SUPREME COURT OF INDIA

Bharti Cellular Ltd.

Vs.

Union of India

C.A.No.7026 of 2003

(Markandey Katju and T.S.Thakur JJ.)

05.10.2010

JUDGEMENT

T.S.Thakur, J.

1. This appeal under Section 18 of the Telecom Regulatory Authority of India Act, 1997 is directed against an order dated 23rd May, 2003 passed by the Telecom Disputes Settlement Appellate Tribunal, New Delhi, whereby the Tribunal has dismissed in part the petition filed by the appellant under Section 14 (a)(I) of the Act and upheld the computation of licence fee demanded and realized by the respondent-Union of India in terms of the Licence Agreement executed between the parties.

2. The appellant-company holds a licence to provide cellular mobile telephone services for Delhi Metro area. The Licence Agreement executed between the appellant on the one hand and the Government of India on the other, inter alia, provided for payment of fixed amount towards licence fee for the first three years of the licence period. From the fourth year onwards the licence fee payable was to be on the basis of number of subscribers of the service provider subject to the minimum stipulated in the agreement. Clause 19 of the Licence Agreement in particular dealt with this aspect and, inter alia, provided that for the first three years a lump sum licence fee shall be chargeable annually and that the year shall be reckoned as the period of twelve months beginning with the date of commissioning of the services or completion of twelve months from the date of the signing of the licence whichever is earlier.

3. The appellant's case before the Tribunal was that although it had a provisional operational clearance from the respondent effective from 29th August, 1995 and an interface/service approval from 26th September, 1995, it could commence commercial services only from 15th November, 1995 meaning thereby the Licence Agreement should be deemed to have become operative only from 15th November, 1995. The respondents, however, treated 26th September 1995 i.e. the date when the interface/service clearance was given as the date of commencement of the Licence Agreement and computed the licence fee dues, interest, penal

interest, liquidated damages etc. with reference to the said date. The appellant also questioned the method of computing the number of subscribers for determining the licence fee payable from the fourth year onwards contending that the term "subscribers" should be understood to be such as have activated cellular mobile telephone connection from the appellant and as are currently activated and used by a person for which bills are issued by the appellant. A few other disputes were also raised by the appellant in the petition filed on its behalf. One of them related to the alleged illegality and arbitrary computation of the advance payment stipulated for the entire quarter as due in the month of June itself and calculation of the interest and penal interest on the overdue amount. One other grievance of the appellant was regarding the Unit Call Rate for the purpose of calculation of the licence fee. It was contended by the appellant that in terms of the Licence Agreement the rate of Rs.5 lakhs per 100 subscribers was based on the Unit Call Rate of Rs.1.10. This rate was revised by the respondent to Rs.6.023 lakhs per 100 subscribers or part thereof on 30th July 1998 based on the Unit Call Rate of Rs.1.40 prevalent at that time. Unit Call Rate was then reduced to Rs.1.20 from 1st May, 1999. The appellant, therefore, claimed that the calculation of the licence fee payable for the period from 1st May, 1999 to 31st July, 1999 should be on the basis of the then Unit Call Rate prevalent, namely, Rs.1.20 only.

4. The respondent contested the petition on several grounds giving rise to the following four issues which the Tribunal framed for determination: (i) Whether the methodology adopted by the Respondent for arriving at the number of subscribers from the 4th year of the Licence Agreement was in order? (ii) Whether the Respondent could charge interest on the licence fee payable by the Petitioner as demanded by the Respondent in letters dated 10th August 1999 and 6th March 2000? (iii) Whether the Petitioner is entitled to the benefit of reduction in the unit call rate with effect from 1st May 1999 for calculating the per subscriber licence fee? (iv) Whether the respondent can levy penal interest on the licence fee from 1st February 2000 till the actual date of payment?

5. In so far as issue No.(i) above is concerned, the Tribunal took the view that the respondents had clarified to the appellant and other cellular operators that the basis for calculating the number of subscribers for determining the licence fee shall be the total figure of IMSI in the Home Location Register. The Tribunal found that the representation made on the subject by the petitioner- appellant on 1st April, 1999 was rejected by the respondent on 23rd April, 1999 and the appellant offered a Migration Package on 22nd July, 1999 which, inter alia, contained a clause that no dispute relating to the Licence Agreement for the period upto 31st July 1999 shall be raised at any future date. The appellant gave its unconditional acceptance to the entire Migration package on 27th July, 1999. Having done so, the appellant was not entitled to raise any issue that related to the pre-migration period.

