

Cellular Operators Association Vs. Department of

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Court : SEBI Securities and Exchange Board of India or Securities Appellate Tribunal SAT

Decided On : Mar-29-2004

Judge : D Wadhwa

Appellant : Cellular Operators Association

Respondent : Department of

Judgement :

1. In this petition filed under Section 14(a) of the Telecom Regulatory Authority of India Act, 1997 (for short TRAI Act), first petitioner is the Association of Mobile Service Providers (CMSPs) and petitioners 2 to 15 are its members. There are four respondents. First respondent is the Department of Telecommunications in the Ministry of Communications, Government of India. Second and third respondents BSNL (Bharat Sanchar Nigam Ltd.) and MTNL (Mahanagar Telephone Nigam Ltd.) are Fixed Service Providers and the 4th respondent is TRAI, the Telecom Regulatory Authority of India constituted under Section 3 of the TRAI Act.

Functions of the TRAI are prescribed under Section 11 of the TRAI Act.

Two of its functions are (i) to fix the terms and conditions of interconnectivity between the service providers and (ii) to regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication service. Access to the networks of other service providers is critical to a cellular

service provider's ability to enable its subscribers to make calls to all fixed line and cellular subscribers across the country.

2. The issue involved in the present petition is quite simple.

Petitioners say that in the exercise of its function TRAI issued the Interconnection Determination dated 8.1.2001 determining, inter alia, the retention of 5% of the passed through revenue by the cellular operators i.e. the petitioners but they say that the BSNL and MTNL, respondents 2 and 3 respectively have not paid this amount to the petitioners for the period from 8.1.2001 to 31.1.2002. Petitioners say that instead of 8.1.2001 they are agreeable that date could be 25.1.2001. In the bills raised by BSNL and MTNL though full amount was paid by the petitioners for passed through traffic from the networks of BSNL and MTNL but credit was not given to the petitioners of this 5% revenue.

3. The word 'determination' is not to be found in the TRAI Act. Under Section 14(b) of the TRAI Act this Tribunal is to hear and dispose of appeal against any direction, decision or order of the TRAI under that Act. But it is not disputed before me that this 'determination by TRAI' which is subject matter of this petition is, in fact a 'decision' of the TRAI and its binding nature. BSNL and MTNL on the other hand say that 'Determination' dated 8.1.2001 of TRAI consisted of a package of six issues and the petitioners, therefore, could not seek partial implementation of that portion of the Determination which favours them.

They, however, did not point out which of the other issues were in favour of either BSNL or MTNL or how the claim of the petitioners was dependent on any of those issues. They also contend that petitioners had earlier filed an appeal before this Tribunal, it being Appeal No.2/2001, against the same very Determination dated 8.1.2001 of the TRAI which was ultimately dismissed as withdrawn on 13.8.2001. Further contention of these respondents is that TRAI notified on 14.12.2001 the Telecommunication Interconnection (Charges and Revenue Sharing) Regulation, 2001 (for short Interconnection Regulation) and under this the date of implementation of 5% revenue was "by 31st January, 2002" which the respondents have complied. Under this Interconnection Regulation payment to basic service providers i.e. BSNL and MTNL is @ Rs.1.14 per metered call unit

against Rs.1.20 by CMSPs. The amount of Re.0.06 is to be retained by CMSPs to cover their cost of billing, collection and bad debts. Rs.1.14 per metered call unit against Rs.1.20 i.e. Re.0.06 per metered call comes to 5% and this amount was to be retained by CMSPs. Petitioners have prayed: "It is therefore, most respectfully prayed that this Hon'ble Tribunal may be pleased to:- (a) Direct the Respondents to implement the TRAI Determination dated 08.01.2001 allowing CMSPs to retain 5% of their pass through revenue paid to the Fixed Operators for calls made by Cellular Subscribers with effect from 08.01.2001.

