REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.1563 OF 2007

CELLULAR OPERATORS ASSOCIATION OF INDIA & ORS. … **APPELLANTS**

VERSUS

TELECOM REGULATORY AUTHORITY OF INDIA & ORS. … **RESPONDENTS**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

This appeal has been preferred by the appellants against the order dated 22nd December, 2006 passed by the Telecom Disputes Settlement & Appellate Tribunal, New Delhi (hereinafter referred to as the 'Tribunal') in Appeal No.2 of 2006 (with M.A. No.58 of 2006). By the impugned order, the Tribunal while dismissing the appeal disposed of the M.A.No.58 of 2006 with certain observations.

2. The factual matrix of the case is as follows:

Appellant Nos.2 to 10 are private GSM cellular operators and the first appellant is their Association. They have been issued licences by the Central Government, Department of Telecommunication (hereinafter referred to as 'DoT') under Section 4 of Indian Telegraph Act, 1885 to establish, maintain and operate cellular mobile telephone services/unified access services in their respective service areas. The first respondent is Regulatory

Authority established under Section 3 of the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as 'TRAI Act').

3. The first respondent-Authority issued a directive dated 27th February, 2006 wherein appellants - private mobile service providers in the four States of Maharashtra, West Bengal, Tamil Nadu and Uttar Pradesh were directed to discontinue differential tariffs levied in the aforesaid four States for calls terminating in the network of Bharat Sanchar Nigam Limited (hereinafter referred to as 'BSNL')/Mahanagar Telephone Nigam Limited (hereinafter referred to as 'MTNL') as compared to calls terminating in the network of other private operators in another citing it to be discriminatory and inconsistent with the amended licence condition notified by the DoT on 20th May, 2005. The appellants complied with the directive dated 27th February, 2006 and submitted compliance report to the Authority.

4. Subsequently, by its directive dated 22nd March, 2007, the first respondent-Authority, inter alia, directed the appellants-service providers to assess the total excess amount charged from the subscribers; keep the entire amount in a separate Bank Account and intimate the Authority the names of the Banks in which such amount has been kept. After receipt of such notice dated 22nd March, 2007 the appellants preferred an appeal under Section 14 read with Section 14A of the TRAI Act challenging the direction dated 27th February, 2006. The challenge was made on the ground that the direction was discriminatory and inconsistent with the amended licence conditions notified by the DoT on 20th May, 2005. The main plea raised by the appellants justifying the differential half of calls from private operator to another private operator vis-à-vis

calls from private operator to BSNL network was that direct connectivity could be achieved between networks of private operators but it could not be achieved between private operators and BSNL network.

5. Initially, BSNL/MTNL was not party to the said appeal. The Tribunal having noticed that the appeal pertains to the differential tariff of calls from private operator to another private operator vis-à-vis calls made from private operator to BSNL/MTNL network directed the appellants to implead the BSNL/MTNL as respondent. After hearing the parties, the Tribunal passed the impugned order dated 22nd December, 2006 dismissing the appeal and disposing of the M.A.No. 58 of 2006 with the observations and directions as quoted above.

6. In appreciation of the case, it is relevant to notice the following facts:

For grant of licences, India was divided into four metro service areas of Delhi, Mumbai, Kolkata and Chennai and various telecom circles which were roughly contiguous to the State of India. In the first phase, licences were granted for the four metro service areas in 1994 and thereafter in the Circles/States in 1995 defining the geographical limits within which the licensee may operate and offer the services. For Mumbai, Chennai, Kolkata and Delhi, in the aforesaid manner, separate licences were issued by the DoT. Separate and distinct licences were issued for the States of Maharashtra, Tamil Nadu and West Bengal excluding the three metropolitan cities of Mumbai, Chennai and Kolkata respectively for which licences were given to MTNL. As far as State of Uttar Pradesh is concerned, it was

divided into two Telecom circles, i.e., U.P. (East) and U.P.(West) with separate licences for U.P.(East) and U.P.(West).

