-connection between different service providers and to regulate arrangements amongst service providers of sharing their revenue derived from providing telecommunication services Inter-connection usage charges have been specified in the separate schedules A copy has been produced as Ext. R-3(b) with the counter-affidavit dated June 2, 2003.

31. A perusal of the above shows that the Authority consists of experts in different fields like Accounts, Finance, Industry, Law and Telecommunication. It had got Consultation Papers. Even open House Discussions were held. It had considered suggestions from various quarters. Thereafter the Tariff Order of 2003 was issued. It is, thus, clear that the matter had been thoroughly considered before the Authority issued the impugned notification

32. At one stage, it was faintly contended by the counsel for the Petitioner that the Authority had not acted in a transparent manner The consumers'' interests were not taken into account. The view point of the consumer was never considered. The contention is totally belied by the explanatory note attached to the Tariff Order of 2003. Still further in the counter-affidavit, it has been

specifically stated that the decision was taken after "consultation with all interested including representatives of the users...." Thus, the contention cannot be substained.

33. Mr. Ram Kumar also referred to the decisions reported in Premier Automobiles Ltd. and Others Vs. Union of India (UOI), The Panipat Co-operative Sugar Mills Vs. The Union of India (UOI), , Express Newspapers Pvt. Ltd. and Others Vs. Union of India (UOI) and Others, , Union of India (UOI) and Another Vs. Cynamide India Ltd. and Another etc., , Delhi Science Forum and others Vs. Union of India and another, , Bihar State Electricity Board and another Vs. M/s. Usha Martin Industries and another, , BALCO Employees Union (Regd.) Vs. Union of India and Others, , West Bengal Electricity Regulatory Commission Vs. C.E.S.C. Ltd. etc. etc., , and Cellular Operators Association of India v. Union of India AIR 2003 S.C. 899. The contention was that this Court can in a suitable case intervene even on the issue of tariff for telephones.

34. There is no quarrel with the proposition. But the above decisions do not lay down that the High Court can interfere in matters of policy decisions taken by the appropriate authority. Equally, it has also not been held that the orders of expert bodies taken after due consideration of the relevant facts regarding telephone or other tariffs can be judicially reviewed by courts. Therefore, a detailed examination of all the decisions is not necessary. However, the only issue is as to whether or not the action is arbitrary.

35. A fact, which deserves mention is that in paragraph 6 of the counter-affidavit the basis for the tariff has been categorically and clearly pointed out. It has been specifically averred that when a call is made from a landline to a mobile phone, the net works involved would be-(i) the net work of the provider of the land phone, (ii) the net work of the transit call-carrying operator, and (iii) the net work of the terminating call operator. The transit call-carrying operator would have facility for transit call-carrying and may be BSNL itself or any other operator having such facility. Under the regulation notified on January 24, 2003, when a call is made from a landline to a mobile line, the landline operator is entitled to collect charges and then reimburse to the transit call-carrying operator as well as the terminating call operator. The method for this has been laid down in the regulation. By the impugned notification, while prescribing the tariff the pulse rate has been fixed at 60 seconds. As a result, when a three-minute call is made from a BSNL land phone to a mobile, the cost is Rs. 3.60. Out of this, 60 paise per minute has to be reimbursed to the transit call operator and the terminating call operator for the use of their net works. Prior to May 1, 2003, the mobile operator was collecting charges for the incoming calls from his subscriber. By the new order, the charges for incoming calls which were collected by the mobile operator have been abolished. Resultantly, it cannot be said that under the new tariff, the total cost of a call has been really raised or that it is arbitrary. Similarly, it was also submitted that the number of free calls has been reduced. It is indeed so. However, there is no rule, which may confer any right on a

subscriber to claim free calls. It is a matter, which has to be considered and decided by the competent authority. The Respondents have taken a view in the matter. There is nothing wrong or unfair about it.