(b) Direct the Fixed Service Operators to refund/adjust all the excess amounts received by them from the Cellular Operators towards the said 5% of CMSPs pass through revenues with effect from 08.01.2001 upto 31.1.2002 together with interest thereon computed at prime lending rate of State Bank of India from the date of over payment in each bill by the CMSPs to the FSPs until the actual date of refund/adjustment." 3. Petitioner and others had filed an appeal (appeal No.2/2001) in this Tribunal on 9.3.2001 seeking to set aside the TRAI's Determination dated 8.1.2001 and the letter dated 12.2.2001 written by BSNL to all its Chief General Managers. Though BSNL and Association of Basic Telecom Operators were respectively respondents 2 and 3 in the appeal, the main prayer was against TRAI. The subject of the letter dated 12.2.2001 of BSNL was "connectivity at the point of interconnection between cellular networks and BSNL/MTNL fixed networks". When this appeal came up for admission on 15.3.2001 before this Tribunal there was an application by the petitioner for interim relief "on the apprehension that the letter dated 2nd March, 2001 sent to all Chief General Managers, Telecom Circles/Districts by Assistant Director General (Tech) will not be implemented". This was a letter written by BSNL to all its field units asking them to comply with the directions contained in the letter dated 28.2.2001 of TRAI*. On this Mr. C.S.Vaidyanathan, learned Senior Advocate on behalf of the BSNL assured the Tribunal that letter had been put into effect or if not, will be put into effect without any loss of time. He also assured that although the letter dated 2.3.2001 will be implemented, no additional points of interconnection will be given as mentioned in the letter till the appeal was heard. On this Tribunal disposed of the application for interim relief. On the next date it was pointed out by the learned counsel for the petitioners that in spite of order dated 15.3.2001 the reactivation of

Dehra Dun, Bareilly, Saharanpur and Muzzafarnagar had not taken place. On this Mr.Vaidyanathan stated that if these points were disconnected, those will be reactivated, if not already reactivated. The Tribunal clarified that all points ofE-mail:traï@del2.vsnl.net.in Fax:91-11-3738708 No.101-1/97-Tech Vol.V Dated the 28th February 2001 It has come to the notice of the TRAI that some POIs are being altered/disconnected by BSNL unilaterally without any explanations and/or notice to the concerned Cellular Mobile Service Providers.

Presumably, the action results from a particular interpretation given by BSNL to the Authority's determination on inter-connection dated the 8th January 2001 interconnection which were disconnected on or after 8.1.2001 will be restored. There is no further interim order and ultimately the appeal was allowed to be withdrawn. The Tribunal while dismissing the appeal also imposed cost of Rs.20,000/- on the petitioners but that was not on account of any wrong filing of the appeal, but on account of the fact that person verifying the affidavit in support of appeal had stated that petitioner was not invited by TRAI on its meetings on two dates, when in fact, he had been so invited and has also participated. The deponent, in fact, admitted the mistake and said that the mistake was due to inadvertence and he expressed his regrets.

It is not necessary for me to refer to the grounds in the appeal (2 of 2001) on the basis of which petitioners sought quashing of TRAI's Determination dated 8.1.2001 but basically Determination concerned with the number of points of interconnection. After the amendment to the TRAI Act, the appellant in the appeal said that they had been requesting the TRAI to set out the regulatory principles/framework for interconnection so that the Interconnection Agreement could be finalized. Instead of exercising its powers under the TRAI Act, TRAI The Authority would like to advise in this regard that the basis of all inter-connection arrangements has to be mutual agreement between the parties concerned and a determination by the regulator is necessitated only when the two parties fail to arrive at such a mutual agreement. In the present instance also TRAI was required to intervene when the two extreme positions of the basic service operators on the one hand and the cellular mobile service operators on the other could not be reconciled by them mutually. A determination, therefore, had to be issued by the

TRAI to meet reasonably the cellular mobile service operators' request for liberalizing the existing interconnection regime and making it more equitably by providing a larger number of POIs. The determination by the TRAI, should not, therefore, be so interpreted by any of the involved parties that it defeats its basic objective of achieving a more liberal and equitably interconnection regime than what existing prior to its issuance. played the role of mediator and tried to get the parties to arrive at mutually agreeable terms on the basis of which the Interconnection Agreements could be finalized. There were 18 issues pending with the TRAI for interconnection and TRAI on 13.11.2000 gave its opinion on 13 issues. Subsequently on 8.1.2001, the appellants alleged that without there having been any finalisation of the outstanding issues between the BSNL and the appellants, TRAI gave its Determination on six issues that remained outstanding after its letter dated 13.11.2000 which was in complete departure from the role of TRAI as mediator which it had assumed until then. I have been taken through the grounds of appeal and I find that appellants had objected on the question of issue of revenue sharing between the CMSPs and FSPs and said it denied parity to CMSPs. It would, therefore, appear that appellant wanted more as its share of revenue on the calls made from its network and transmitted or terminated in another service provider's network.