6. There is, in our opinion, no legal infirmity in the view taken by the Tribunal. Once the petitioner-appellant had specifically and unconditionally agreed to accept the Migration Package and given up all disputes relating to Licence Agreement for the period upto 31st July 1999, it was not open to it to turn around and agitate any such dispute after availing of the Migration Package. A party who has unconditionally accepted the package cannot after

such acceptance reject the conditions subject to which the benefits were extended to him under the package. It cannot reject what is inconvenient and onerous while accepting what is beneficial to its interests. The package having been offered subject to the conditions that all disputes relating to the Licence Agreement for the period ending 31st July 1999 shall stand abandoned by the operators there was no room going back on that representation.

7. Relying upon the decision of this Court in *City Montessori School v. State of Uttar Pradesh and Ors.*[1], *New Bihar Biri Leaves Co. v. State of Bihar*[2] *and R.N. Goswain v. Yashpal Dhir*[3] this Court has in Civil Appeal No. 7236 of 2003 - Shyam Telelink now Sistema Shyam Teleservices Ltd. v. Union of India held that no one can approbate and reprobate and anyone who has accepted with full knowledge or notice of facts, benefits under a transaction which he might have rejected or contested, cannot question the transaction or take up an inconsistent position qua the same. We have said:

> "The maxim qui approbat non reprobat (one who approbates cannot reprobate) is firmly embodied in English Common Law and often applied by Courts in this country. It is akin to the doctrine of benefits and burdens which at its most basic level provides that a person taking advantage under an instrument which both grants a benefit and imposes a burden cannot take the former without complying with the latter. A person cannot approbate and reprobate or accept and reject the same instrument."

8. In the light of the above, the view taken by the Tribunal is legally unexceptionable.

9. That brings us to the second issue formulated by the Tribunal for determination. The Tribunal has answered this issue in favour of the appellant holding that while respondent was entitled to recover licence fee together with interest from the earlier unpaid amounts upto and for the month of July 1999, it was not entitled to recover both advance quarterly licence fee for July-September 1999 and revenue-sharing fees for August 1999 and September 1999 in terms of the Migration Package. This part of the order of the Tribunal has not been assailed before us by the appellant obviously because the view taken by the Tribunal has gone in its favour and the matter remitted back for re- working the dues along with interest by the end of July 1999, keeping in view the observations made by the Tribunal in para 23 of its order. It is noteworthy that the Government has also not assailed the said part of the order.

10. The third issue which had been taken up by the Tribunal for consideration related to the Unit Call Rate and the effect of any revision in such rates. Condition 19.1(f) which is relevant in this context reads: "19.1(f): The rate of Rs.five lakhs per hundred subscribers or part thereof is based on the unit call rate of Rs.1.10. Fourth year onwards, as defined in clause 19.1(d), the rate of Rs.five lakhs will be revised based on the unit call rate. The revision will be limited to 75% of the overall increase in the unit rate during the period preceding such revisions."

11. Relying on the above provisions Tribunal held that even though there is no specific exclusion of downward revision in the clause extracted above, the limiting of the revision is confined to increase only. The expression "revision will be limited to 75% of the overall increase in the unit rate" appearing in clause 19.1(f) (supra) is indicative of the fact that revision was envisaged only in the case of increase in Unit Call Rate and not in the case of fluctuation resulting in a decrease in the said rate. That apart, the Tribunal has rightly held that the petitioner-appellant had not led any evidence before it and that the question regarding Unit Call Rate was raised by it at any stage either before or after the licence was issued for the year 1994 and that the issue relating to the Licence Agreement could not be agitated being a pre- migration package.

12. That leaves us with issue no.4 formulated by the Tribunal relating to the levy of interest on the licence fee from 1st January 2000 till actual date of payment. The Tribunal has taken the view, and in our opinion rightly so, that the respondents were entitled to recover not only the outstanding licence dues but also interest due on the same for the period of default. The Tribunal has rightly held that to the extent condition stipulated a deadline i.e. 31st January, 2000 it was open to the respondent to charge simple interest on the overdue amount for keeping the licence valid instead of terminating the same on the ground of default.

13. In the totality of the above circumstances, we see no reason to interfere with the order passed by the Tribunal nor do we see any legal flaw in the directions issued by the Tribunal for re-working the dues along with interest keeping in view the observations made in the order under appeal.

14. There is no merit in this appeal which is hereby dismissed but without any order as to costs.

[1]*2009 (14) SCC 253*
[2]*1981 (1) SCC 537*
[3]*AIR 1993 SC 352*