

(1994) 09 CAL CK 0028
In the Calcutta High Court
Case No : Letter No. 4008 of 1992

Union of India and others

APPELLANT

Vs

M/s. Binani Consultants (P) Ltd. and another

RESPONDENT

Date of Decision : 27-09-1994

Acts Referred:

Constitution of India, 1950 — Article 13(2), 14, 19(1), 202, 226
Telegraph Act, 1885 — Section 4, 4(1), 4(2), 7B

Citation : AIR 1995 Cal 234 : (1995) 1 CALLT 66 : (1995) 1 CHN 8 : 99 CWN 119

Hon'ble Judges : Nikhil Nath Bhattacharjee, J; Bhagabati Prasad Banerjee, J

Bench : Division Bench

Advocate : Mrs. Archana Sengupta, for the Appellant; Mr. Pijush Dutta and Mr. R.N. Pal, for the Respondent

Judgement

Bhagabati Prasad Banerjee J.

1. This is an appeal against the judgment dated 19th of August, 1993, allowing the writ application and directing the appellant to reconnect the telephone lines of the respondent which were disconnected for non- payment of pay phone bills, and to accept the call charges on the basis of original agreement. The appellants were also restrained from reducing the rate of commission of the writ petitioner/ opposite parties. Further, the appellants have been restrained from reducing the billing period from monthly to fortnightly and from charging any additional security deposit except in accordance with the terms and conditions of the agreement in question.

2. The writ petitioner/ opposite parties entered into an agreement with the Calcutta Telephone authorities for the purpose of acting as Operating Agency in respect of pay phones in the city of Calcutta. The relevant provision of the said agreement is as follows :--

"The Operating Agency will be permitted to charge Re. 1 / - per unit from the public for the calls made from the pay phones. The Operating Agency will pay to

the Department @ 80 paise per metered call unit in case of pay-phone with STD facility and @ 60 paise per metered call unit in case of pay-phone with only local call facility (on the basis of the calls recorded in the exchange). The Operating Agency can retain 20 paise for each metered call unit for pay-phone with STD facility and 40 paise for pay-phone with only local facility. However, it is made clear that the aforesaid charges of Re. 1/- per unit are subject to variation from time to time by the Government and in case the Government changes the charges per unit. The share of Operating Agency will also be decided by the CID at the time of revision."

3. Several pay-phones have been allotted to the writ petitioner/opposite parties under the agreement. The licence was also granted for this purpose by the appellants allegedly in exercise of the powers conferred under sub-sec. (2) of S. 4 of the Indian Telegraph Act, 1885. The terms and conditions of the licence are given in Annexure-11A to this licence. The said licence, inter alia, provides as follows:--

"The Telegraph Authority reserves the right to modify at any time the terms and conditions of the licence by giving notice of three months to the licensee if the Telegraph Authority is satisfied that it is necessary or expedient to do so in the interest of the general public or for the proper operation of pay-phones."

4. By a notification /circular dated 2nd of May, 1991, the Government of India made a general revision in the rate of commission from 20% to 10% which was made effective from 1st of June, 1991, for the recorded call units beyond 10,000 per period. Under the said notification/ circular, the Operating Agency of pay-phones like that of the writ petitioner/opposite parties would be entitled to get 20% up to 10,000 call units and beyond that at the rate of 10%. This change in commission was introduced by the notification/circular which was enforced on and from 1st of June, 1991 throughout India. It is not in dispute that the writ petitioner/ opposite parties accepted the said revision in commission and accordingly, paid the bills that was raised on and after 1st of June, 1991 and thereafter when there was arrears for default in payments the writ petitioner/ opposite parties applied for instalments for payment of the outstanding dues. After paying the said bills for sometime, the writ petitioner/opposite parties made further default in payment of the bills to the extent of several lakhs of rupees. The appellants had disconnected the 46 STD/ISD pay-phones in respect of which the writ petitioner/opposite parties were Operating Agents and/or granted licences in respect of the said pay-phones. After the said lines were disconnected, the writ petitioner/opposite parties filed a writ application for the purpose of restoring the said 46 STD/ ISD pay-phones, on the ground that the terms and conditions of the agreement and/or licence could not be revised by the circular and/or notification by the Central Government in this behalf and accordingly, the writ petitioner/opposite parties was liable to get 20% commission in stead of 10% commission beyond 10,000 units as decided by the appellants. The lines have since been restored by several orders passed by this

Court on payment of the admitted amount of dues which are payable on the basis of the rates prevailing before the revision in commission was effected and taking into consideration the amount of security deposit lying with the appellants pending disposal of this appeal. The order of the learned Trial Judge was stayed on some terms and conditions and giving reasons therefore and it appears that the writ petitioner/opposite parties moved the Supreme Court against the interim order, but the interim order passed by this Court was not interfered with by the Supreme Court.