The Authority, therefore, advises you not to alter/disconnect any POI with any service provider except by mutual agreement till the 7th April, 2001 which is 90 days from the date of the determination i.e. 8.1.2001. Status quo Ante should be restored forthwith in respect of all POIs which have been disconnected on or after 8.1.2001 unilaterally. The issue may be discussed between the concerned parties during this period for resolution. A meeting is being convened by the Authority to facilitate mutual agreement between the parties concerned. You will be advised further in this regard shortly.

CC: Cellular operators Association of India, 14, Bhai Vir Singh Marg, New Delhi-110 001.

4. It is contended by Mr. Kirit Raval, learned Solicitor General that this petition has been filed to get over the bar of limitation inasmuch as Interconnection

Regulations were notified by TRAI on 14.12.2001 and this petition was filed on 10.7.2003. Learned Solicitor General raised the following points in opposition of the petition: 1. Petitioners are seeking partial implementation of TRAI's Determination dated 8.1.2001 and which pertains to revenue sharing, particularly, when whole of the issues in the Determination were challenged by the petitioners in Appeal No.2/2001 which was eventually withdrawn on 13.8.2001. The Determination dated 8.1.2001 was a composite package which could not be implemented till the end of 2001. Although retention of 5% passed through revenue was permitted to cellular operators, there were certain other fundamental changes in the routing /handover of calls prescribed whereby undue revenue losses were being caused to BSNL on account of incorrect/improper routing being followed by cellular operators and these were to be eliminated. Everything came into place by the end of 2001. Interconnection Regulations were notified on 14.12.2001.

Since the petitioners themselves got an interim order of stay in the appeal, TRAI's Determination dated 8.1.2001 could not be implemented till 13.8.2001 when the appeal was withdrawn.

2. Petitioners have not challenged the Interconnection Regulations which Regulations are statutory and which prescribed the date of implementation of retention of 5% passed through revenue by cellular operators as 31.1.2001. The Interconnection Regulations could be challenged only in appeal and 30 days period is prescribed for the purpose. In the absence of challenge to Interconnection Regulations and these having attained finality the petitioners are estopped/barred from pursuing the present petition.

3. Petitioners themselves wrote a letters dated 15.12.2001 and 28.3.2002 to TRAI contending that passed through charges should be payable w.e.f. 8.1.2001 and not 31.1.2002 which contention was rejected by TRAI on 10.4.2002. The Department of Telecommunication (DOT) also rejected the contention of petitioners by its letter dated 13.6.2002. Those rejections of TRAI and DOT have not been challenged by the petitioners.

4. Reliance of the petitioners on the judgment of the Tribunal dated 8.8.2003 in Petition No.1/2001 dealing with limited mobility in WLL is misplaced. When the judgment was given 5% retention of passed through charges by CMSPs had already become permissible and acted upon as per Interconnection Regulations notified on 14.12.2001 which prescribed that this amount is payable "by 31.1.2002". In any case the judgment of the Tribunal in Petition No.1/2001 did not state that the 5% retention was to be implemented w.e.f. 8.1.2001. In this respect principles of 'sub silentio' was invoked. 'Sub silentio' - under silence; without notice being taken, without being expressly mentioned - Black's Law Dictionary 7th Edn.' In support of this a reference was made to the decisions of the Supreme Court in Arnit Das vs. State of BiharA-One Granites vs.

State of U.P. and Ors.

5. As to the implementation of Determination for 5% retention from 8.1.2001 in Himachal Pradesh Circle it is stated that it was due to a bona fide error and that it is immaterial if in one small circle any such retention was permitted before 31.1.2002 6. In any case Determination dated 8.1.2001 allowing 5% revenue for CMSPs with effect from 8.1.2001 could not be implemented as the petitioners themselves got stay of the whole of the Determination in the appeal (2/2001) filed by them which came to be withdrawn only on 13.8.2001.

5. Case of the petitioners is not a complex one. It is rather quite simple. The Determination dated 8.1.2001 is a decision under the Act as not disputed before me. It is certainly then a statutory Determination.

