

(2005) 05 DEL CK 0070

In the Delhi High Court

Case No : WP (C) 8709 and 8710 of 2005

Tata Teleservices Ltd. and Another

APPELLANT

Vs

Bharat Sanchar Nigam Ltd.

RESPONDENT

Date of Decision : 30-05-2005

Acts Referred:

Constitution of India, 1950 — Article 226
Interconnectivity Usage Charges Regulations, 2003 — Regulation 2, 4, 5
Telecom Regulatory Authority of India Act, 1997 — Section 11, 14, 15

Citation : (2005) 5 CompLJ 366

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Arun Jaitley and Rajiv Nayar, Ramji Srinivashan, Rian Karanjawala, Ruby S. Ahuja, Bharat Singh, Sandeep Mittal and Mohd. Akaram, for the Appellant; Gopal Subramaniam Maninder Singh, Ankur Talwar, Angad Mirdha and Pratibha M. Singh, for the Respondent

Judgement

S. Ravindra Bhat, J.—These applications were heard at some length on 26th May 2005, with consent of parties. Counsel for the BSNL who was present on advance notice had indicated that in view of the urgency in these matters, no specific counter affidavit was being filed and that the issue of interim relief could be considered on the basis of the existing materials on record.

2. The petitioners in these proceedings, under Article 226 of the Constitution, claim appropriate directions for quashing of a letter dated 14th January 2005 and certain demand notices issued by the respondent (hereinafter referred to as BSNL). A further relief by way of a writ of mandamus directing the BSNL to adhere to and comply with certain interconnection agreements and the Interconnectivity Usage Charges Regulations, 2003 framed under the Telecom Regulatory Authority of India Act 1997 (hereafter called the "2003 Regulations" and "the Act" respectively) have been sought.

3. It is claimed that this petition is necessitated on account of the fact that the

Telecom Disputes Settlement and Appellate tribunal (hereinafter called "the Tribunal") established u/s 14 of the Act, is not functional on account of vacancy in the office of Chairperson. The dispute between parties can be adjudicated, as per Section 14(a)(i) of the Act, exclusively by the Tribunal; Section 15 of the Act bars jurisdiction of Civil Courts in respect of such disputes. The petitioners approached the Tribunal on 3rd May 2005, with the grievances raised in these proceedings. However, due to the peculiar situation arising on account of the vacancy in the office of Chairperson, the Tribunal is non-functional. The petitioner, Therefore, has sought appropriate relief in these proceedings.

4. The petitioner is a licensed service provider under the Act; it provides an array of basic and cellular facilities. The controversy involved in these proceedings is whether the service offered by the petitioner is a Fixed Wireless Phone [known as Wireless Local Loop (Fixed) or WLL (F)] or is it to be treated as belonging to another category namely, Wireless Local Loop (Mobile) (hereafter called WLL(M)). The dispute between parties appears to have been occasioned by the launch of a product/brand by the petitioner known as "Walky".

5. The telecommunication industry, to a large measure, depends on what is termed as "Interconnection" which is a mechanism, whereby one service provider, enables its customers access customer service and network of other telecom service providers. Interconnection is premised upon linkage between various service providers; it also implies an integrated and coherent functioning system. The Telecommunication Interconnection (Charges and Revenue Share) Regulation 1999 and the Telecommunication Interconnection (Call Charges) Regulations 2001 had been framed before Regulations of 2003 came into force.

6. In terms of the 2001 and 2003 Regulations, Interconnection Usage Charges (hereinafter called IUC) is regulated. The service provider, whose network is sought to be used is the "interconnection provider"; a service provider using such facilities of interconnection is called the "interconnection seeker", in terms of Clauses 2(x) and (xi) respectively. The bone of contention in these proceedings is the action by BSNL, which, the petitioners allege, amount to a unilateral change in the terms of interconnection. Regulation 4 of The Regulations of 2003, defines what are called as Access Deficit Charge (ADC). These charges are akin to a pooled subsidy which have to be shared by the concerned licensees, having regard to the nature of service. Table 3, applicable as per Regulation 4, lists out the ADC's applicable for various types of calls. Para 3.2 contained in the note, elaborates the manner in which such ADC's are to be collected/paid or shared. The classification of a particular service, in this case, whether it is WLL(F) or WLL(M) would determine who would have to pay the charges and who would be entitled to retain them.

7. The BSNL entered into agreements with various service providers including the petitioners (after 2003 Regulations came into force). Such agreements are known as "interconnection agreements"; they bilaterally provide for various conditions upon which interconnectivity is provided. These include commercial,

technical, operational, security and financial conditions.