5. The learned Trial Judge considered the facts and circumstances of this case and referred to the decision of the Supreme Court in the case of *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, *Sterling Computers Ltd. v. M/s. M & N Publication Ltd.*, reported in 1993(1) SCC 415 in support of the contention that in the contractual field of this matter, the writ petition is maintainable and the Writ Court can interfere with the violation of such contractual rights. The learned Trial Judge also considered the decision of the Supreme Court in the case of *M. P. Sugar Mills (P) Ltd. v. State of U.P.*, reported in AIR 1979 SC 627 on the scope of the principles of promissory estoppel and held that on the basis of the principles of promissory estoppel, the appellants were estopped from changing the commission and ultimately held that the Court is entitled to examine the policy matter, especially the policy making principles and if it appears to be arbitrary to the Court, the Court can strike down such policy decision. Accordingly, the learned Trial Judge has held that the terms and conditions of the agreement which were supported by grant of licence under the provisions of S. 4(2) of the Indian Telegraph Act, 1885. The rate of commission could not be revised by a notification and/or circular and further held that the lines were to be restored on payment of call charges on the basis of original agreement and also restrained the appellants from reducing the billing period and/or from charging the additional security deposit except in terms of the original agreement. In short, once the rights, duties and obligations of the parties are embodied in a contract entered into by and between the appellants and the writ petitioner/opposite parties, the same could not be altered, subsequently by any notification and/or circular.

6. Mrs. Archana Sengupta, learned Counsel appearing on behalf of the appellants, submitted in the first place that the relationship between the appellants and the respondent were governed by contract and under the contract the appellants have been appointed the respondent as an Operating Agent for operating pay-phones against the commission of 20 paise per Rupee and that the rate of commission was reduced by a notification which was effective from 1st June, 1991. It was submitted by Mrs. Sengupta that the licence was granted and the agreement were entered into with several terms and conditions including the

payment of security, additional security and providing the rate of commission. It is submitted that there is no restriction imposed by the Central Government under the provisions of the Indian Telegraph Act and/or by the notification issued in this behalf restricting the power to revise and/or reduce the rate of commission. It was further submitted that the terms and conditions of the licence and agreement are subject to arbitration clause. The provision of arbitration clause is as follows :--

"ARBITRATION -- In the event of dispute or differences arising as to the construction or execution of the contract or the respective rights and liabilities of the parties concerned or the interpretation of any clause hereof or any other special conditions of the Agreement (except as to any matters the decision of which is specially provided for by these or the special conditions) the same shall be referred to the sole Arbitration of CCM, CTD or his nominee. The award of the Arbitrator shall be final and binding on the parties to this agreement."

7. The different sub-clauses of Clause 26 also provides the elaborate provisions how the arbitration could be referred to and disposed of. It was further submitted that the licence under the Act, the terms and conditions of the licence and the agreement must be read and construed as a whole and accordingly, if there was any dispute with regard to which of any one of the terms and conditions of the contract and/or the licence, in that event, the parties should have resorted to the remedy under the Arbitration Clause and that the writ petition was not maintainable in the facts and circumstances of this case, particularly in view of the provisions of Section 7B of the Indian Telegraph Act, 1885. It was submitted by Mrs. Sengupta that a party under a contract if affected by any circular can raise a question of violation of the provision of Article 14 of the Constitution of India before accepting and/or acting on the provision of the said circular. It was submitted that, admittedly, in the instant case the writ petitioner/opposite parties have made payment after the terms of the said circular revised the rate of commission from 1st June, 1991 and making such payment for about 1 year and thereafter made some payments. But, thereafter, the party has made admittedly huge defaults in respect of payment of telephone revenue for payment of the outstanding dues payable even under the old contract. The party applied for instalments and as instalments have been granted, the writ petitioner/ opposite parties moved this Court challenging the validity of the said circular. Mrs. Sengupta, learned Counsel, submitted that, in this circumstances, the writ petitioner/opposite parties was estopped from challenging the validity of the said circular. It was further submitted that the writ petition should not have been entertained at the instance of a party who is admitted in default in payment of the admitted dues, admittedly, payable on the basis of the liability under the original contract. It is not a case where the party has defaulted only in payment of amount under dispute because of revision in commission. It is submitted that the party must come with clean hand and a party who has defaulted to pay the amount under the agreement cannot be allowed to challenge the notification on the ground that the notification was invalid when he was in arrear in respect of

amount which is not in dispute. Even if the notification was not there, the conduct of the party disentitled the party to get remedy in writ jurisdiction which is purely equitable. It is submitted that one must come with clean hands and the requirement of clean hands includes the principle that no man shall take advantage of his own wrong or default.

