

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 2nd January, 2013

Petition No.946 of 2012

With

(M.A. No. 662 of 2012)

Loop Mobile Ltd.

...Petitioner

Vs.

Bharti Airtel Limited & Ors.

...Respondents

Petition No.822 of 2012

Loop Mobile (India) Ltd.

...Petitioner

Vs.

Bharti Hexacom Limited

...Respondents

BEFORE:

HON'BLE MR. P.K.RASTOGI, MEMBER

For Petitioners

: Ms. Shally Bhasin, Advocate
Mr. Akshat Hansaria, Advocate
Mr. Manikya Khanna, Advocate

For Respondent

: Mr. Gopal Jain, Advocate
Mr. Aman Avinav, Advocate

For TRAI

: Mr. Saket Singh, Advocate

ORDER

The Petitioner has filed these petitions to declare as null and void, the agreement dated 10.11.2012 for payment of 10 paise per sms as SMS Termination Service entered into between the parties. According to the Petitioner, it was coerced into signing the impugned Agreement by the Respondents who threatened to disconnect the SMS termination services by virtue of their dominant position.

2. By way of interim prayer, the Petitioner has also requested that operation of the said agreement may be stayed during the pendency of the present case and direct the Respondent not to take any coercive steps for withdrawal of SMS Termination Services for the Petitioner's network in all areas.

3. Ms. Bhasin, learned counsel appearing on behalf of the Petitioner has brought to my notice an order issued by this Tribunal on 9.11.2012 in Petition No. 822 of 2012. By way of an interim order, this Tribunal had ordered the Respondent (Respondent No. 2 in this petition) not to withdraw the Interconnect SMS services of the Petitioner network till the next date of hearing. She further stated that by mistake she forgot to make Bharati Airtel Ltd. (i.e. Respondent No. 1 in the present petition) as Respondent in that petition.

4. On 9th November, 2012 at 2:45 PM, the Respondent's representative sent an e-mail wherein the draft agreement for SMS Termination Charges was communicated to the Petitioner. On 10th November, 2012 at 8:53 PM, the Petitioner informed the Respondent that we have agreed to sign the agreement on the terms of the Respondent as they were left with no other option, in view of the Respondent's threat to disconnect the SMS services, if the said agreement is not signed.

On 11th November, 2012 at 8:54 PM the Petitioner informed the Respondent that we are signing this agreement under duress and do not agree for charges for SMS termination. The Petitioner further informed the Respondent that in any event the rate of 10 paise per SMS as the termination rate is extremely high and not commensurate with the cost principle.

Ms. Bhasin further pointed out that there was no court open in that week being the Deepawali Holidays, therefore, the Petitioner had no option to sign the agreement under the duress.

5. Mr. Gopal Jain, learned counsel appearing on behalf of the Respondents, however, submitted that the present petition is not maintainable and the Tribunal has no jurisdiction to decide about the validity of the terms and conditions incorporated in the agreement. He further denied the allegation of duress by the Respondent on the Petitioner

and he pointed out an e-mail sent by the Petitioner to the Respondent wherein on Saturday, i.e, 10th November, 2012, the Petitioner wrote to the Respondent “As discussed, we are ready to sign the agreement sent by you unconditionally and without duress”.

He brought to our notice a judgement reported in (2011) 10 SCC 543, Union of India Vs. Assn. of Unified Telecom Service Providers of India wherein, it was held:-

“40. A Constitution Bench of this Court in State of Punjab v. Devans Modern Breweries Ltd. [(2004) 11 SCC 26] relying on Har Shankar case [(1975) 1 SCC 737] and Panna Lal v. State of Rajasthan [(1975) 2 SCC 633] has held in para 121 at p. 106 that issuance of liquor licence constitutes a contract between the parties. Thus, once a licence is issued under the proviso to sub-section (1) of Section 4 of the Telegraph Act, the licence becomes a contract between the licensor and the licensee. Consequently, the terms and conditions of the licence including the definition of adjusted gross revenue in the licence agreement are part of a contract between the licensor and the licensee. We have to, however, consider whether the enactment of the TRAI Act in 1997 has in any way affected the exclusive privilege of the Central Government in respect of the telecommunication activities and altered the contractual nature of the licence granted to the licensee under the proviso to sub-section (1) of Section 4 of the Telegraph Act.

