

(24)

TELECOM DISPUTES SETTLEMENT AND APPELLATE TRIBUNAL
NEW DELHI

DATED THIS THE 3rd MARCH, 2003

MA No.42 of 2002 in Appeal No.3 of 2002

IN THE MATTER OF:

Bharat Sanchar Nigam Limited

.... Appellant

Vs

Telecom Regulatory Authority of India and
Another

.... Respondents

BEFORE: -

HON'BLE MR. JUSTICE D.P. WADHWA
CHAIRPERSON

MR. R.U.S. PRASAD, MEMBER

MR. P.R. DASGUPTA, MEMBER

For Appellant

Mr. Maninder Singh, Mr. Kirtiman
Singh, Mr. Angad Chopra and
Mr. Ankur Talwar, Advocates.

For Respondent No.1 (TRAI)

Mr. Meet Malhotra with
Mr. Raghvinder Singh, Advocates.

For Respondent No.2 (BTSOL)

Mr. C.S. Vaidyanathan, Senior
Advocate with Mr. Ajoy K. Roy,
Mr. P.K. Prabhat, Advocates.

ORDER

This appeal (No.3 of 2002) was filed by Bharat Sanchar Nigam Limited (BSNL),
a Government company, challenging the interim arrangement made by the Telecom

Regulatory Authority of India (TRAI) regarding distribution of default* traffic between BSNL and Bharti Telesonic Limited (BTSOL). BSNL is one of the telecom service providers, which provides basic and long distance telecommunication services. BTSOL was also permitted to provide national long distance telecommunication services under licence agreement dated 29.11.2001 entered with the Government of India. BSNL in the Appeal has challenged the communication dated 25.1.2002 issued by the TRAI on the grounds that it is without jurisdiction; it being contrary to the provisions of the TRAI Act, 1997; and also in contravention of NLDO (National Long Distance Operators) licence granted by the Government of India to BTSOL. There are two Respondents in the Appeal. First is TRAI and the second BTSOL.

When this Appeal came up for admission on 31.1.2002, before this Tribunal, while issuing notices, it was directed that *"In the meantime, the directions given by the Telecom Regulatory Authority of India vide its letter dated 25th January 2002, shall not be implemented"*. This interim order continued during the pendency of the Appeal. While the pleadings in the Appeal were being completed, on 6.3.2002 it was brought to the notice of the Tribunal that TRAI was seized of the matter and discussions were on for passing a final order regarding default traffic. The Appeal was adjourned to enable the TRAI to come to a final decision and give directions on the subject matter involved in the Appeal. On 31.7.2002, it was stated by Mr. Kirit Rawal, Additional Solicitor General of India who was appearing on behalf of the BSNL that TRAI had passed a final order on

**'default traffic' is a call which cannot be carried further on a national long distance network in the absence of carrier access code which provides an option to the consumer to choose between two or three national long distance operators.*

24.7.2002, which was received by the BSNL on 29.7.2002. Two weeks' time was sought to study the order. Nothing happened thereafter and instead an application was filed by BSNL on 12.8.2002, it being MA No.42 of 2002, complaining that BTSOL has committed breach of the interim order passed by this Tribunal and for taking appropriate action in terms of Section 20* of the Act.

Record of proceedings is silent as to any reference to the appeal after 31.7.2002 but instead pleadings were being completed in MA No.42 of 2002. When this matter came up before this Tribunal on 28.1.2003, following orders were passed:

"It is not disputed that after the order of Telecom Regulatory Authority of India dated 24th July, 2002, this appeal has become infructuous. Appeal No.3 of 2002 is, therefore, dismissed as infructuous.

However, Mr. Maninder Singh says that the interim order dated 31st January 2002 which had been continued, has been infringed by the respondents and he seeks relief u/s 20 of the Telecom Regulatory Authority of India Act, 1997. We, therefore, take up MA No.42 of 2002 seeking relief.

Arguments heard. Orders reserved in M.A No. 42 of 2002, with liberty to the parties to file their brief notes of submissions not more than three pages, within two days."

***Section 20 of the Telecom Regulatory Authority of India Act 1997:**

"Penalty for willful failure to comply with orders of Appellate Tribunal -- If any person willfully fails to comply with the order of the Appellate Tribunal, he shall be punishable with fine which may extend to one lakh rupees and in case of a second or subsequent offence with fine which may extend to two lakh rupees and in case of continuing contravention with additional fine which may extend to two lakh rupees for every day which such default continues."