8. It is further submitted that the revision of the notification dated 2nd of May, 1991 which was effective from 1st of June, 1994 was for the purpose of increasing the revenue of the appellant and that this increase in the revenue was incorporated in the Budget of the relevant year showing the amount of receipt from subscriber of the telephones. It is submitted by Mrs. Sengupta that whenever any income or expenditure provided in the Budget is placed before the Parliament and the Budget is passed by way of an appropriation bill which subsequently becomes a law and in this connection reliance was placed on the decision of the Supreme Court in the case of *Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab*, wherein it was held by the Supreme Court that executive function comprises both the determination of the policy as well as carrying it into execution. Where the Ministry or the Executive Government formulates a particular policy in furtherance of which they want to start a trade or business a specific legislation legislating such State activity before they could be embarked upon is not always necessary if the trade or business involves expenditure of funds. It is certainly required that Parliament should authorise such expenditure either directly or under a provision of a Statute. What is generally done in such cases is that the sums required for carrying on the business are entered in the Annual Financial Statement which the Ministry has to lay before the legislature in respect of every financial year under Article 202 of the Constitution. So much of the estimates as relate to expenditure other than that is charged on the consolidated fund are submitted in the form of demands for grants to the legislature and the legislature has the power to assent any such demand or assent to a demand. After the grant is sanctioned, an Appropriation Bill is introduced to provide for the appropriation out of the consolidated fund of the State of all monies required to meet the grants thus made by the assembly. As soon as the Appropriation Act is passed the expenditure made under different heads covered by it would be deemed to be properly authorised by law under Art. 266(3) of the Constitution of India. Accordingly it was submitted that the said reduction in commission was made according to law.

9. On behalf of the respondent-writ petitioner Mr. Pijush Dutt submitted that in the instant case the relationship between the parties are not governed by the Contract but is governed by a licence granted u/s 4(1) of the Indian Telegraph Act and that the statutory licence could not be modified in the manner it was done. Mr. Dutt submitted that under the original statutory licence and/or the Agreement the writ petitioner-opposite party was entitled to a commission of 0.20 p. per rupee and that such rate of commission could not be reduced by an administrative order. It was further submitted that in the facts and circumstances of this case arbitration clause could not be invoked in view of the fact that the

arbitration as provided did not contemplate dispute of the nature which has arisen in this particular case. The arbitration clause is, according to Mr. Dutt, could be resorted to only when it clearly comes within the language used in the arbitration clause and that it was further submitted that when the fundamental right to carry on trade or business guaranteed under Art. 19(1)(g) of the Constitution is effected by an administrative act, the arbitration clause cannot be said to be an alternative remedy to be resorted to before coming to the Writ Court, as in the case of violation of fundamental rights, alternative remedy cannot be said to be a bar for moving the Writ Court. It was next submitted by Mr. Dutt that on the basis of principle of legitimate expectation contained in the terms and conditions of the licence the rate of commission could not be reduced except in the manner provided in the terms and conditions of such a licence. Mr. Dutt also submitted that Section 41(1) of the Indian Telegraph Act provides that the Central Government shall have the exclusive privilege of establishing, maintaining and working of telegraphs provided that the Central Government may grant a licence on such condition and in consideration of such payments as it thinks fit to any person to establish, maintain or work a telegraph within any part of India. Section 4(2) of the said Act also provides that the Central Government may by notification in the Official Gazettee delegate to the Telegraph Authority all or any of its power under the first proviso to subsection (1) of the said Act and that the exercise by the Telegraph authority of any power so delegated shall be subject to such restriction and terms and conditions as the Central Government by a notification think fit and proper. Relying upon the provisions of Section 4 of the said Act, Mr. Dutt submitted that in view of this provision and the statutory licence which has been granted, the Central Government have no power to reduce the rate of commission, Mr. Dutt also submitted that in the facts and circumstances of this case the principle of legitimate expectation debars the authority of the Central Government to reduce the rate of commission in the manner it has done and in this connection referred to several English decisions as well as the decisions of the Supreme Court of India. Mr. Dutt also submitted that even in the contractual field the State had no unfettered power to change the terms and conditions of the Contract at Will. In this connection, reference was made to the decision of the Supreme Court in the case *Kumari Shrelekha Vidyarthi and Others Vs. State of U.P. and Others*, wherein it was held that the State actions in contractual matter can be reviewed by the Court in the context of the violations of Art. 14 of the Constitution of India and that the arbitrary exercise of power is against the Public policy. It was further submitted that exclusion of Art. 14 in contractual matters is not permissible in our Constitutional scheme. The scope and permissible grounds of judicial review in such matters and the relief which may be available are different matters but that does not justify the view of its total exclusion. Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Art. 14 and prompt judicial review, it can be said that the ultimate impact of all actions of the State or a public body being undomely on public interest, the requisite public elements for this purpose is also presentjn