7. The first respondent-Authority has laid down Inter Connection Usage Charges (hereinafter referred to as 'IUC') with respect to the changing for the use of network elements of other operators which include termination charges, carriage charges and access deficit charge for use of network elements of other operators. These charges for inter-circle calls are different from those for intra-circle calls. On 20th May, 2005, the Government of India notified that inter-service area connectivity between access providers within Mumbai Metro and Maharasthra Telecom Circle, Chennai Metro and Tamil Nadu Telecom Circle, Kolkata Metro and West Bengal Telecom Circle and U.P.(East) and U.P.(West) Telecom Circle service areas respectively, is permitted subject to condition that the access provider will operate within the existing licensed service area and shall not be permitted to create infrastructure outside their licensed service area for the purpose of inter-service area connectivity. It was further provided that the access provider may take leased lines for such connectivity. With the above arrangement, calls within a State in the above mentioned four states would be treated as intra-service area calls for the purposes of routing as well as ADC.

8. The final result of the above said notification was that the metros were merged with the respective State circles and the calls from metros to the remaining areas of the respective States and in case of U.P.(East) and U.P.(West) circles from one to the other, were to be treated as intra-circle calls.

9. The appellants were charging higher tariff for calls made from appellant's network in the metros to the BSNL and MTNL networks in the remaining areas of the State compared to calls made from appellant's network in the metros to another appellant's network in the remaining areas of the State. For example, a subscriber on a private operator's network calling from Mumbai to another private operator's subscriber at Nasik was being charged at low rate as compared to a call made by the same subscriber from the same place to BSNL subscriber at the other place. In this background, the first respondent by Circular dated 27th February, 2006 observed that this differential tariff was discriminatory and inconsistent with the amended licence condition notified by the DoT on 20th May, 2005 and, therefore, directed the appellants to immediately discontinue such differential tariff and asked for compliance of the same within 15 days.

10. As noticed above, the first respondent-authority vide Circular dated No.101-15/2005-MN dated 27th February, 2006 observed that differential tariff was discriminatory and inconsistent with the amended licence conditions notified by the DoT on 20th May, 2005 and, therefore, directed the appellants to immediately discontinue such differential tariff and ask for compliance within 15 days.

11. The aforesaid direction was challenged by the appellants before the Tribunal with a prayer to set aside the directions issued by the Circular No.101-15/2005-MN dated 27th February, 2006. The appellants also sought for an interim relief granting ex-parte stay of operation of the said circular.

12. The Tribunal having not granted any interim relief, the appellants moved before the High Court in a Writ Petition, being

W.P.(C) No.5428 of 2006. The High Court observed that no punitive or coercive action shall be taken by the first respondent Authority at least till the next date of hearing before the Tribunal and disposed of the writ petition. The Tribunal by the impugned order dated 22nd December, 2006 held as follows:

> *"**26.** Having gone through the documents produced by both the parties and having heard arguments we are of the view that the appellants did not make adequate effort to provide direct connectivity between the appellants' MSCs and the BSNL/MTNL's MSCs which would have brought tariffs at part for calls made within the appellants' network. We are also left with the impression that DoT and BSNL could have taken a more pro-active approach to ensure that the requisite leased lines and Ps of I were made available for establishing direct connectivity in a time bound manner which would have helped achieving the transition sought to be brought about by the DoT notification of 20-5-2005 in a more smooth manner. Be that as it may, we do not agree with the argument put forth by the appellants about the protection to them for charging higher tariff under the clause of forbearance. The clause of non-discrimination is very clear and self-explanatory which has been defied by the appellants. We do not find any merit in the appeal and the same is dismissed. M.A. No. 58 of 2006 also stands disposed."*

13. Learned counsel appearing on behalf of the appellants submitted that the differential tariffs are because of the difference in the cost elements involved in the two natures of calls. Insofar as calls terminating in the network of BSNL/MTNL are concerned, as direct connectivity had not been established between the appellant's network and BSNL/MTNL network, the appellants were obliged to pay carriage charges to BSNL and MTNL (respondent nos. 2 and 3) for calls terminating on their networks. But in case of a call terminating in the network of the private operator these charges were not applicable as direct connectivity had been

established between the private operators. Therefore, the cost elements involved in the two calls were different leading to a difference in tariffs charged by the service provider for such calls from its subscribers. The above position is explained with the help of a Diagram to show that in the case of a call from a metro like Mumbai to another place like Pune, the call between two subscribes of private networks is connected directly, which in the case of a call to BSNL subscriber is treated as a STD call as it is first connected to Nagpur and then to Pune, which is the routing plan for STD calls. According to appellants, in STD arrangement, BSNL as the National Long Distance Operator was able to recover carriage charges which were as high as Rs.1.10 per minute, which charges would no longer be payable once direct connectivity was established.