Since a great deal now depends on the interpretation of the communication dated 25.1.2002 and the interim order passed by this Tribunal on 31.1.2002, it would be appropriate to quote the communication dated 25.1.2002 *in extenso*:

"No. 310-9(4)/2001-TRAI

Dated the 25th January 2002

Shri N. Arjun,
Chief Executive Officer,
Bharti Telesonic Limited,
234, Okhla Industrial Estate,
New Delhi – 110 020

- Reference:
1. Your letter dated 24.12.2001, 27.12.2001, 9.1.2002, 16.1.2002, 18.1.2002, 22.1.2002, 23.1.2002 and 24.1.2002.
 2. TRAI letter No.s 405-4/2001-FN dated 2.1.2002, 4.1.2002, 14.1.2002, 16.1.2002, Letter No.s 310-9(4)/2001-TRAI (Econ) dated 28.12.2001, 4.1.2002 and letter Nos. 409-1/2002-FN dated 24.1.2002.

This refers to your MOUs submitted to TRAI on 24th December 2001, the tariff report for National Long distance calls received on 16th January 2002, and the subsequent correspondence on the matter resting with your letter dated 24th January, 2002. Following the clarifications provided by you during meetings with TRAI and by correspondence till the 24th of January, 2002, the Authority is happy to convey its approval of the report filed by you subject to the following: -

1. *For calls originating in an Access Provider's network (CMSO/BSO) and transited on your NLD network, technical arrangements must be put in the Access Provider's network, so as to analyze the Carrier Access Code (CAC) dialed by subscribers and route the call to the NLD operator, chosen by him. On the basis of CAC dialing, equal access to yours as well as any other long distance network should be available to customers at all times. Adequate publicity must be given to educate the customers regarding the new dialing scheme based on CAC. This should be done through all media on a repeated basis, so that the number of default calls is reduced to a minimum.*
2. *It is has be ensured that long distance calls in which CACs have not been dialed by the subscriber also get completed, on default basis. Otherwise, at least in the initial stage, a large number of repeat attempts are likely as subscribers will not be familiar with the new dialing scheme. Such repeat attempts will result into infructuous use of network resources as well as customer dissatisfaction.*

3. *The Authority has initiated a process of public consultation on Interconnection and one of the important issues included therein is the question of default carrier for long distance calls. A view in the matter is yet to be taken by the Authority based on the inputs received from the stakeholders and others. As an interim measure, since there are only two operators i.e. the incumbent and BTSOL, who are in a position to carry NLD traffic, on their respective networks, the Access Providers (CMSOs/BSOs) shall put in place technical arrangements to distribute the default traffic measured in terms of chargeable minutes equally. The Authority would like to suggest this be achieved by passing all default traffic of 24 hours (00/24 hrs) to the two operators (BTSOL/BSNL) on alternate days, by the APs (CMSOs/BSOs). Suitable technical arrangements may be made in this regard by mutual discussion with APs and the Authority intimated details thereof.*

4. *Since the MOU between the BTSOL and the cellular mobile operators, which were submitted earlier, have been withdrawn vide your letter of 23rd January 2002, there is no mutual agreement at this point of time between BTSOL and all other cellular operators. We would also add that the agreement with all operators has to be on same terms, and in conformance with the Interconnection Regulation issued by the Authority from time to time. Until such agreements are arrived at, reported to the Authority, and its approval obtained, the provisions contained in the Telecommunications Interconnection (Charges and Revenue Sharing) Regulation 2001 (5 of 2001), will apply, which stated as under:
'In the absence of mutual agreement between the interconnection provider (s) and the seeker (s), in respect of revenue sharing, the revenue sharing will be as specified in the Schedules of this Regulation'.*

This issues with the assumption that you have received the necessary clearance from DOT for commencement of your services and that it if the clearance is with any conditions to be fulfilled before commencement of the service, such conditions will be duly fulfilled. As you ready yourself to offer your services to the Indian public as the first National Domestic Long Distance Service Operator in the country besides BSNL, TRAI wishes you well and hopes your services will be like by the public.

Yours faithfully,

Sd/-

(R.K. Bhatnagar)

Advisor (Fixed Network)

Copy to :

1. *Secretary, Department of Telecommunications, Sanchar Bhavan, New Delhi*
2. *Cellular Operator's Association of India, New Delhi*
3. *CMD, BSNL, New Delhi."*

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Letter dated 24.1.2002 of Department of Telecommunication to BTSOL granting permission to commence NLD services and that dated 21.12.2001 to BSNL and BTSOL providing for 'Dynamic Selection' are relevant and these we quote:

No.10-25/2001-BS (Vol.II)
Government of India
Department of Telecom
(Basic Service Lincensing Group)
Sanchar Bhavan, 20 Ashok Road, New Delhi – 110 001.

