

(2009) 07 BOM CK 0038

In the Bombay High Court

Case No : Summons for Judgment No. 116 of 2008 and Summary Suit No. 2708 of 2007

Vodafone Essar Ltd.

APPELLANT

Vs

Nitin Goel

RESPONDENT

Date of Decision : 23-07-2009

Acts Referred:

Telecom Regulatory Authority of India Act, 1997 — Section 3(1)
Telegraph Act, 1885 — Section 10, 11, 3(6), 4, 4(1)

Citation : (2010) 4 BC 448 : (2010) 3 BomCR 782

Hon'ble Judges : Vazifdar S.J., J

Bench : Single Bench

Advocate : Pooja Kshirsagar, instructed by Dholakia Law Associates, for the Appellant; Anand Kumar, for the Respondent

Judgement

Vazifdar S.J., J.—The suit is filed to recover a sum of Rs. 63,816.37 together with interest thereon at 18% per annum from the date of the filing of the suit till payment and/or realization.

2. The claim arises in respect of the mobile telephone facility granted by the plaintiff to the defendant, pursuant to an agreement in writing between the parties. It is important to note as far as the merits of the matter are concerned, that the defendant has availed of the roaming facility both national as well as international. It is also fairly conceded that during the period when the disputed bills were raised, the defendant had been travelling even abroad. There is little to be said on merits in favour of the defendant.

3. However, a question of law was raised on behalf of the defendant based on the Customer Agreement entered into between the parties and the provisions of The Indian Telegraph Act, 1885.

4. It was contended that in view of Clause 5(f) of the Customer Agreement, entered into between the parties the provisions of the said Act including Section

7-B thereof stand incorporated in the agreement. Clause 5(f) of the said agreement reads as under :

5. Validity

....

f) These terms and conditions are subject to the Indian Telegraph Act of 1885, the rules and regulations framed thereunder and any statutory modifications or re-enactment for the time being in force and any Government regulations issued from time to time.

5. Section 7B of the Act reads as under:

7-B. Arbitration of disputes.

(1) Except as otherwise expressly provided in this Act, if any dispute concerning any telegraph line, appliance or apparatus arises between the telegraph authority and the person for whose benefit the line, appliance or apparatus is, or has been, provided, the dispute shall be determined by arbitration and shall, for the purposes of such determination, be referred to an arbitrator appointed by the Central Government either specially for the determination of that dispute or generally for the determination of disputes under this section.

(2) The award of the arbitrator appointed under Sub-section (1) shall be conclusive between the parties to the dispute and shall not be questioned in any Court.

6. It was submitted that Section 7-B barred the jurisdiction of the Civil Court and that the disputes in the suit can only be determined by arbitration in accordance with the provisions in that section.

7. It is not necessary for me to decide whether Section 7-B bars the jurisdiction of Civil Courts for even assuming that it does, it would not make a difference as I am of the view that the section does not apply in this case.

8. It is obvious that only those terms of the said Act and the rules and regulations framed thereunder which are consistent with the agreement can be deemed to have been incorporated therein. An agreement between private parties cannot confer on either of them statutory powers by incorporation of the provisions of a statute.

9. Even assuming that Section 7-B is read into the agreement, it would make no difference. Section 7-B contemplates an arbitration only in respect of disputes arising between the telegraph authority and the person for whose benefit the line has been provided. In other words Section 7-B is restricted to disputes between the persons for whose benefit the line has been provided and the telegraph authority.

10. I will presume that the defendant is, under the said Act, a person for whose benefit the line has been provided. I will also proceed on the basis that the

plaintiff is a licensee under the said Act. Section 7-B however does not include within its ambit licensees under the said Act.

11. It was however submitted on behalf of the defendant that the plaintiff is the telegraph authority under the said Act. In support of this contention, the learned Counsel appearing on behalf of the defendant relied upon Sections 3(6) and 4 of The Indian Telegraph Act, 1885 which read as under:

3. Definitions.

In this Act, unless there is something repugnant in the subject or context,

(6) "telegraph authority" means the Director General of [Posts and Telegraphs], and includes any officer empowered by him to perform all or any of the functions of the telegraph authority under this Act;

4. Exclusive privilege in respect of telegraphs, and power to grant licences.

[(1)] Within [India], the Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs:

Provided that the Central Government may grant a license, on such conditions 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):

[Provided further that the Central Government may, by rules made under this Act and published in the Official Gazette, permit, subject to such restrictions and conditions as it thinks fit, the establishment, maintenance and working

(a) of wireless telegraphs on ships within Indian territorial waters [and on aircrafts within or above [India], or Indian territorial waters), and

(b) of telegraphs other than wireless telegraphs within any part of [India]].