contractual matters. Therefore, it would be difficult and unrealistic to exclude the State action in contractual matters, after the contract has been made from the purview of judicial review to test its validity on the anvil of Art. 14. Thus, the sweep of Art. 14 undoubtedly takes within its fold the circular issued by the Government in that case in exercise of its executive power. Reliance was also placed to the decisions of the Supreme Court of India in the case of *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, *Radha Krishna Agarwal's* case was cited in order to highlight that in that case even though the Supreme Court have held that in contractual field Writ is not maintainable but the Supreme Court had no occasion to go into the question of Art. 14 in such matters as no case was made out in that case. It was observed by the Supreme Court that the allegations on which violation of Art. 14 could be based were neither properly made nor established in that case. Accordingly, it was submitted that *Radha Krishna Agarwal's* case could not be said to be an authority in respect of violation of a contract offending the provision of Art. 14 of the Constitution of India. Reference was also made to the decision of the Supreme Court in the case of *Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries*, wherein the Supreme Court had occasion to consider the applicability of doctrine of legitimate expectation in respect of Government contracts. In that case it was held that in contractual sphere as well as other State actions, the State and all its instrumentalities have to conform to Art. 14 of the Constitution of which non-arbitrariness is a significant facet. To satisfy this requirement of non-arbitrariness in State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectation of the persons likely to be affected by the decision. Whether the expectation of the claimant is reasonable or legitimate is a question of fact in each case. Whenever the question arises it has to be determined not according to the claimant's perception but in larger public interest wherein other more important may outweigh that which would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this way would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. This case was decided in the context of acceptance of higher amount than that quoted in the tender made by negotiations and it was held that acceptance by the authority of such amount was not arbitrary. Several other decision of several other High Courts were also cited in support of the contentions that contractual rights and obligations must be judged fair and reasonable but it is not necessary to add the number of cases of the principle is now well settled. Mr. Dutt also submitted that the letter by which the rate of commission was reduced was arbitrary and has no legal basis. It was also violative of Art. 13(2) of the Constitution of India as it offends the fundamental right guaranteed to the petitioner under Art. 19(1)(g) of the Constitution of India.

10. It was further submitted by Mr. Dutt that the said circular which was issued in anticipation of budget the reduction in the commission consequent upon

inclusion in commission by the Post and Telegraph Deptt. has not been specifically provided in the budget and, accordingly, the principle laid down by the Supreme Court in the case of Ramjaya's case (supra) is not applicable in the facts and circumstances of this case. It was further submitted that there was no revision in the tariff but there was reduction in commission and that there is a scope for revision of tariff under the terms and conditions of the contract. But there is no scope for reduction of commission under the licensed rate in the contract itself.

11. According to Mr. Dutt, there could not be any waiver of any fundamental of legal right. In the instant case the rate of commission emanates from a condition of licence which could not be reduced save and except by taking action in accordance with law. Next, it was submitted that the appellant has violated the principle of natural justice in not giving an opportunity of hearing before reduction of the commission by the circular dated 2-5-1991 which was given effect from 1-6-1991.