Dated, the 24th January, 2002

To

M/s Bharti Telesonic Ltd.,
234, Okhla Industrial Estate, Phase-III,
New Delhi – 110020

Subject: Commencement of National Long Distance (NLD) Service.

With reference to your letter dated 22.1.2002 and results of interconnection tests submitted in respect of New Delhi, Mumbai, Bhopal, Indore, Hyderabad, Bangalore, Faridabad, Gurgaon, Ahmedabad and Chandigarh with other service providers as per NLD service licence, the undersigned is directed to state that the service can commence from above mentioned cities, subject to the following conditions:

- (i) Arrangements for ensuring delivery of calls to all destinations be finalized at the earliest by entering into interconnection arrangements with all other service providers including NLD service provider within the stipulated time frame as per TRAI Regulations issued from time to time. (TRAI Regulation 5/2001 refers)
- (ii) Dynamic selection of NLD call shall be implemented so as to provide customers a choice of selecting NLDO wherever interconnection with Access Provider takes place.
- (iii) Arrangements with BSOs in LDCAs where POP has been set up should be finalized at the earliest by entering into interconnection arrangements with other service providers within the stipulated time frame as per TRAI Regulations issued from time to time (TRAI Regulation 5/2001 refers).

- (iv) Subscriber being informed that at present this NLD service is not available to all destinations within India.

Sd/-
(Rama Krishna)
Director BS.III

Copy to:

1. Secretary, TRAI, New Delhi
2. CMD, BSNL, New Delhi
3. CMD, MTNL, Delhi
4. Basic and Cellular Service Operators in M.P., A.P., Karnataka, Delhi, Mumbai, Maharashtra, Gujarat and Punjab.

Similar letter of the same date was issued in respect of Chennai.

No.10-5/99-BS.I
Government of India
Department of Telecommunications
Sanchar Bhavan, 20 Ashok Road,
New Delhi – 110 001.

Dated the 21st December, 2001

To

M/s Bharat Sanchar Nigam Ltd.,
Sanchar Bhawan, New Delhi.

M/s Bharti Telesonic Ltd.,
New Delhi.

Sub: Provision of dynamic selection for National Long distance Service.

With the opening of National Long Distance service, the undersigned is directed to state that dynamic selection is to be introduced into the national long distance network so as to provide choice of the national long distance operator to the subscriber. At present, there are two licences have been issued to the following companies to provide such service.

- (i) M/s Bharat Sanchar Nigam Ltd.
- (ii) M/s Bharti Telesonic Ltd.

2. In order to introduce dynamic selection, the following dynamic procedure has to be adopted by the subscriber:

0 + CAC + CIC + Subscriber NSN
CAC (Carrier Access Code) in respect of National Long Distance Service shall be 10.

CIC (Carrier Identification Code) will indicate the carrier selected by the subscriber.

The carrier identification code for BSNL shall be 20 and for M/s Bharti Telesonic Ltd., shall be 50.

NSN (National Significant Number) comprising of area code and local number.

Necessary steps should be taken to introduce the procedure immediately on priority.

Sd/-
(M.S. Shamsi)
Section Officer (BS.I)

Copy to:

1. All Basic Service Operators and Cellular Mobile Service Operators.
2. Association of Basic Telephone Operators.
3. Cellular Operators Association of Oindia (COAI)
4. Sr. DDG (TEC).

The question that arises for consideration is as to what were the directions contained in letter dated 25.1.2002 of the TRAI which had been stayed by this Tribunal by its interim order dated 31.1.2002. The words 'approval', 'suggest' and 'direction' have different connotations. According to Mr. Maninder Singh, learned counsel for BSNL, the directions which were stayed were (i) distribution of default traffic measured in terms of chargeable minutes equally as contained in para 3 of the letter; (ii) distribution of default traffic of 24 hours between two operators on alternate days (also contained in para 3); and (iii) the agreement, as mentioned in para 4 of the communication dated 25.1.2002, to be on the same terms with all operators and to be reported to the Authority. He further argued that there was a non-existing assumption that the preconditions laid down by the Department of Telecommunications have been fulfilled by the second respondent BTSOL. However, according to Mr. C.S. Vaidyanathan, learned Senior Advocate for the BTSOL, directions issued by TRAI to the two NLDO (National Long

Distance Operators) were merely to put in place technical arrangements to distribute the default traffic measured in terms of chargeable minutes equally and then there were suggestions that it be shared equally. It was these directions which were stayed by the Tribunal.