When TRAI also made recommendations on the issue of limited mobility on 8.1.2001, it reiterated its Determination allowing CMSPs to retain 5% of the passed through revenue paid to the fixed operators per calls made by cellular subscribers to cover their collection charges and bad debts. The recommendations of the TRAI were accepted by DOT and Guidelines were issued on 25.1.2001. On this basis DOT issued draft amendments to the License Agreements of the CMSPs on 25.9.2001 confirming the right of the CMSPs to retain 5% of the passed through revenue. Subsequently, the licenses were amended on 11.4.2002. It was mentioned therein that "in respect of the calls generated from cellular

network to fixed service network, 5% will be retained by the cellular operators, in accordance with the decision of TRAI, out of the total charges collected by the cellular operators for fixed leg of the calls" and that this shall be applicable from 25.1.2001, the date of issue/announcement of the Guidelines for issuance of license for basic services. In petition No.1/2001 which was heard along with petition Nos.2 and 3 of 2001, all the service providers CMSP/FSPs and DOT, Consumer Groups were parties. This Tribunal upheld the stand of DOT and the issue relating to retention of 5% w.e.f. 25.1.2001 stood settled.

The judgment recorded that CMSPs were allowed reimbursement of 5% of access charges and as a matter of fact, the judgment recorded that "in regard to retention of 5% access charges which has been allowed to cellular operators there is a case for increasing this percentage to a reasonable level. Higher percentage in this regard could be recommended by the Telecom Regulator after due and comprehensive consideration of the issue in a transparent manner". In the judgment reference has also been made to the recommendations of TRAI being considered by the Telecom Commission on 24.1.2001 where the Commission observed "that the concession proposed by TRAI for cell operators will become operative from the date of issue/announcement of Guidelines for issuance of license for basic service." There is no dispute that Guidelines were issued on 25.1.2001. It is contended that according to the judgment in petition No.1/2001, 5% retention was allowed to CMSPs w.e.f. 25.1.2001 and this was a circumstance allowing limited mobility in WLL (Wireless in Local Loop) to the FSPs. Group on Telecom and Information Technology (GOT-IT) had also in its report dated 27.4.2001 recommended and accepted the right of CMSPs to retain 5% of pass through revenue.

7. BSNL wrote letter dated 21.8.2001 to all its Chief General Managers of Telecom Circles/Telephone Districts stating that since the appeal challenging correctness of Determination of TRAI dated 8th January, 2001 stood unconditionally withdrawn on 13.8.2001 by COAI, the said Determination had become final. Learned Solicitor General has based his arguments on this letter that there was a basket of six issues determined by TRAI on 8.1.2001. I reproduce this letter as under: Subject: Connectivity at the Point of Interconnection between cellular networks and

BSNL/MTNL fixed network.

This is further to our letters of even number dated 12th February, 2001, 16th March, 2001 and 26th March, 2001. Since the appeal challenging the correctness of the determination of TRAI dated 8th January, 2001 stands unconditionally withdrawn by COAI, the said determination has become final. Necessary steps are now required to be taken for enforcement of the said determination in toto as already communicated vide our earlier letter of even number dated 12th February, 2001.

For the purpose of implementation, the matter has been discussed with COAI who have agreed that routing and charging of PSTN to Mobile calls and vice versa may be corrected as per the determination by 15th September, 2001. For this purpose, additional ports at the Level-I TAX may be made available expeditiously in consultation with and on the request of the Cellular Operators. We may start correcting the routing of PSTN to Mobile and Mobile to PSTN calls as soon as possible and latest by 10th September, 2001, so as to complete the same by 15th September, 2001 LDCA wise in consultation with the cellular operators.

As soon as routing and charging of the PSTN to Cellular and cellular to PSTN calls is implemented as per the determination, further provisioning and augmentation of the POIs at Level-II TAXs in the Telecom Circles for the terminating traffic of the LDCA concerned and at the tandem exchanges in the Metros may be considered subject to technical feasibility and compliance of the other commercial conditions.

The detailed instructions and the list of level-I TAXs to be designated as the Gateway TAX have been communicated vide our letter dated 12th February, 2001, a copy of which is enclosed again for information and ready reference 8. This letter, however, does not dispute the Determination regarding retention of 5% revenue. It is contended by the petitioners that BSNL implemented only five out of the six issues determined by TRAI in its Determination dated 8.1.2001 and not the sixth issue relating to 5% retention by CMSPs. Assuming that other issues still remain to be sorted out but that had nothing to do with the retention of 5% of the revenue. If there are less POI (Points of Interconnection), there will be less pass through traffic in the networks of BSNL and MTNL and consequently retention of

5% revenue by the petitioners lower. Moreover when we examine the conduct of BSNL fault squarely lies at its door not fully complying with the TRAI's Determination in toto.