12. It is true that a licence was purported granted u/s 4(2) of the Indian Telegraph Act, 1985 to the writ-petitioner/ opposite-party to instal or maintain or operate STD/ISD Pay Phones on the terms and conditions of the licence given in Annexure 1JA of the Licence. Clause 5 of the Licence clearly provides that "the Telegraph Authority reserves the right to modify at any time the terms and conditions of the Licence by giving notice of three months to the licensee if the Telegraph Authority is satisfied that it is necessary or expedient to do so in the interest of general public or for proper operation of pay phones". The general conditions for installation and maintenance of the said pay phones provided in Annexure 11A of the said Licence provides the rate of charge and the rate of commission receivable by the writ-petitioner/opposite-party. The terms and conditions of the Licence also provides that "any dispute" arising regarding the provisions of this licence shall be settled through arbitration as provided u/s 7B of the Indian Telegraph Act. The Agreement that was entered into between the parties specifically for the purpose of installation and maintenance of pay phones which clearly provided that the writ-petitioner/opposite-party was operating agents of the Posts & Telegraphs Department. The Clause 5 of the Licence also provided the rate of call charges as well as the rate of commission receivable by the writ-petitioner/opposite-party. It is also clearly provided in Clause 5 of the said Licence/Agreement that "the share of operating agency will also be decided by the CTD at the time of revision". The Clause 6 of the Licence/ Agreement also provides for arbitration and the manner of conducting and disposal of arbitration proceedings. So, it is at least clear that the Telegraph Authority have the power to modify at any time, any of the terms and conditions of the Licence by giving three months notice to the licensee if the Telegraph Authority is satisfied that it is necessary or expedient to do so in the interest of General Public for proper operation of the pay phones. Even though licence has been granted u/s 4(1) and (2) of the Indian Telegraph Act. It is not clear to us whether in the facts and circumstances of this case a licence u/s 4(1) of the said Act would be issued or

required to be issued inasmuch as u/s 4(1) of the said Act the Central Government have the exclusive privilege of establishing, maintaining and working of telegraphs or in other words no other authority in India can have rights of establishing, maintaining and working of telegraphs. The meaning of the word "maintaining" after the word "establishing" clearly means that maintaining and working of telegraphs must be done by the authorities who had to establish such things. Admittedly, in the instant case the Central Government had the exclusive rights and privilege of establishing and maintaining of telegraphs or in other words telephone system. But law provides the grant of a licence by the Central Government to any other person to establish, maintain or work a telegraph within any part of India. This proviso contemplates setting up or establishing telephone system or telegraph system by any other person other than the Central Government, after obtaining a licence from the Central Government. The question of granting licence may arise in case of any person other than the Central Government wants to transmit something in the form of telegraph, telephone or television programme within the territory of India by their own plants and machineries. As for example, a foreign Television Company cannot transmit or telecast from India without obtaining a licence from the Central Government wherein the Central Government has the exclusive right and/or privilege to impose terms and conditions of such a licence. Accordingly, Section 4(1) of the Act contemplates granting of a licence to a person by the Central Government for the purpose of establishing or maintaining a telephone system on his own. In the instant case, admittedly, the writ-petitioner/opposite-party has not established any telephone system but he has been granted agency for acting as a mere operating agent of the telephones belonging to the Central Government. The telephone system is being maintained by the Central Government and pay phone connections have been given to the writ-petitioner/opposite-party for the purpose of enabling the public to use telephone through the apparatus provided by the Operating Agency, but ultimately through that apparatus the telephone facility which has been established and maintained by the Central Government is being used by the public on payment of charges, apart of which is receivable by the Operating Agency as commission. Appointment of an Operating Agent for the purpose of using the telephone maintained by the Central Government on payment of charges by the public through the Operating Agency does not and cannot mean that the Central Government had granted or could grant licence for establishing, maintaining and working telephones when the Operating Agency had not established or maintained telephone but mere using the telephone facility, established and maintained by the Central Government. Keeping in mind the scope and ambit of the provisions of Section 4 of the Indian Telephone Act it cannot be said that a licence granted to the writ-petitioner/ opposite-party for the purpose of parting with the exclusive privilege in respect of telegraph by granting licence to the writ-petitioner/opposite-party who was nothing by an Operating Agent who is earning commission against calls and realising money for and on behalf of the Telephone Authority. In short, for each call the Operating Agency was to realise one rupee,

out of which he could retain 20P which has been reduced to 10P and for reduction of 10P commission per call the writ application has been filed, out of which this appeal arises.