8. The petitioners contend that since 1997, they have been providing Fixed Wireless Phone (WLL(F)) facilities. This was within the knowledge of the BSNL; IUC and ADC were being charged/worked out appropriately on the basis of this understanding. In this background, it is submitted that the mere introduction of a new brand which is, not in any manner, different from the other existing WLL(F) facilities, does not warrant a unilateral action by the BSNL in reclassifying such a service as WLL(M) resulting in levy of IUC/ADC charges.

9. Mr. Jaitley, learned senior counsel for the petitioner submitted that provisions of 2003 Regulations had been designed to avoid unilateralism. The Act and the Regulatory platform/framework envisage strict adherence to the basic ground rules since inter dependability between various, competing service providers is essential for the smooth functioning of the telecom sector and assured service to the customers. He relied upon Regulation 2 (xix) and Regulation 5 to say that every service provider is under an obligation to report to the authority i.e. Telecom Regulatory Authority of India (TRAI), before seeking to alter any conditions of interconnectivity. It is submitted that in this case, no such reporting was done by BSNL.

10. Learned counsel for the petitioner submitted that the Telecom Regulatory Authority of India (TRAI) had received certain complaints about the "Walky" services that led to issuance of certain notices/ circulars. The petitioners clarified the position, after which the TRAI did not pursue the matter. Under the circumstances, the BSNL's action in "re-designating" the fixed phone service into WLL(M) is unwarranted.

11. It is submitted that evolution and improvement of technology has resulted in production of efficient and better looking instruments that are essentially WLL(F) phones. The difference between a WLL(F) instrument and a land-line is that it is a portable device having a limited mobility. It has the limited advantage of a mobile phone even while retaining the essential technology of a land line. The limitation inherent in such instruments is that they are incapable of functioning beyond a certain range radius. Learned counsel outlined the four different stages in which such facilities evolved over a period of time. He submitted that the facility retains its own characteristics and has not transformed into a cellular/mobile phone. Since there were certain issues whereby subscribers, instead of retaining the WLL(F) phones within the premises started carrying them and using them, the TRAI wanted to reconsider the issue, apparently with a view of redefining the tariff platform. For the purpose, a consultation paper was issued.

12. According to learned counsel, the consultation paper issued in January 2005 clearly points to the fact that all the concerns about possible utilization, albeit for a limited purpose, of WLL(F) phones as mobile phones, is actively engaging its attention. All the service providers were required to make their presentations. The BSNL is fully aware of this; yet it has unilaterally sought to redefine and

change the terms of engagement vis-a-vis interconnectivity.

13. Learned counsel for the petitioner has relied upon the previous order of the Tribunal in a dispute where interconnection was also in issue. He places particular reliance upon the observations of the Tribunal that in terms of the 2001 Regulations, no single interconnectivity service provider is free to proceed and take unilateral action. Learned counsel relies on the following passage contained in the order of the Tribunal dated 27th April 2005 in a batch of appeals (Association of Basic Telecom Operators and Ors. v. Bharat Sanchar Nigam Limited etc. :-

" In our view BSNL could not have taken upon itself to have unilaterally issued the impugned letters of 28.04.2001 and 31.05.2001 to the Basic Operators asking them to raise the access charges and then threaten them to start billing them at the demanded rates. This kind of unilateral action was against the provisions of the license as well as the interconnect agreement. It was against the provisions of the May'99 TRAI Regulations."

14. The BSNL, which appeared and was represented, on advance notice, has justified its actions. Mr. Gopal Sabramaniam, learned senior counsel submitted that the nature of services offered to the public at large, by the petitioners pointed to the fact that the facility was essentially a mobile service. He relied upon the advertisements/write up of the petitioners available in their website.

15. Learned counsel for BSNL submitted that the services were sought to be introduced by the petitioners sometime in November 2004; thereafter some complaints were made and the Department of Telecommunications [DOT] elicited their response. Reliance has been placed upon letters written by the petitioners themselves at various points in time to TRAI. Learned counsel submitted that these letters/correspondence revealed that the phones are in fact been used as mobile phones; they no longer retain the characteristic of FWP/WLL(F). Reference has been invited to a letter written by the petitioner itself to the TRAI on 31st March 2005, which states that the nature of CDMA technology is such that implementation of restrictions upon individual subscriber(s) portable use of the handsets would require considerable changes to network that needed time, effort and resources. These, as also, the description to the services again spelt out in the letter of the petitioners to the TRAI dated 24.01.2005, point to their no longer being Fixed Wireless Phones but in fact having transformed into mobile phones.