47. *A dispute between a licensor and a licensee referred to in Section 14(a)(i) of the TRAI Act, therefore, is a dispute after a person has been granted a licence by the Central Government or the Telegraph Authority under sub-section (1) of Section 4 of the Telegraph Act and has become a licensee and not a dispute before a person becomes a licensee under the proviso to sub-section (1) of Section 4 of the Telegraph Act. In other words, the Tribunal can adjudicate the dispute between a licensor and a licensee only after a person had entered into a licence agreement and become a licensee and the word “any” in Section 14(a) of the TRAI Act cannot widen the jurisdiction of the Tribunal to decide a dispute between a licensor and a person who had not become a licensee. The result is that the Tribunal has no jurisdiction to decide upon the validity of the terms and conditions incorporated in the licence of a service provider, but it will have the jurisdiction to decide “any” dispute between the licensor and the licensee on the interpretation of the terms and conditions of the licence.*

55. *On the other hand, we find from the long line of decisions in Har Shankar v. Excise & Taxation Commr. [(1975) 1 SCC 737] , Govt. of A.P. v. Anabeshahi Wine & Distilleries (P) Ltd. [(1988) 2 SCC 25 : 1988 SCC (Tax) 147] , Excise Commr. v. Issac Peter [(1994) 4 SCC 104] , State of Orissa v. Narain Prasad [(1996) 5 SCC 740] , State of M.P. v. KCT Drinks Ltd. [(2003) 4 SCC 748] , State of Punjab v. Devans Modern Breweries Ltd. [(2004) 11 SCC 26], Shyam Telelink Ltd. v. Union of India [(2010) 10 SCC 165 : (2010) 4 SCC (Civ) 99] and in Bharti Cellular Ltd. v. Union of India [(2010) 10 SCC 174 : (2010) 4 SCC (Civ) 108] , that this Court has consistently taken a view that once a licensee has accepted the terms and conditions of a licence, he cannot*

question the validity of the terms and conditions of the licence before the court. We, therefore, hold that TRAI and the Tribunal had no jurisdiction to decide on the validity of the definition of adjusted gross revenue in the licence agreement and to exclude certain items of revenue which were included in the definition of adjusted gross revenue in the licence agreement between the licensor and the licensee.”

6. On the other hand, Ms. Bhasin brought to my notice an order in Writ Petition No. 3038 of 1999 reported in 1999(2) MPJR 572, 2000 (1) MPLJ 565 in the High Court of Madhya Pradesh at Jabalpur which held that:-

“The Courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or clause in a contract, entered into between parties who are not equal in bargaining power. This view has been approved by the Constitution Bench of the Supreme Court in DTC vs. DTC Mazdoor Congress, [MANU/SC/0031/1991](#) : AIR 1991 SC 101.

She further pointed out that in Atlas Express Ltd. Vs. Kafco Ltd., Queen’s Bench Division (Commercial Court), (Tucker J), 12,13 December 1988, 10 January 1989, it was held:-

“The first question raises an interesting point of law, i e whether economic duress is a concept known to English law. Economic duress must be distinguished from commercial pressure, which on any view is not sufficient to vitiate consent. The borderline between the two may in some cases

be indistinct. But the authors of Chitty on Contracts and of Goff and Jones on the Law of Restitution appear to recognise that in appropriate cases economic duress may afford a defence, and in my judgement it does. It is clear to me that in a number of English cases judges have acknowledged the existence of this concept...

Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree with the observation of Kerr J. in The Siboen and the Sibotre [1976] 1 Lloyd's Rep. 293 at p. 336 that in a contractual situation commercial pressure is not enough. There must be present some factor "which could in law be regarded as a coercion of his will so as to vitiate his consent": loc. cit. This conception is in line with what was said in this Board's decision in Barton v Armstrong [1976] A.C. 104 at p. 121 by Lord Wilberforce and Lord Simon of Glaisdale – observations with which the majority judgment appears to be in agreement. In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are, as was recognised in Maskell v Horner [1915] 3 K.B. 106, relevant in determining whether he acted voluntarily or not.

In the present case there is unanimity amongst the judges below that there was no coercion of Lau's will. In the Court of Appeal the trial judges finding... that Lau considered the

matter thoroughly, chose to avoid litigation, and formed the opinion that the risk in giving the guarantee was more apparent than real was upheld. In short, there was commercial pressure, but no coercion. Even if this Board was disposed, which it is not, to take a different view, it would not substitute its opinion for that of the judges below on this question of fact.