13. We are not called upon to decide whether or not the licence that was granted was valid or not. We have considered the provisions of Section 4 of the Act to understand the scope and ambit of the power which is sought to be exercised by the Telephone Authorities in the facts and circumstances of this case. Whatever may be the value of the licence the terms and conditions of the licence set out in Annexure 11A of the Licence as well as the details of the General Conditions for installation, maintenance and operation of pay phones by Operating Agency have been clearly set out in an agreement made between the Parties. The agreement in question which is at page 82 of the Paper Book provides that the Operating Agency was made an offer to run pay phones at his own costs and the Calcutta Telephone District (known as "CTD") agreed to allow the Government Agency to procure, instal and maintain the pay phones on certain terms and conditions which are revisable from time to time. So, from the agreement it is clear that the writ-petitioner/opposite-party had been granted "the right to procure, instal and maintain" pay phones. The question of procuring, installing and maintaining of telephone or telegraph u/s 4(1) of the said Act did not and could not arise at all. Under the agreement it is clear that the rate of pay phones had been granted under a contract. True, this contract has been entered into by and between the Department of the Central Government and the writ-petitioner/ opposite-party in respect of a telephone which is established, maintained by the Telephone Authorities. It is in the field of contractual obligation between the parties, it is not the law that a Writ Court can intervene in each and every case. A Public Body may have a power to take decision which will in some way affect or vary existing private law right of an individual. An individual may challenge such a decision for judicial review. If the source of power is statutory indicating that the matter has a sufficiently public element to render it susceptible to judicial review. If it is a case of a private law right the individual had . to proceed by an ordinary action. The Court had drawn a distinction derived from contract which is a class as "private law rights" and rights derived from public law. By "public law right" the Court generally means the ability to invoke the supervisory jurisdiction of the Court to ensure the public authorities to perform their statutory duties and properly exercised their statutory powers. The statute may expressly or impliedly impose restriction on the exercise of contractual power by a Public Body. Judicial review will be available to determine whether contract violates such statutory restriction or there has been breach of contract in violation of the statutory restriction. The Court would be performing the public law supervisory role of ensuring compliance with statutory limitation on the powers of public authorities and would not be dealing with private law issue of what the terms of the contract were or whether they had been broken.

14. It is not the question that the contract entered into between the parties was unjust, unfair or unreasonable. The only question is whether in the facts and

circumstances of this case the writ-petitioner/opposite-party can challenge the validity of the reduction in commission by the notification dated 2nd May, 1991 effecting from 1st June, 1991. It is not in dispute that after the commission was reduced by the notification in question the writ-petitioner/opposite-party accepted the said reduction in commission and submitted the bills which were raised on the basis of reduction in commission for sometime and thereafter when the writ-petitioner/opposite-party was unable to pay and applied for instalment and only after the instalment was refused by the Telephone Authorities the writ-petitioner/opposite-party moved a writ application challenging the validity of the notification dated 2nd May, 1991 which was made effective from 1st June, 1991. Conduct of the party is a very relevant factor for moving a writ application. If a party has accepted the notification in question without questioning its validity, there cannot be any waiver of fundamental rights, but in the instant case the question is whether the Operating Agent has a fundamental right to carry on trade or business is granted under Article 19(1)(g) of the Constitution of India or not. The right conferred on under Article 19(1)(g) of the Constitution could not be curtailed or abridged save and except by imposing a reasonable restriction. The scope of Article 19(1)(g) of the Constitution is well settled. A citizen's right to carry on trade or business cannot be interfered with unreasonably by the authority concerned, but in the instant case the relationships between the parties were nothing but a principal and agent. The writ-petitioner/opposite-party is running the pay phones as mere Operating Agent. The Operating Agent is collecting the telephone charges from the public and retaining a portion of it as his commission.

15. In our view the relationship between the parties is as principal and agent, it has nothing to do with a citizen's right to carry on trade or business. Trade or business or profession contemplated by Article 19(1)(g) of the Constitution means an independent business, trade or profession. The Agent who is accountable to the principal as the agent realises charges after deducting his commission. Such a relationship is beyond the scope and ambit of Article 19(1)(g) of the Constitution of India and accordingly, it cannot be said that the Operating Agent is carrying on a trade or business independently under Article 19(1)(g) of the Constitution of India and the Principal has no right to vary the terms and conditions of the agency. Accordingly, the acceptance of the notification dated 2nd May, 1991 and making payment on the basis of such notification for sometimes does and thereafter, applying for instalments with the Telephone Authorities to pay by instalment of the dues on the basis of revised rate of commission is certainly a factor to be taken into consideration while entertaining and granting relief to the writ application in the facts and circumstances of the case.