[Explanation.-- The payments made for the grant of a licence under this Sub-section shall include such sum attributable to the Universal Service Obligation as may be determined by the Central Government after considering the recommendation made in this behalf by the Telecom Regulatory Authority of India established under Sub-section (1) of Section 3 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997).]

[(2) The Central Government may, by notification in the Official Gazette, delegate to the telegraph authority all or any of its powers under the first proviso to Sub-section (1).

The exercise by the telegraph authority of any power so delegated shall be subject to such restrictions and conditions as the Central Government may, by the notification, think fit to impose.]

12. It was submitted that the telegraph authority u/s 3(6) includes any person who is granted a license u/s 4(1) of the Act. The submission is not well founded.

I am unable to agree that from Section 3(6) it follows that a licensee under the Act and/or its employees can be said to be the telegraph authority under the said Act. If indeed that was so, every licensee u/s 4 would be a telegraph authority under the Act.

13. It is important to note that Section 3(6) does not provide that the telegraph authority includes anyone other than the Director General of Posts and Telegraphs and officers empowered by him to perform any of the functions of the telegraph authority under the Act. Admittedly, the plaintiff is not an officer empowered by the Director General of Posts and Telegraph to perform any act or any of the functions of the telegraph authority under the Act.

14. Indeed, if the submission on behalf of the defendant were to be accepted, considering the powers conferred upon the telegraph authority under the Act, it would entitle every licensee to interfere with the functioning of every other licensee as well as that of the statutory authorities under the Act.

15. Section 10 relied upon by the defendant reads as under:

10. Power for telegraph authority to place and maintain telegraph lines and posts.

The telegraph authority may, from time to time, place and maintain a telegraph line under, over, along or across, and posts in or upon, any immovable property:

Provided that

(a) the telegraph authority shall not exercise the powers conferred by this section except for the purposes of a telegraph established or maintained by the [Central Government], or to be so established or maintained;

(b) the [Central Government] shall not acquire any right other than that of user only in the property under, over, along, across, in or upon which the telegraph authority places any telegraph line or post; and

(c) except as hereinafter provided, the telegraph authority shall not exercise those powers in respect of any property vested in or under the control or management of any local authority, without the permission of that authority; and

(d) in the exercise of the powers conferred by this section, the telegraph authority shall do as little damage as possible, and, when it has exercised those powers in respect of any property other than that referred to in Clause (c); shall pay full compensation to all persons interested for any damage sustained by them by reason of the exercise of those powers.

16. Section 10 militates against the defendant's submission. If the defendant's contention is accepted, it would entitle every licensee to place and maintain a telegraph line under, over, along or across and post, in or upon any immovable property for the purposes of a telegraph established or maintained by the Central Government or to be so established or maintained. These functions are not the concern of a licensee u/s 4. A licensee u/s 4 cannot possibly be entitled to or

even concerned with the maintenance of a telegraph established or maintained by the Central Government. There is nothing on the record in the present case whereby any such powers have been conferred upon the plaintiff by any authority. Nor is there anything that indicates the plaintiff having been appointed or constituted a telegraph authority. This is of course assuming that the conferment of such power or such appointment is permissible under the Act.

17. Section 11 of the said Act which was also relied upon on behalf of the defendant, reads as under:

11. Power to enter on property in order to repair or remove telegraph lines or posts.

The telegraph authority may, at any time, for the purpose of examining, repairing, altering or removing any telegraph line or post, enter on the property under, over, along, across, in or upon which the line or post has been placed.

18. If the defendant's submissions were to be accepted, it would entitle a licensee to exercise powers u/s 11 by entering on the property under, over, along, across, in or upon which the line or post has been placed for the purpose of examining any telegraph line. This is no concern of the licensee appointed u/s 4. This is purely the duty of the telegraph authority viz. The Director General of Posts and Telegraphs or any officer empowered by him to perform all or any of the functions of the telegraph authority. Examining, altering, repairing or removing any telegraph line or post maintained by the Government or the licensees, is not the concern of any of the other licensees appointed u/s 4.

19. In the circumstances, there is no defence to the claim in the suit.

20. The summons for judgment is therefore made absolute and the suit is decreed as prayed.

Refund, if any, as per rules.