36. In fact, it is clear that the experts in the field have fixed the tariffs. The needful has been done after consultation, discussion and examination of the matter. The resultant effect is that initially the cost was being met by the person who made the call as well as the one who received it. Now the person who receives the call on a mobile phone does not have to pay. Since the experts have taken a policy decision after proper consideration of the matter, it cannot be said that they had acted arbitrarily or unfairly. There is a rationale for the tariffs fixed by the Authority. The person who makes a call from the landline is now in a position to have an easy access to anyone with whom he wants to communicate. He can talk to the person wherever he may be at any time. The easy access is an additional benefit. It is one of the benefits which the subscriber of a landline gets. The increase in his cost is amply justified by the extra facility that the telephone subscriber gets.

37. The common experience today is that many people have the landline phones as well as the mobile facility. If a person is at home, he can be contacted on the landline. However, if he is not at home, and yet one wants to speak to him, the person can make use of the available facility of making a call to the mobile phone. The subscriber has a choice. He may opt not to avail of it. The extra money, if any, is paid only when the additional facility is used. There is a clear rationale for the increase in tariff. Still further, it is the admitted position that according to the old tariff order, the person who received the call had to pay in addition to the money paid by the calling party. The Authority has taken the view that the burden should fall on the person who makes the call and not on the one who receives it. This is a pure question of policy. However, the decision cannot be said to be arbitrary or unfair. Still further, in view of the fact that the additional charges have to be paid to the providers of transit and terminating facilities, the increase was inevitable.

38. Taking the totality of the circumstances and the material placed on record, into consideration, it cannot be said that the rates are arbitrary, exorbitant or unfair.

39. Mr. Ram Kumar contended that the tariff is violative of Article 14 inasmuch as the difference in rate is based only on the nature of the instrument. While a call from a landline to a landline costs less, it becomes expensive when the call is made from a landline to a mobile phone. According to the learned Counsel, the nature of the instrument cannot form a rational basis for any differential in the rate.

40. The contention cannot be accepted. As noticed above, the mobile phone provides an additional facility. One is able to contact a person even when he is not at his house or office. He can be contacted anywhere. One can reach a man

in a bus, car or train. The mobile phone provides easy access even at a distant place. In view of this factual position, the tariff order and the regulation provide for an additional charge. The differential in rate is not based on the nature of the instrument but the facility. Nothing has been pointed out from the record to show that the rate is related to the instrument The Respondents are not charging a higher rate on the basis of the use of the gadget but solely for the additional facility. It has a rationale. It cannot be said to be discriminatory or violative of Article 14. Resultantly, the contention that the action suffers from the vice of discrimination cannot be sustained.

41. Mr. Ram Kumar referred to the decision in Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others, . In this case, Their Lordships had laid down the principles to be borne in mind by courts in testing the validity of a provision on the touchstone of Article 14. It was inter alia held that Article 14 does not forbid reasonable classification. To pass the test of permissible classification two conditions must be fulfilled. Firstly, the classification must be founded on an intelligible differentia. Secondly, the differentia must have a rational relation to the object sought to be achieved.

42. On a consideration of the matter, we find that in the present case, both the tests are satisfied. There is a clear and intelligible distinction between the facilities of a telephone call from a landline to a landline and from a landline to a mobile phone. The differentia in rate has a nexus to the cost incurred by the provider of the service. Still further, even the test which has been subsequently laid down in the later decisions, viz., no action should be arbitrary or unfair, is also satisfied in the present case. Thus, we find that the action of the Respondents is not contrary to the rule enunciated by Their Lordships in Ram Krishna Dalmia''s case (supra). In fact, it deserves mention that in this case it was categorically held by Their Lordships that "there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles". We find that the Petitioner has not placed any material on record to rebut the initial presumption of constitutionality.

43. Mr. Ram Kumar then referred to the decision in Sansar Chand Atri Vs. State of Punjab and Another, to contend that the creation of a class within a class cannot be sustained.

44. In Atri''s case, the Court was considering the validity of a rule, which denied the benefit of reservation for ex-servicemen to a person who was released from the Army at his own request. It was held that a person who had rendered the requisite period of service and earned pension should be treated as a retired ex-serviceman. In this context, it was inter alia observed that the creation of "a class within a class without rational basis becomes arbitrary and discriminatory". The ratio of this case is not at all attracted to the facts of the present case. It cannot be said that the classification of telephones based on the additional facility does not form a valid basis for classification.