16. Learned counsel invites reference to the letter on 24th January 2005, to TRAI, where the petitioner states that Fixed Wireless Phones combine the advantages of both mobile phones and land line phones. It also enabled convenient mobility and had other features like caller identification, facilitate to receive SMS, dial-up internet without modem etc.

17. Mr. Subramaniam also submitted that the TRAI itself had occasion to take cognizance of these matters. He submitted that on 6th January 2005, the TRAI

issued a directive u/s to the petitioners to withdraw the advertisements. It is submitted that this directive itself was later superseded on account of the petitioners having approached the Tribunal. Nevertheless, this as also two letters issued by the TRAI showed that the BSNL's assessment of the nature of services offered being WLL [M] was not unfounded.

18. Counsel for the BSNL also submitted that it has acted in accord with the Regulations as well as the interconnection service agreement with the petitioner. He placed reliance on Regulation 2(xxviii) of the 2003 Regulations which define WLL(M) to mean limited mobility telephone service using wireless in local loop technology within a short distance charging area. The services offered by the petitioners, according to him, fit the description in that definition and the BSNL is well within its right to insist on payment of the IUC, accordingly.

19. Having considered the materials and records and heard counsel for the parties, it would be necessary to recapitulate the scope of proceedings under Article 226. In judicial review proceedings, the Court has to only assess the legality, bona fides, regulated of decisions as well as fairness in the process of decision-making. It rarely, if ever, enters into the merits of the decision itself to determine whether one set of alternatives is preferable over the other; that choice is deemed best to exercised by the administrative/quasi judicial authority.

20. Where judicial review proceedings concern correctness of decisions of quasi judicial authorities, particularly Tribunals, the scope of scrutiny is even narrower; the Court merely has to evaluate whether the decision of such Tribunal or the authority is within the bounds of law and the jurisdiction which controls such a Tribunal and whether the approach of the Tribunal is broadly correct.

21. The present petition has been necessitated on account of a peculiar situation whereby the Tribunal is unable to exercise jurisdiction. In that sense, there is a vacuum in the dispute resolution mechanism contained in the Act. Jurisdiction of the Civil Court is also barred. Hence, the only remedy for an aggrieved licensee is to approach the High Court under Article 226. It is in such cases that the Court is of necessity drawn into- of course within the bounds of its jurisdiction- assessment of the merits of the disputes.

22. The factual narrative set out earlier would show that the petitioners have been providing FWP/WLL(F) services for sometime. What has triggered the present controversy is the introduction of its new, Walky services. BSNL asserts that this service has radically altered the ground reality; it is a mobile service. The petitioners on the other hand equally vehemently assert that the technology used for this service continues to be the same; they have merely used aggressive marketing techniques and have also offered an improved version of the telephone instrument.

23. These matters were heard for the limited purpose of considering whether to grant any interim relief and if so to what extent. For such purposes, the Court has to consider the broad prima facie nature of the merits of the dispute. The

examination of merits is a task that has to be undertaken by the Tribunal, which possesses exclusive jurisdiction.

24. The record discloses that WLL(F) services were apparently being offered by the petitioners. Those instruments had an element G?" (perhaps more than just an element) - of portability. It amounted to a limited mobility. The nature of technology that exists, restricting such limited mobility apparently ensures its use within the restricted radius or range. Consequently, the subscriber is free to use such FWP/WLL(F) as a limited mobile phone. The communications of the petitioner to the TRAI suggest that there are certain technology concerns or issues which require to be considered and addressed in order to ensure that WLL(F) facilities remain as such and do not mutate into WLL(M) services. The consultation paper issued by the TRAI also seems to indicate that these issues require a fresh look and discussion and a possible re-formulation of the tariff / regulatory structures in that regard.

25. In this background, the issue that squarely arises is whether BSNL could "reclassify" the services of the petitioner and claim higher/differential IUC (including ADC), which has been impugned in these proceedings. The BSNL has relied upon advertisements issued by the petitioners as also contents of their letters addressed to the TRAI. It has further placed reliance upon the DOT's letter dated 23rd March 2005, which records that the petitioner has to take steps that the WLL(F) facilities remains such. Learned counsel for the petitioner had also relied upon certain documents to show that the BSNL itself extending similar facilities in its "Garuda" and "Tarang" projects and that the limited mobile telephone services, given in the Railways is identical to the WLL(F) facilities offered under the Walky scheme.

