

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CS (OS) 1102/ 1998**

Reserved on : 6th February, 2008.

Decided on : 15th February, 2008.

Mahanagar Telephone Nigam Ltd.

..... Plaintiff

Through: Ms. Leena Tuteja, Advocate

versus

Saifuddin & another

.....Defendants

Defendant No. 1 *ex-parte*;

Through: Mr. Ajay Chaudhary, for Defendant No. 2

CORAM:

Mr. Justice S. Ravindra Bhat

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| 1 . Whether reporters of local papers may be allowed to see the judgment.? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest | Yes |

Mr. Justice S. Ravindra Bhat

1. The plaintiff, Mahanagar Telephone Nigam Ltd (hereafter called "MTNL")
sues the defendants for a decree in the sum of Rs. 17, 83,056/- with interest at 24%
p.a.

2. According to averments in the plaint, one Smt. Sudesh Vig was subscriber; she
had applied for a telephone connection. When the intimation of connection was

issued on 27th October, 1994, she was no longer interested in the telephone and wanted to surrender it to the MTNL. It is alleged that before she could surrender the telephone, the second defendant, a phone inspector working for the MTNL at that time, allegedly asked her to get the telephone connection transferred to some interested person; he allegedly offered Rs. 1,000/- to her to do so. The said Smt. Vig allegedly agreed, being a housewife and not familiar with procedures, accepted the offer, and allegedly signed blank papers, transferring the telephone connection to an intending purchaser. At the time, she did not suspect any foul play. The second defendant, after allegedly getting the papers signed from Ms. Sudesh Vig, connived with the first defendant and got the telephone connection installed at the premises being 10756, Manakpura, Karol Bagh, New Delhi. This entailed misuse of the blank papers signed by the said Ms. Vig. It is also alleged that though Ms. Vig had applied only for the connection with Subscriber Trunk Dialing (STD), the defendants got the connection converted and changed to STD, and International Subscriber Dialling (ISD), for the said connection, i.e No. 3557108. It is also alleged that the telephone connection was used for STD and ISD calls. This led to issuance of three bills by MTNL i.e:

<u>Date of Bill</u>		<u>Amount</u>
16-10-1995	..	Rs. 6,02,389/-
16-12-1995	..	Rs. 6,36,989/-
29-1-1995	..	Rs. 1,06,599/-
30-1-1996	..	Rs. 3,51,128/-

3. The plaintiff alleges that a notice was issued to Ms. Sudesh Vig to pay the amount of Rs. 17,77,105 on 26-2-1996, concerning the use of the telephone, installed at Manakpura, Karol Bagh; purporting to be aggrieved, she filed a writ petition, No. 998/1996 before this court, saying that the telephone was never installed at her residence and that the second defendant had approached and paid her Rs. 1000 to sign blank papers; according to her, the papers were needed to transfer the telephone connection. After hearing parties, including the MTNL, this court directed the Central Bureau of Investigation (CBI) to investigate the entire facts, by its order dated 14-3-1996. The CBI, after due investigation, recorded a determination of fraud in respect of installation and use of the telephone at Manakpura, Karol Bagh; a first information report (FIR) was lodged on 15-5-1996 under provisions of the Indian Penal Code and the Prevention of Corruption Act. The criminal case has not yet been decided; it is as yet pending.

4. It is further alleged that after investigation and report by the CBI, the plaintiff sent bills to the first defendant, which were, however, received back with the remark "not available at the address". It is also averred that the second defendant filed a writ petition, No. 1591/1997 before this court, against the plaintiff, and Ms. Sudesh Vig, being WP 1591/1997 seeking direction that the plaintiff should take steps to recover amounts from Ms. Vig. That writ petition was dismissed on 21-4-

1997 *in limini* at the statement of the plaintiff's counsel that a CBI inquiry had been ordered into the matter. It is claimed that instead of making any payments, the defendants defaulted; they are liable to pay the amounts.

5. After issuance of summons, only the second defendant put in appearance and filed his written statement; the first defendant, despite service of summons, did not enter appearance and defend the suit. He was set down *ex-parte* by order dated 21-5-2003.

6. The second defendant filed his written statement and contested the suit. The suit is objected to on the ground of non-joinder of a necessary party, ie. Smt. Sudesh Vig; it is also averred that there is no privity of contract between him and the plaintiff. According to the second defendant, the suit cannot proceed in the absence of the subscriber, i.e. Sudesh Vig, who is liable, according to Rule 440 of the Telephone Rules. The second defendant also denies the averments in the suit and avers that the suit has not been properly instituted and filed by a duly authorized person.

7. In support of its case, the plaintiff has relied upon the evidence of four witnesses; PW-1, PW-2, PW-3 and PW-4. The plaintiff has also relied upon documents, being Exh.PW1/1 (copy of OB dated 27-10-1994); Exh.PW-1/2 (copy of intimation regarding release of new telephone connection); Exh. PW-1/3 and Exh. PW-1/4 (letters dated 19-7-1995); duplicate bills Exh. PW-2/1 to Exh. PW-2/5. Exh.

PW-4/1, delegation of authorizing Chief Accounts Officer (Legal) has been produced; Exh. PW-4/2, copy of order dated 14-3-1996 of this court in WP 998/1996 is also relied upon.