45. There is another aspect of the matter. Even though we have examined the contentions of the learned Counsel with regard to the validity of the Tariff Order as also the consequential revision of rates as notified by the BSNL, yet the fact remains that the matter lies exclusively within the jurisdiction of the competent authority. The courts are really not equipped to examine matters involving technology, the costs thereon and the rates. Thus, it is best to leave these matters to the Judgment of the Statutory Authority constituted under an Act of the Parliament. The rule in this behalf was clearly laid down by a Constitution Bench of the Supreme Court in S. Narayan Iyer Vs. The Union of India (UOI) and Another, .

46. It is true that since the decision in Iyer''s case, the factual position has changed. The tariff is not a part of the budgetary proposals. It is not debated in Parliament. A Statutory Authority, which consists of experts, considers the matter. It is not being examined in the Finance Ministry. But the change in the forum is of no real consequence. The rate still remains a question of policy. This court cannot really examine the questions of policy as involved in the fixation of rates.

47. In view of the above, it is held that the tariff is not arbitrary, excessive or exorbitant. It does not suffer from the vice of discrimination based on the nature of the phone. Thus, it does not violate Article 14 of the Constitution. Thus, the first question is answered against the Petitioners. Regarding (2): Is the impugned action violative of Article 19 of the Constitution?

48. Mr. Ram Kumar contended that the right to freedom of expression and information is guaranteed under Article 19 of the Constitution. Fixation of arbitrary rates places an unreasonable restriction on the freedom of communication and information. Reference was made to the decisions in Bennett Coleman and Co. and Others Vs. Union of India (UOI) and Others, , Secretary, Ministry of Information and Broadcasting, Govt. of India and others Vs. Cricket Association of Bengal and others, and People''s Union of Civil Liberties (PUCL) Vs. Union of India (UOI) and Another, .

49. It is undoubtedly correct that the right to communication is a part of the freedoms under Article 19. Imposition of restrictions on the number of pages or levy of excessive customs duty has been frowned upon by Their Lordships of the Supreme Court. Yet, the decisions cannot be read to mean that whenever the Authority revises the rates there is an invasion of the rights under Article 19. Equally, an upward revision of rate cannot always lead to an inference of unreasonable restriction on the freedom. It is only when the increase is apparently arbitrary that the Courts can intervene. Today, the rise in costs is a known fact. Under the pressure of the Associations and Unions of Employees, the Government has to periodically revise the rates of pay. There is often a substantial increase in salaries etc. It results in an additional burden. Resultantly, the costs go up. To meet the rising cost, the tariffs have to be revised. These costs have to be met by the subscribers. The State cannot be forced to subsidize

everything. The user of facility has to pay for what he needs and uses. He cannot complain that the increase restricts his freedom and it should, thus, be annulled.

50. Even otherwise, we have found that the increase in the rate is not arbitrary. The Petitioners have not been able to show that in view of the impugned action, the number of calls has gone down. No evidence has been referred to, which may suggest that the Petitioners'' freedom of communication has been adversely affected. Resultantly, the ground based on Article 19 cannot be sustained.

Regarding (3): Is the action mala fide?

51 Mr Ram Kumar contended that the action suffers from the vice of mala fides The Respondents had enhanced the rates with the oblique objective of helping the private operators. According to the counsel, if the calls made from an landline are expensive, the people shall be forced to use mobile phones Thus, the action of the Respondents in fixing the impugned tariff is really calculated to help the mobile operators Since the impugned action is based on extraneous considerations it is vitiated by mala fides.

52 It is undoubtedly true that mala fides would vitiate an order. Whenever an authority passes an order with an oblique objective or on account towards an oblique objective. Only then the charge can be sustained.

53. What is the position in the present case?

54. The Petitioner has alleged that the members of the ruling party "in Parliament have raised objections that the attempt of the Government is to help the mobile telephone manufacturers." The counsel had also referred to ground (C) in the petition. Therein it has been alleged that "the exorbitant increase of rate is with the sole object of helping the big private mobile telephone industries such as Reliance Infocomm, Escotel, Air Tel etc. etc" It has been stated that the companies "have tremendous influence over the Government and in particular, the Honourable Minister in charge of Telecommunication Department. The influence commanded by the Reliance Group of Industries on the present Central Government, is no longer a secret. On the basis of these allegations, the Petitioner maintains that the "recent revision of rates by the BSNL is utterly mala fide and intended to increase the purchase of mobile phone from private industrialists.