16. The notification in question was a general revision in the rates of commission of, any phones in respect of an operating agent throughout India and it is needless to point out that such revision in the rate of commission is a policy-decision of the Central Government which is for the purpose of earning revenue

or for other reason. Pursuant to such a policy-decision the rate of commission has been revised in a manner by which up to 10,000 calls there is no change in the existing rate of commission, but beyond 10,000 calls the rate of commission was reduced from 20P. to 10P. There is no material before us to show that the writ-petitioner/opposite-party was affected by such revision inasmuch as it is only after the call exceeds 10,000 the party is likely to be affected. In the writ petition it has not been pleaded whether as a matter of fact, the Respondent had been affected by such a change.

17. The learned Trial Judge allowed the writ application holding that the appellant has no jurisdiction to vary the terms and conditions of the agreement/licence under which pay phones were being operated and further violation of the terms and conditions of the contract has given rise to a right to the writ-petitioner/opposite-party enforceable under Art. 226 of the Constitution of India. It was held by the learned Trial Judge that it was on the basis of the representation contained in the agreement between the parties, the writ petitioner/opposite-party had made huge investment in the business and by such reduction in commission the writ-petitioner/ opposite-party would suffer irreparable loss and injury. No case has been made out as to how the writ-petitioner/opposite-party would be suffering loss and injury which would amount to compelling him to face loss in business. If a case is made out that the variation of the terms and conditions of commission had resulted in the loss of business, the same may be said to be an unreasonable or unfair act on the part of the appellant, but no particulars have been disclosed. The learned Trial Judge has also held that the appellant has no right to ask for additional security deposit from the writ-petitioner/opposite-party and/or to change the billing period. Under the agreement the writ petitioner/opposite-party collects money from the public and deposits it after a fixed period and during the period it retains large sum of money belonged"to the appellant. For the purpose of protecting the interest of the appellant, a sum is required to be kept as a security incase of default. A party who might have realised several lakhs of rupees ultimately fails to pay the share of the department. In that event in the absence of a security deposit the same could not be recovered and public revenue may be lost. In the instant case, the change in the rate of commission might not have been provided in the budget before such change was made. But as a general practice the effect of the change in the rate of commission was reflected in the next budget. If the change in the rate of commission was made before the budget in that event the estimated income out of such revision could have been shown in the budget. But when the change has been made in the midst of a season it is provided in the next budget and the total receipt by the Telephone Authorities on account of revision in the rate of commission must have been provided in the budget for the next year which was passed by the Parliament at which appropriation bill was passed. So, it is clear that the change in the rate of commission was impliedly and/ or indirectly approved by the Parliament, Secondly, whenever a decision is taken by a Department or an Authority such a decision is taken not as a

delegatee, but as a limb of the Government. Whatever decision is taken, decision is taken for and on behalf of the Government. When a Government takes a decision revising rate of commission it must be held that it has been done in the public interest and/ or for proper maintenance of the Telephone Authorities under a policy-decision. Such a policy-decision taken by the Government of India cannot be interfered with by the Court unless such a policy was on the face of it arbitrary or contrary to public interest. We are unable to hold that such a policy-decision was arbitrary. After giving notice of three months, this notice does not mean notice of hearing, but the notice of change, so that a party may be aware that after three months the terms and conditions of the licence is sought to be changed. This notice is provided only for the purpose of making change of aware (sic) to the affected party and the affected party may know of it and takes steps accordingly. Otherwise, the party may be caught by surprise by any change without giving sufficient time. Absence of such notice does not render the change bad when the party accepted the change without notice. A party can waive the notice and after waiving the notice, he cannot subsequently challenge the validity of the same. The Supreme Court in the case of S. Narayan Iyer Vs. The Union of India (UOI) and Another, , held that the telephone charges and/or rates would be revised by the Union of India and no relief could be granted in such a matter by the Writ Court. The telephone charges could be revised by the Union of India for which no relief could be granted by the Writ Court. Certainly it could not be said that rate of commission out of telephone charges realised by operating agents of pay phones could be challenged straightway by filing writ application. We respectfully disagree with the finding of the learned trial Judge that telephone charges for the subscriber could be changed by the Government but the rate of commission of pay phone holders who act as operating agent of the department could not be revised. It is out of the telephone charges paid by the subscriber a portion of it is receivable by the agent as his commission. The position of the commission agent cannot be placed higher than the persons who actually uses the telephones and pay the telephone charges. The agency agreement is for a limited period and renewable from time to time. The agency agreement could also be terminated in the manner provided in the agreement. Accordingly, we do not find any reason to agree with the finding made by the learned trial Judge that the appellant had no jurisdiction to revise the rate of commission and/or to make demand for additional security and/or to change the billing period. It is within the exclusive domain of the Principal, viz., the Union of India to ask for additional security for protecting the revenue of the department and to reduce the billing period for the purpose of protecting the interest of Union of India. The operating agency collects the revenue, keeps a smaller part of it as a commission and hands over the balance to the Telephone Department. So, it is beyond the power of the Writ Court to interfere with the terms and conditions under which the additional security shall be increased, decreased and/or the billing period may be reduced. When the writ petitioner/opposite party agrees to act as operating agency it is clearly established that he was nothing but an agent under the principal and it is clearly provided in the agreement that the share of the