It was submitted by Mr. Maninder Singh that BTSOL was granted only a conditional permission by the DoT (Department of Telecommunications), that there were preconditions to be fulfilled before the national long distance operation could be started by BTSOL and that these preconditions were never fulfilled by BTSOL. It was submitted that on that account TRAI was obliged to take appropriate action against BTSOL in accordance with the provisions of the Act and regulations made thereunder. It appears that the grievance of BSNL pertains to BTSOL carrying the default calls received from other Cell Operators which were otherwise not permitted to them without fulfilling the preconditions of the DoT. There is merit in the argument that the operations of BTSOL in this regard during the period from 31.1.2002, when interim orders were issued by this Tribunal, till 24.2.2002 when the Default Call issue was finally settled by TRAI, were strictly not in consonance with either the conditional clearances given by the Central Government/TRAI or the interim order dated 31.1.2002 of this Tribunal. Shri Maninder Singh argued that this amounted to a violation of the orders of the DoT and/or of the TRAI. Whatever grievance BSNL may have in this respect, it

should be addressed either to DoT or to TRAI. It is difficult for us to extract from the letter dated 25.1.2002 any direction which had been stayed by the Tribunal and which was subsequently violated, as contended by the BSNL. BSNL says that on account of illegal action by BTSOL it has suffered a loss to the tune of Rs.25.00 crores. BSNL can certainly make a complaint to the TRAI or DoT for any violation of its directions or orders. It is also not clear to us as to why no such grievance was made earlier before this Tribunal. The present application was filed only on 12.8.2002 after the matter had been settled on 24.7.2002; the order dated 25.1.2002 was only by way of interim arrangement which ceased to exist after 24.7.2002. The whole complaint of BSNL is directed against the TRAI or DoT for its inaction or violation of other conditions imposed on the BTSOL as National Long Distance Operator.

The principal prayer of the Appellant has been that we “Initiate appropriate proceedings and pass appropriate order(s) against BTSOL under Section 20* of the TRAI Act.”

***Section 20 of the Telecom Regulatory Authority of India Act 1997:** *“Penalty for willful failure to comply with orders of Appellate Tribunal -- If any person willfully fails to comply with the order of the Appellate Tribunal, he shall be punishable with fine which may extend to one lakh rupees and in case of a second or subsequent offence with fine which may extend to two lakh rupees and in case of continuing contravention with additional fine which may extend to two lakh rupees for every day which such default continues.”*

The question that now arises for consideration is if this Tribunal has such powers as prayed by the Appellant. Section 20 of the TRAI Act is a penal provision, which defines the offence as well as the punishment by way of fine. We may in this connection refer to Section 67** of the Indian Penal Code. It would be thus seen that in case of non-payment of fine, when the offence is punishable with fine only, there could be sentence/imprisonment. That an offence has been committed and what punishment is to be imposed is for the criminal Court to consider and decide. As a matter of fact Section 34*** of the TRAI Act bars the jurisdiction, if any, of the Tribunal even to file a complaint in the Court of Chief Metropolitan Magistrate or a Chief Judicial Magistrate of first class, as the case may be. It is only the Authority i.e. TRAI which can initiate action as without that the criminal court cannot take cognizance of any offence punishable under

** Section 67 of The Indian Penal Code: **"Imprisonment for non-payment of fine, when offence punishable with fine only.** – If the offence be punishable with fine only, [the imprisonment which the Court imposes in default of payment of the fine shall be simple, and] the term for which the Court directs the offender to be imprisoned, in default of payment of fine, shall not exceed the following scale, that is to say, for any term not exceeding two months when the amount of the fine shall not exceed fifty rupees, and for any term not exceeding four months when the amount shall not exceed one hundred rupees, and for any term not exceeding six months in any other case."

*** Section 34 of the TRAI Act – **"Cognizance of offences:**

(1) No court shall take cognizance of any offence punishable under this Act or the rules or regulations made thereunder save on a complaint made by the authority.