55 The allegations made by the Petitioner have been comprehensively controverted in the counter-affidavit filed on behalf of Respondents 3 and 4. In paragraph 4, there is a categorical denial of the allegations. In fact, the Respondents have given facts to demonstrate that the new rate is justified and was warranted by the existing circumstances.

56 On a perusal of these allegations, it is clear that there is no suggestion that the Telecom Regulatory Authority was acting mala fide or was wanting to promote the interests of the mobile telephone operators. There is no specific allegation against any individual person, officer or authority It has been averred

that the action s calculated to ''help the mobile telephone manufacturers''. Who is manufacturing the telephones? There is no answer. Again it is said, "the exorbitant increase of rate is with the sole object of helping the big private mobile telephone industries such as Reliance...." How would the action help Reliance etc.? The averments are vague. There is an insinuation against the Minister. But nobody has been named or impleaded as a party. On the basis of such vague allegations, the charge of mala fides cannot be sustained.

57. Mr. Ram Kumar laid great emphasis on an advertisement published in a Malayalam newspaper. It was issued by the Escotel. In this advertisement, certain newspaper reports in Malayalam have been printed to show that people were surrendering their landline phones. On this basis, the counsel raised the contention that the action of the Respondents is actually helping the private operators.

58. The suggestion made on behalf of the Petitioner was categorically controverted by the counsel for the Respondents. In addition to that, we find no material on the record to sustain the plea that the subscribers have really surrendered their landline phones. In fact, a perusal of the advertisement indicates that the private operators are not charging at a rate lower than the one fixed by the Respondents. The pulse rate introduced by the particular private operator is 30 seconds while that of the BSNL in case of a call from a landline phone to a mobile phone is 60 seconds. Thus, the rate of the private operator for use of mobile phones is in no way less than that introduced by the BSNL. In any case, the contention of the counsel could have some content of legitimacy if it was shown that the impugned rule was higher than that for a call from a mobile to a mobile. That could have been a cause for a subscriber to switch over from a landline to a mobile. Such is admittedly not the situation. Still further, it is also an admitted fact that even the Nigam has entered the mobile telephone operations. Thus, it could possibly have no motive for helping any private operator. And then, we have a free Press in our country. On the basis of a mere advertisement m a newspaper or a press report, a definite finding cannot be recorded. There should be evidence to show that people have really surrendered their landline phones.

59. On behalf of the Respondents, reference was made to a report in the Hindu, dated May 23, 2003. The statement of the Deputy Governor of the RBI was reported. It was stated that the telecom firms were in danger of bankruptcy. The effort was to show that the private operators were suffering substantial losses.

60. As already observed, in the circumstances of this case, the reports in the newspapers cannot form the basis of a firm finding. For the present, it shall suffice to say that there is no evidence to show that there was any lack of bona fides.

61. Faced with this situation, learned Counsel for the Petitioner pointed out that according to the Minister for Telecommunication, the recommendation of the

Authority "is not compulsorily required to be followed and can be altered". It may be so. Yet, nothing stops the Government or the operating agency from accepting the recommendation of the Authority. In the present case, the Respondents have actually accepted it. The recommendation made by the Authority, as observed earlier, was based on a thorough consideration of all aspects. If it had not been accepted, the action may have been criticized on the ground that there were no reason to reject it. The competent authority having accepted the recommendation, the Petitioner suggests that it had acted in a mala fide manner. We find no justification for this suggestion made by the Petitioner.

62. In view of the above, even the third question is answered against the Petitioners.

63. Mr. Ram Kumar also contended that the Petitioners had a right to be heard before the rates were revised.

64. There are millions of subscribers in the country. The Counsel has not referred to any rule requiring the authority to hear the individual subscribers. Still further, the Authority had actually made the recommendation after consideration of all the relevant facts and open discussion. The claim that the Petitioner had a right to be heard, if accepted, would mean that every subscriber should be called and questioned. This would make the working of the Authority as well as the Nigam impossible. We are unable to accept the contention.