9. When the petitioners contended that in the Himachal Pradesh Circle BSNL actually implemented the said Determination by allowing one of the CMSPs (Bharti) to allow 5% of the access charges w.e.f. 25.1.2001. The explanation offered by BSNL is that Himachal Pradesh Circle is a small Circle and if any one or two small circles allowed such retention of 5% passed through revenue that would only show that it is a bona fide error and could not be made applicable in other circles. It is a poor explanation. Even if Himachal Pradesh is a small circle, BSNL did not sought refund of 5% of that revenue allegedly paid under mistake. I do not think it was at all necessary for the petitioners to challenge Interconnection Regulations as their case is based on the Determination dated 8.1.2001 of TRAI which admittedly is a decision and a statutory one. No interim order on 15.3.2001 in appeal No.2/2001 was made by this Tribunal as contended by the respondents which prohibited them from implementing the Determination dated 8.1.2001, particularly with reference to revenue sharing between CMSPs and FSPs. I may also refer to the explanatory memorandum to Interconnection Regulations and para 2 is relevant which I reproduce: "Schedule II of this Regulation specifies revenue sharing arrangements for calls originating in a cellular mobile service provider's (CMSPs) network and transited or terminated in another service provider's network. In its Determination dated the 8th January, 2001, on six major issues relating to interconnection, the Authority has determined that 5% of the pass through revenue paid to the Basic Service Providers by the CMSPs may be retained by the later to cover there cost of billing and collection and bad debts.

Payment to the Basic Service Provider @ Rs.1.14 per metered call unit against Rs.1.20 represents this arrangement. The balance 5% i.e. Rs.0.06 per metered call unit, will be retained by CMSPs".

10. I am unable to appreciate any of the objections raised by BSNL to the case set up by the petitioners. When it is stated by BSNL that there were certain requirements to be met before 5% of passed through revenue could be allowed to

CMSPs but BSNL did not specify what were those requirements which were required to be fulfilled by CMSPs and when those requirements at all were eliminated and how. As noted above, there were no interim order granted by this Tribunal in Appeal No.2/2001 filed by the petitioners which could prohibit the BSNL from complying with the Determination dated 8.1.2001/25.1.2001 from giving credit to the CMSPs of 5% passed through revenue through the network of BSNL. Telecommunication Interconnection (Charges and Revenue Sharing) Regulation, 2001 did not have the effect of superceding the Determination dated 8.1.2001. That Determination was a decision and was made by the TRAI in discharge of its function under the TRAI Act. There is nothing in the Interconnection Regulation to suggest that Determination dated 8.1.2001 of TRAI stood superceded. We have to give a commonsense and pragmatic interpretation to the Interconnection Regulations when Schedule-II talks of date of implementation by "31st January, 2002". That could at best mean where the passed through revenue of which credit has so far not been given should be done by this date i.e. 31st January, 2002. Any other interpretation would question the very legality of the Determination dated 8.1.2001. It is unfortunate that TRAI failed to implement its own decision dated 8.1.2001 as if it was a non-est and this inaction on the part of the TRAI has caused undue inconvenience and expense to the petitioners. It is all the more unfortunate that DOT just toed the line of TRAI and failed to exercise its own independent judgment. Both TRAI and DOT were aware of the recommendations dated 8.1.2001 of the TRAI allowing limited mobility in WLL to Fix Service Providers from 8.1.2001 and that question was taken due note in the judgment of this Tribunal in Petition No.1/2001. The decision of the TRAI in WLL case while accepting the recommendations of allowing 5% of passed through revenue to CMSPs did not in term mention the date from which it was payable.

But nobody was in doubt and particularly and certainly not the TRAI and DOT that it was 8.1.2001. Principle of sub silentio has no application and the decisions cited are not of any relevance to the facts and circumstances of the present case. In the present petition Petitioners have sought implementation of the Determination/Decision of TRAI dated 8.1.2001/25.1.2001 and it was not necessary for them to separately challenge the letters of rejection of TRAI or DOT though the validity of which was questioned in the petition.

11. For all these reasons, these petitions are allowed with cost against BSNL. BSNL and MTNL are directed to implement the TRAI recommendations dated 8.1.2001 allowing the petitioners to retain the 5% of their passed through revenue paid to them for calls made by the petitioners w.e.f. 25.1.2001 and both BSNL and MTNL shall refund/adjust all the excess amounts received by them from the petitioners towards the 5% of their passed through revenues w.e.f. 25.1.2001 upto 31.1.2002. This amount shall carry interest @ 12% per annum from 1.2.2002 as BSNL and MTNL were allowed to make the payments due from 25.1.2001 by 31.1.2002. Counsel fee Rs.20,000/-.

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