14. Thus the reason for the differential tariffs as per the appellant was that the call between subscribers of private operators was routed directly and costed as a local call while the call to a BSNL/MTNL subscriber was routed through another place and costed as an STD call.

15. It was further contended that the aforesaid position had continued right from July, 2005 in the knowledge of the first respondent and now in sudden turn around, the first respondent chose to disregard the compulsions under which the private operators were constrained to offer differential tariffs and directed the private operators to discontinue the differential tariff. Its net effect was to force the operators to increase their tariffs for calls terminating on the network of other private operator or alternatively reduce the tariff for calls to BSNL/MTNL subscribers and pay the difference from their own pocket. Either of these

alternatives would be against the fundamental duties and responsibilities of the first respondent under the Act and the impugned action was not only against the public interest but would also have put the private operators in a highly disadvantageous position.

16. Learned counsel for the appellant further submitted that the Tribunal erred in law in not appreciating that simply prescribing differential tariff does not violate the mandate of Article 14 of the Constitution or result in discrimination; the same class has to be determined in accordance with the similarity of features of its constituents. According to the appellants, the costs involved in the nature of the two calls are different and, therefore, though the subscribers belong to the appellants, they form a distinct class when they make a call to the BSNL Cell one number. It is also submitted that the Tribunal failed to notice that the DoT decision of 20th May, 2005 explicitly stated that the tariffs which were under forbearance would continue to be regulated by market forces.

17. Learned counsel appearing on behalf of first respondent submitted that it was the duty of the appellants to arrange the leased lines for establishing direct connectivity with the BSNL network as they had done to connect each other's network. The appellants no where pleaded that the second respondent denied the provision of Points of Interconnect (hereinafter referred to as 'Ps of I') and the only pleading was with respect to non-grant of leased lines by BSNL. In fact, the appellants never approached the BSNL for provision of Ps of I.

18. It was brought to the notice of the Court that immediately on issue of letter by the DoT when the metro circles were merged with

the respective state circles, BSNL had issued a Circular on 24th May, 2005 asking the appellants to sign addenda to the existing interconnect agreements for provision of Ps of I. However, no effort was made by the appellants to this effect. In another case before the Tribunal, respondent No.2 had stated on affidavit that wherever the payments have been made, the Ps of I were being provided within 90 days. In these four service areas, no demand was ever placed on BSNL.

19. Similar was the stand taken by the appellants and respondents before the Tribunal. The Tribunal observed that some demands for Ps of I/E-1 connectivity were placed by the appellants on BSNL but as late as in December 2005, January 2006 and February 2006. The Tribunal held that there was no reason that in case infrastructure for direct connectivity could be created for connecting amongst themselves the networks of the appellants, the same could not be done for connecting the MSCs of appellants' networks to those of BSNL/MTNL networks in the four service areas in question.

The Tribunal rightly held that the appellant could have made use of the similar leased lines as they had between their networks and asked for Ps of I from the BSNL for the MSCs located in these four service areas which was not done. No effort was made by the appellants to create this direct connectivity and they took recourse to the easier way of handing the traffic to the BSNL as National Long Distance Operator and continued charging the consumers higher tariffs.

20. The respondent has prescribed the tariffs for various calls/telecom services under the Telecommunication Tariff Order 1999 as amended from time to time. As a general condition clause 6 of the

Tariff Order prescribes that no service provider shall, in any manner, discriminate between subscribers of the same class and such classification shall not be arbitrary. Further, clause 2(k) of the Tariff Order defines "Non-discrimination" to mean that service provider shall not, in the matter of application of tariffs, discriminate between subscribes of the same class and such classification of subscribes shall not be arbitrary. Clause 2(k) and Clause 6 of the Tariff Order are reproduced herein under:

> **"2(k)** Non-discrimination means that service provider shall not in the matter of application of tariffs, discriminate between subscribers of the same class and such classification of subscribers shall not be arbitrary.
>
> **Clause 6. <u>Non-discrimination:</u>** No service provider shall, in any manner, discriminate between subscribers of the same class and such classification shall not be arbitrary."