operating agency is liable to revision by the Telephone department. The relationship between the parties is governed by the law of agency. The agency contract also provides the power of the appellant to change the rate of commission. The licence also provides that any terms and conditions of the licence could be revised by giving three months' notice. Under clause 6 of the general terms and conditions for installation, maintenance and operation of pay phone such rate of commission is specifically mentioned with an arbitration clause. The notice as contemplated before such increase had been waived by the respondents. A party can waive the service of a mandatory notice in any proceeding and after participating in the proceeding he cannot challenge the validity of such proceeding on the ground of non-service of the notice. The principal argument of Mr. Dutt was that when the parties have agreed under the contract the contractual terms and conditions could not be altered save and except after complying with the provisions. The contract which authorises the Central Government to revise the rate of commission does not provide any specific notice period for making such change. Accordingly, it cannot be contended that changing the rate of commission would amount to changing the terms and conditions of the licence as provided in clause 5 of the licence. We make it clear that for subscribing a pay phone for the purpose of earning commission it is not necessary to grant a licence as contemplated u/s 4(2) of the said Act but we do not know under what circumstances it was granted. Whatever be the purpose of such licence we do not find that there is any scope for procuring, installing and maintaining pay phone a licence u/s 4 of the Act is contemplated, inasmuch as, the operating agent has not to establish a telephone system but to operate the telephone system already maintained by the Union of India. Accordingly, it cannot be said that for becoming an operating agent a licence had to be granted and the terms and conditions of agency is statutory and controlled and regulated by Section 4 of the said Act. In any event, Section 4 of the said Act did not restrict or abridge the power of Central Government to revise the rate of commission. For the purpose of procuring and maintaining a Receiver a licence may be necessary but that licence does not extend further and the terms and conditions of the rate of commission and other details cannot be said to be controlled and regulated by Section 4 of the said Act. Accordingly, the contract which was entered into between the parties under which the writ petitioner-opposite party was appointed as an operating agency cannot be said to be a statutory contract for the purpose of abridging the right of the appellant to change the terms, and conditions of agency. In this case there is an arbitration clause. Secondly, in the instant case the writ petitioner-opposite party accepted the said change in the commission and paid bills on the basis of such change and thereafter applied for instalment and when instalment was not granted he moved the writ application on the basis of which the learned trial Judge granted relief, accordingly the respondent was not entitled to any relief.

18. In our view and in the facts and circumstances of this case the learned trial Judge was wrong in granting the relief in a matter like this when a notification

has been issued by the Central Government changing the rate of commission under certain conditions and restrictions which are applicable throughout India and when a party accepted it and acted upon it he cannot be allowed to challenge the same after he has voluntarily accepted the same and made payments on that basis.

19. Accordingly, we are of the view that the conduct of the writ petitioner disentitled him from challenging the validity of the notification revising the rate of commission. Secondly, such a change had been effected on the basis of a policy decision taken by the Govt. of India which must have been reflected in the subsequent Budget which had impliedly sanctioned by the Parliament and that at this stage it is not open on our part to hold that the said notification was illegal. The relationship between the parties are Principal and Agent. An agent is accountable to the Principal for anything done by the agent for and on behalf of the Principal and law of Agency will have some application in the facts and circumstances of this case. Not only it is in the contractual field this is a case of agency under a contract and no fundamental right is involved in the instant case. We do not find that the change in the commission is arbitrary and/or unreasonable and had resulted in violation of any of the fundamental rights guaranteed under Article 14 or 19(1)(g) of the Constitution of India, in the peculiar facts and circumstances of this case we are unable to grant any relief to the writ petitioner-opposite party.

20. In that view of the matter, we set aside the order of the learned trial Judge and dismiss the writ application without any order as to costs.

21. All parties are to act on a signed Xerox copy of this judgment on the usual undertaking.

Nikhil Nath Bhattacharjee, J.

22. I agree.

23. Appeal allowed.