26. After considering all these above factors, prima facie, I am of the opinion that the action of the BSNL is unilateral. There is no gainsaying the fact that in terms of Regulation 5 (ii) every licensee is under an obligation to comply with reporting standards, whenever it seeks to alter the status quo existing with regard to interconnectivity services/charges. This standard or requirement does not appear to have been complied with. Consequently, there is some substance in the contention of the petitioners that the entire issue being looked into by the TRAI, which has issued a consultation paper. The process is expected to lead to some changes. Under these circumstances, the action of BSNL does seem precipitate to say the least; it is certainly unilateral.

27. The purpose of the Act was to create a framework within which a spectrum or range of services could be regulated. Telecom business activity inherently presupposes sharing of resources/networks. The need to have a regulatory framework, which assures integration, unified access and technical standards, is critical. The powers of TRAI u/s 11 of those of the Tribunal are unique. If one keeps this perspective in mind, any unilateral action by one service provider/ interconnection service provider could spell chaos since it could imperil the foundation of an integrated system which is essentially comprises of disparate

and competing elements held together due to the Act, the Regulations framed under the Act and bilateral agreements within the umbrella of that framework.

28. In view of all the above, I am of the view that the facts of this case did not justify the BSNL to conclude that the petitioners had altered the existing situation so radically as to warrant a unilateral action and its further insistence on payment of differential IUC (including ADC).

29. The discussion on existence or otherwise of a prime facie case, however, does not conclude the issue. What has to be next seen is the impact of grant or refusal of the interim relief claimed. Counsel for the BSNL contended that the Court ought not to pass any interim order since what is at stake are huge sums of money amounting to approximately Rs.50 crores per month. He submitted that in the event of a stay or suspension of its proposed action, as claimed, willy nilly a situation would arise where the petitioners would invariably contend, at a later stage (in spite of their not succeeding on the merits), that large public or consumer interests would be at stake. In such a case though its stand would be vindicated, nevertheless it would be deprived of its legitimate dues.

30. The petitioners on the other hand assert that if the interim order is not granted, the consumer/customers would be irreparably prejudiced since a stage would arise when the burden of the differential charges would have to be passed on to them.

31. A reading of the Tribunal's recent order in the Association of Basic Telecom Operators and Ors v. Bharat Sanchar Nigam Limited decided on 27th April 2005 would show that in fact no interim order had been made, in those proceedings, at least initially.

The charges payable to BSNL were directed to be made subject to outcome of the proceedings. However, it is during the course of its order, the Tribunal had categorically observed that unilateral action of the BSNL was not justified.

32. The question, therefore, is whether the nature of the dispute is such that the petitioners would be irreparably prejudiced and whether the balance of inconvenience would be in their favor for the grant of interim relief.

33. The contention of the petitioners has centered around the legality or the correctness of the actions of the BSNL. They did not focus on the irreparable prejudice that would ensue if the interim order were not to be granted. No doubt, the petitioner contended that denial of interim relief would eventually lead to a situation where all the parties would have to be borne by the consumer. The petitioners did contend, however, that denial of the interim relief would result in increased burden to the customer.

34. As noticed at the outset, this order per force has to be of a temporary duration; it has a limited life and would be subject to the orders passed by the Competent Tribunal namely, the Telecom Disputes Settlement Appellate Tribunal.

35. Having regard to all the above factors, I am of the considered opinion that the petitioners ought to be granted limited ad-interim relief to the extent of a stay/suspension from the payment of differential IUC to the extent of 50%. The BSNL is Therefore directed not to enforce the impugned letter dated 14.01.2005 and its subsequent letters/communications demanding differential IUC (including ADC) to the extent of 50%. This is subject to the condition that the petitioners shall deposit the balance 50 charges with the BSNL within a period of four weeks from today. The BSNL shall maintain a separate account of these amounts, in an appropriate manner; amounts payable for future periods shall be also regulated in the same ratio. The petitioner shall deposit the balance of 50% amounts in respect of future bills, with the BSNL, in accordance with terms of the bills. The deposit of these amounts shall be subject to final outcome of the proceedings before the tribunal, which may consider the question of balancing of equities.

36. It is clarified that the observations in the course of this order are not meant to be construed as an expression on the merits of the case and are solely meant for the purpose of examining the controversy with a view to decide the interim application; this arrangement shall continue till the Tribunal is properly constituted and proceeds to decide the issue of appropriate interim relief. The parties are directed to approach the tribunal immediately, after its due constitution. The tribunal is at liberty to pass such orders as it may deem appropriate, including variation, modification, or vacation of the terms of these directions.

37. The applications are disposed off in the terms of the above directions.

38. dusty to parties under the signatures of Court Master.