(2) No court inferior to that of a Chief Metropolitan Magistrate or a Chief Judicial Magistrate of first class shall try any offence punishable under this Act."



the Act. The Sections, which come to mind, are Section 20 and Section 29* of the TRAI Act. It would, therefore, appear that Appellant is knocking at the wrong door. Tribunal cannot take any action under Section 20 of the Act. The provisions of the Act, in this connection, appear to be flawed. Here, we are asked to initiate action under Section 20 for which it is only the Authority (TRAI) competent to set the criminal law into motion. That apart, an order passed by Tribunal is executable as a decree of civil court and for that the Tribunal is vested with powers of a civil court. It is so provided in Section 19**

***Section 29 of the Telecom Regulatory Authority of India Act 1997:**

“Penalty for contravention of directions of Authority – If a person violates directions of the Authority, such person shall be punishable with fine which may extend to one lakh rupees and in case of second or subsequent offence with fine which may extend to two lakh rupees and in the case of continuing contravention with additional fine which may extend to two lakh rupees for every day during which the default continues.”

****Section 19 of the TRAI Act: Orders passed by Appellate Tribunal to be executable as a decree –**

- (1) An order passed by the Appellate Tribunal under this Act shall be executable by the Appellate Tribunal as a decree of civil court, and for this purpose, the Appellate Tribunal shall have all the powers of a civil court.
- (2) Notwithstanding anything contained in sub-section (1), the Appellate Tribunal may transmit any order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by that court.

of the Act. The order of which breach is complained was an interim order. Under Order XXI, Rule 32*** of the Code of Civil Procedure (Code), a decree for injunction can be executed by detention of the person in a civil prison or by attachment of his property or by both. This provision would appear to be applicable when there is a final order of injunction. Assuming these can apply even to an interim order, but that can only be during the subsistence of the proceedings. In the present case, Appeal has already been disposed of. We may also note that under the Code, Order XXXIX contain provisions for temporary injunction. Rule 2-A# of Order XXXIX provides for consequence of disobedience or breach of temporary injunction. This Rule was inserted in the Code by

*****Order XXI, Rule 32: Decree for specific performance for restitution of conjugal rights, or for an injunction.** – (1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for the injunction, has been passed, has had an opportunity of obeying the decree and has willfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract, or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both.

(2)Where the party against whom a decree for specific performance or for any injunction has been passed is a corporation the decree may be enforced by the attachment of the property of the corporation or with the leave of the Court by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

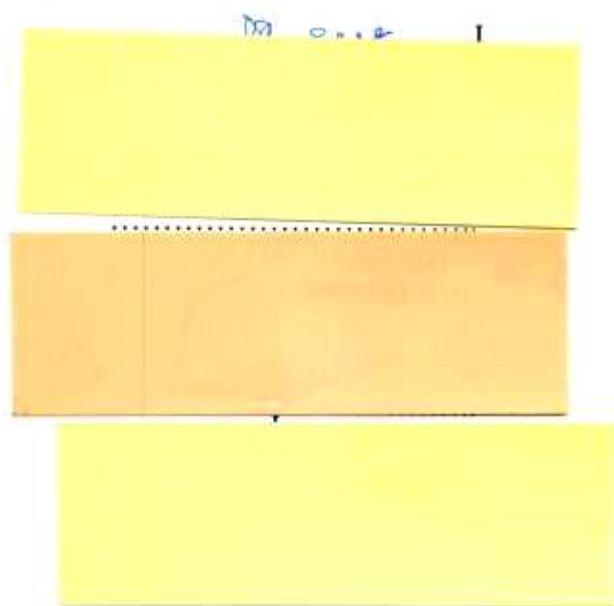
(3)Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for six months if the judgement-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out the proceeds, the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgement-debtor on his application.

(4)Where the judgement-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have property sold has been made, or if made has been refused, the attachment shall cease.

(5)Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgement-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

amendment of the Act 104 of 1976. There is no such provision under which this Tribunal can take action where there is a breach of an interim order. It is, therefore, difficult for us to grant any relief, even after assuming that there is a breach, to the Appellant.

In this view of the matter it is difficult for us to see as to how the judgment of the Hon'ble Supreme Court in the case of Delhi Development Authority vs. Skipper Constructions Pvt. Ltd., - (1996) 4 SCC 622 could be said to be applicable. This application is, therefore, dismissed.



#Order XXXIX, Rule 2-A. Consequence of disobedience or breach of injunction. – (1) In the case of disobedience of any injunction granted or other order made under rule 1 or rule 2 or breach of any of the terms on which the injunction was granted or the order made, the Court granting the injunction or making the order, or any Court to which the suit or proceeding is transferred, may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the meantime the Court directs his release.

(2) No attachment made under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold and out of the proceeds, the Court may award such compensation as it thinks fit to the injured party and shall pay the balance, if any, to the party entitled thereto.