*It is, therefore, unnecessary for the Board to embark on an enquiry into the question whether English law recognises a category of duress known as 'economic duress'. But, since the question has been fully argued in this appeal, their Lordships will indicate very briefly the view which they have formed. At common law money paid under economic compulsion could be recovered in an action for money had and received: see *Astley v Reynolds*. The compulsion had to be such that the party was deprived of 'his freedom of exercising his will'. It is doubtful, however, whether at common law and duress other than duress to the person sufficed to render a contract voidable; see *Blackstone's Commentaries* and *Skeate v Beale*. American law (*Williston on Contracts*) now recognises that a contract may be avoided on the ground of economic duress. The commercial pressure alleged to constitute such duress must, however, be such that the victim must have entered the contract against his will, must have had no alternative course open to him, and must have been confronted with coercive acts by the party exerting the pressure: see *Williston on Contracts*. American judges pay great attention to such evidential matters as the effectiveness of the alternative remedy available, the fact or absence of protest, the availability of independent advice, the benefit received, and the speed with which the victim has sought to avoid the contract. Recently two English judges*

have recognised that commercial pressure may constitute duress the pressure of which can render a contract voidable: see Kerr J in The Siboen and The and Mocatta J in North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd. Both stressed that the pressure must be such that the victim's consent to the contract was not a voluntary act on his part. In their Lordship's view, there is nothing contrary to principle in recognising economic duress as a factor which may render a contract voidable, provided always that the basis of such recognition is that it must amount to a coercion of will, which vitiates consent. It must be shown that the payment made or the contract entered into was not a voluntary act.”

7. It is true that if the parties have written agreement, the terms and conditions of the agreement cannot be altered unilaterally. If the terms have to be modified, it should be done in accordance with the terms of the contract or as mutually agreed by the parties. Similarly, as held by the Supreme Court, this Tribunal has no jurisdiction to decide the validity of the terms and conditions of the contract but it will have jurisdiction to decide any dispute between the parties on the interpretation of the terms and conditions of the contract.

8. In the present petition, the Petitioner has alleged that this agreement has been signed under the coercion by the Respondent by virtue of their dominant position. Whether the signing of the agreement has been done under the coercion or not can be examined by this Tribunal in terms of its jurisdiction under Section 14 (a) (ii) of the TRAI Act, 1997.

At the preliminary stage, we cannot determine whether the coercion has taken place or not. It is only after the trial it will be possible to adjudicate about the coercion or otherwise.

9. Therefore, I am of the opinion that this Tribunal has jurisdiction to go into the matter as raised by the Petitioner. Accordingly, the plea of the Respondent for lack of jurisdiction of the Tribunal is rejected and the Petition is admitted.

10. Regarding the Interim Order, as prayed for, I am of the opinion that in absence of the reply of the Respondent, it is not possible to issue any order at this stage. However, the Respondent may file its short reply within a week and a rejoinder, thereto within three days.

The matter may be put up for hearing on the interim matter on 21.01.2013.

11. The TRAI has been made as Respondent No. 3 in this petition and a prayer has been made against it in the following terms:-

“Direct Respondent No. 3 TRAI to formulate appropriate Regulations/policy inter-alia specifying whether any charge can be levied in respect of SMS Termination Services and the calculation thereof.”

It is noticed that already a Regulation exists in respect of SMS Termination Services and if the Petitioner is aggrieved by the said Regulation, it is for the Petitioner to come in appeal against the said Regulation. In my view, TRAI cannot be made a party in original petition as it does not fulfil the criteria as required under Section 14 (a) of the TRAI Act, 1997. Mr. Saket Singh appearing on behalf of the Respondent No. 3 also pointed out that in Petition No. 60 (C) of 2010 Tamil Nadu Progressive Consumer Centre Vs. Ministry of Information & Broadcasting and others when this Tribunal passed certain directions in the original petition, the Supreme Court stayed to the said order vide its order dated 14.11.2011.

12. The counsel for the Petitioner agreed to delete the name of TRAI as Respondent. Accordingly, it is hereby directed to delete the name of the Respondent No. 3 from the petition.

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(P.K. Rastogi)
Member

HKC/