In terms of the above Tariff Order, the first respondent in September 2002, introduced forbearance in prescribing tariffs as far as Cellular calls are concerned and in taking this decision the first respondent took note of the emerging market scenario and came to the conclusion that a stage had been reached, when market forces could effectively regulate the cellular tariff.

21. The question whether the non-discrimination clause is applicable to the class of subscribers making call to another private network from a private network as compared to the class making call from a private network to BSNL/MTNL network was raised by both the parties. The appellants' contention was that they were two different classes since the routing of the call was different and BSNL was charging higher amount for the latter category of

calls. In reply to the same, it has been rightly contended on behalf of the respondents that the same subscriber or two subscribers from the same house making calls from the same network to another private network or to BSNL network located at the same destination form the same class. The interpretation of the respondents being more logical was also accepted by the Tribunal. For the said reason the Tribunal rightly held that the action of appellants amount to discrimination between the same class of subscribers which is against the basic definition laid down in Clause 2(k) of the Tariff Order.

22. On 20th May, 2005, the Government of India announced that inter service area connectivity between Access Providers within four States – Mumbai Metro & Maharashtra Telecom Circle, Chennai Metro & Tamil Nadu Telecom Circle, Kolkata Metro & West Bengal Telecom Circle and U.P. (East) & U.P.(West) Telecom Circle Service areas is permitted subject to the condition that the Access provider will operate within their existing licensed service area and shall not be permitted to create infrastructure outside their licensed service area for the purpose of inter-service area connectivity. The access providers may take lease lines for such connectivity. This inter-service area connectivity shall be only for terminating traffic. Relevant extracts from Clause 5.2 and 6.0 of the Circular dated 24th May, 2005 are reproduced hereunder:

> *"**5.2.** The traffic organized by mobile subscribers belonging to one service area but located in another service area within same state shall be treated as home network traffic instead of national roaming traffic. This principle shall be applicable for both charging at POI as well as traffic certificates for ADC billing. Further, since the traffic between two service areas within same state shall be treated as intra-service area traffic, therefore, such traffic shall not be handed over by NLDOs to BSNL.*

> ***6.0.*** *The access service providers of these four states shall be permitted to seek POIs with BSNL switches in the complete state irrespective of their service areas in which they can provide their services. Concerned access provider shall have to sign separate Addenda to existing Interconnect Agreements with BSNL for establishing these new POIs with BSNL. Till the time these Addendas are signed and new POIs established the existing arrangements shall continue including handover of such calls to BSNL through NLDOs treating the traffic as inter circle and charging IUC accordingly. All the traffic within a state (in these four States only and in case of State of UP it also includes State of Uttaranchal) shall be treated as intra circle traffic and IUC charged accordingly at POI (except the traffic handed over at POIs of NLDOs) as well as for the purpose of traffic certificates for ADC billing. These new POIs, as above, shall be commissioned after concerned access providers sign these Addendas to their existing Interconnect Agreement with BSNL. These instructions are to be implemented w.e.f. 0000 hours of 25th May, 2005."*

The net effect of the aforesaid Circular was that the appellants were to sign the Addenda agreements with BSNL and then apply for new Ps of I and till such time that the new Ps of I are established the existing arrangements were to continue.

23. We have noticed that the appellants took advantage of the aforesaid provision. But they did not apply before the BSNL/MTNL to apply new Ps of I and treating the tariff as inter service charges differently from same sets of consumers. The access providers have option to continue with the existing inter-connected routing of the class of service areas but that cannot be a ground to discriminate, in any manner, between the subscribers of the same class. The Tribunal rightly held that the appellants - service providers discriminated between subscribers of the same class; one on the ground that the call ends with the private parties and another on

the ground that the call ends with BSNL/MTNL. The classification of the subscribers into two categories on the basis of calls made by them from private network to another private network and from private network to BSNL/MTNL network is arbitrary as it fails to satisfy the twin test for reasonable classification laid down by this Court in State of West Bengal v. Anwar Ali Sarkar & Anr. AIR 1952 SC 75. Therefore, the Tribunal rightly dismissed the appeal.

24. We find no merit in this appeal, it is accordingly dismissed. No costs.

……J.
(SUDHANSU JYOTI MUKHOPADHAYA)

……J.
(PRAFULLA C. PANT)

NEW DELHI;
JANUARY 30, 2015.