65. Mr. Sreedharan Pillai, learned Counsel for the Respondents had raised the contention that the Petitioners in both the cases have an effective alternative remedy by way of an appeal before the appellate tribunal. Since we have heard the case at length, we do not think that it would be appropriate at this stage to relegate the Petitioners to any other remedy. Resultantly, it also does not appear to be necessary to examine the issue with regard to the actual availability of an alternative remedy. Having heard the matter, we have considered it appropriate to decide the issues.

66. Mrs. Molly Jacob, learned Counsel for the Petitioner in the connected case had adopted the arguments raised by Mr. Ram Kumar. No new point was raised. Thus, it is not necessary to go into that case separately. The issues are common.

67. The Petitioner has also filed a Contempt Petition. It is alleged that the Respondents are continuing to charge at the revised rates despite the interim order passed by a Bench of this Court on May 13, 2003. This, it is alleged, was continued despite the service of notice through a lawyer. On this basis the Petitioner prays that the Respondents, viz., the Managing Director, BSNL and the Deputy General Manager be punished for contempt.

68. On behalf of the Respondents it was contended that no bill for the period in question was issued to the Petitioner. Thus, he can have no cause to complain.

69. Even otherwise, we have examined the matter. We have found no merit in the contentions raised. No bill having been issued to the Petitioner, it cannot be

said that the Respondents have willfully disobeyed any order passed by the Court. Resultantly, we find no merit in this Contempt Petition. It is dismissed.

70. No other point was raised.

71. In view of the above, it is held that:

1. The Telecom Regulatory Authority as constituted under the 1997 Act consists of experts in different fields like accounts, finance, industry, law, management and telecommunication. It was on a consideration of the Consultation Papers, the suggestions from various quarters and Open House Discussions that it had issued the Tariff Order of 2003.

2. On consideration of the matter, it had taken the view that it was not proper to make the receiver of the call to pay any expense. This was a pure matter of policy. Similarly, it was also decided to reduce the number of free calls. Nobody has a right to claim free calls. It does not violate any rule or law. It is not arbitrary or unfair. There was a clear rationale for the tariff as fixed by the Authority.

3. The Government had initially accepted the recommendation of the Authority. Later on, it was modified vide Ext.P-3. Even this was approved by the Authority vide its letter of May 13, 2003. The tariff was not excessive or exorbitant. The enhancement was justified by the provision of extra facility viz., a person from the landline telephone being able to call another who is not present at his house or office. Thus, the challenge based on arbitrariness of the action and Article 14 of the Constitution cannot be sustained.

4. There is no discrimination based on the use of the particular instrument. The subscriber has been given the option to make a call on the mobile phone. The differential in rate is actually based on the additional facility made available to the calling party. The charge of discrimination as levelled by the Petitioners cannot, thus, be sustained.

5. Even the ground of unreasonable restriction on the freedom under Article 19 is untenable. There is no evidence that the revised tariff places any unreasonable restriction on the freedom of speech or communication. The claim is wholly imaginary. Thus, it cannot be accepted.

6. A person who levels the charge of mala fides has to plead facts and prove the allegations beyond reasonable doubt. An allegation of mala fide can be easily made. However, it can be sustained only when the allegations are clear and categorical. The allegations have to be proved. When personal malice is alleged, the person concerned has to be personally impleaded as a party. He is entitled to answer the allegations and give his version of the factual position.

7. In the present case, no person has been impleaded as a party. Neither the private parties who are allegedly influential nor those who were influenced have been impleaded in these petitions. The allegations are wholly vague. There is no

evidence to support the plea. Thus, it cannot be sustained.

8. Still further, it has not been even suggested that the impugned rate for a call from a landline to a mobile phone is higher than that for a call from a mobile to a mobile. Thus, there can be no reason for a person to switch over from a landline to a mobile phone. In the circumstances, the charge of mala fides cannot be sustained.

In view of the above conclusions, we find no merit in both the petitions. These are, consequently, dismissed. Even the Contempt Petition is dismissed. However, the parties are left to bear their own costs.