8. PW-1 deposed that on issuance of OB, Ex PW-1/1 Sudesh Vig wanted to surrender connection to the plaintiff; however, before she could surrender the same, the second defendant approached her and offered to pay Rs. 1000/- to get the connection transferred to an intending purchaser. He also deposed that the second defendant was working as phone inspector in the Idgah Exchange. In his cross examination he admitted that he had no personal knowledge of what was stated in the affidavit; he claims knowledge from the records of CBI; he also admitted to not having worked in the said office at that time. PW-2 deposed in support of the duplicate bills Exh. PW-2/1 to Exh. PW-2/5. He stated that no payment was received in respect of the bills and the telephone continued to be in the name of Ms. Sudesh Vig according to the plaintiff's records. He also deposed that this court referred the matter to the CBI on coming to know *prima facie* that defendants had colluded with each other and used the telephone by making STD and ISD calls. He also says that the bills were received by second defendant and that the bills sent to the first defendant were received back by the Plaintiff with the remark "not available at the address". In his cross examination, this witness stated that the affidavit was not based on personal knowledge, but based on the record which he had seen.

9. PW-3 has deposed about the application by Sudesh Vig for a telephone connection, pursuant to which OB No. 56051037758 was issued on 27-10-1994; a copies of the application form and duplicate application, with acknowledgement slip, specimen signature sheet are marked by him as Exh. PW-3/1 and Exh. PW-3/2. In his cross examination, he admitted that the registered subscriber is liable to pay the dues of the telephone and the second defendant is not registered telephone subscriber. He also said that dues can be recovered from the actual user, in addition to the registered user. He was unable to say whether the second defendant used the phone. He admitted to having no personal knowledge about the defendants cheating the MTNL and that his deposition in the affidavit was based on the report of CBI. PW-4 deposed about Shri H.L. Pahwa, Accounts Officer (Legal) of the plaintiff, being authorized to sign and verify the pleadings, at the time of filing the suit. He exhibited the delegation of power/ Power of Attorney authorizing Chief Accounts Officer (Legal) as Exh. PW-4/1. He also deposed about Ms. Sudesh Vig filing a writ petition, CW 998/96 and exhibited a copy of the order of court dated 14-3-1996 as Exh. PW-4/2. He deposed about the CBI report mentioning about the role of the defendants in colluding with each other to defraud the plaintiff, in regard to installation and use of the telephone at 10756, Manak Pura, Karol Bagh, New Delhi, by the second defendant; he exhibited copy of the first information report as Exh. PW-4/3. He deposed that the defendants colluded with each other and used the telephone for

making STD and ISD calls; according to him, both were liable to make payment for the suit amount. In his cross examination, he mentioned that he had no personal knowledge of what he stated in the affidavit/ examination in chief. He stated that the MTNL maintains the record of the registered subscriber as well as actual user; he however mentioned that facts pertaining to actual user is based on CBI's record. He also admitted not having no information whether the second defendant used the phone in dispute or had access to the phone.

10. The second defendant in his affidavit evidence stated that he was phone inspector and deposed that Smt. Sudesh Vig requested for change of address for installation of telephone connection. He deposed that the address was changed and executed according to orders of the concerned Sub-Divisional Engineer/ Divisional Engineer (Telephones). He stated not having seen Ms. Sudesh Vig or having ever approached her for transfer of the telephone; he denied paying Rs. 1000/- to her or having secured her signatures on blank papers. He denied connection with the first defendant and Ms. Sudesh Vig; he also stated that he could not recognize them. According to him, the subscriber Ms. Sudesh Vig requested for change of address, which was done by him after approval and direction of the Sub-Divisional Engineer. In his cross examination, he denied all suggestions about knowing the first defendant and that he installed the phone at his (first defendant's address); he also denied the suggestion about having got blank papers executed from Ms. Sudesh Vig,

or having paid Rs. 1000/- to her. He stated that it was not his duty to take a receipt regarding installation of the phone from the person in whose name it had to be installed; that was the responsibility of the linesman and ascertained by the telephone operator. He used to assign work to linesmen. They were not giving receipts to him. He denied having seen any document for installation of the phone connection of Ms. Sudesh Vig in the premises of the first defendant. He admitted to having got filled Annexure A, which was signed by Ms. Sudesh Vig; and that it was sent along with OB (Order Book). He also admitted that application for STD and ISD was given by Ms. Sudesh Vig. According to the witness, he was not authorized to sanction STD or ISD connection; that was to be done by higher officials. He also stated that the application for activating the facilities was given before installation of the phone, sometime in 1994. The OB was also issued at that time. He marked the photocopy of OB dated 27-10-1994 as Exh. DW-1/1. According to witness, for activation of STD and ISD on the phone in question, no other OB was issued.

11. This court had, by order dated 9-1-2004, framed the following issues for trial:

- (1) Whether the plaint is filed and the suit is instituted by a duly authorized person;
- (2) Whether the suit is bad for non-joinder and mis-joinder of parties;
- (3) Whether the defendants are jointly and severally liable to pay the outstanding bill amount of Rs. 17,83,056/- claimed in the suit;

(4) Whether the defendants 1 and 2 have connived with each other to defraud and cheat the plaintiff by misusing the telephone in question;

(5) If issue No. 3 is answered in favour of the plaintiff, whether the plaintiff would also be entitled to interest and if so, at what rate and for what period;

(6) Relief

The findings of this court on the above issues are as follows:

Issue No. 1	Yes.
Issue No. 2	No
Issue No. 3	No
Issue No. 4	No.
Issue No. 5	No
Issue No. 6	None

REASONS

Issue No. 1

12. The objection as to the authorization to file the suit taken by the second defendant is that the authorization (Exh. PW-4/1) relied upon cannot be taken note of since the Minutes of meeting of the Board of Directors was not produced. Exh. PW-4/1 is a circular issued by the Mahanagar Telephone Nigam Ltd, dated 14-11-

1995; it states that by virtue of powers of the General Manager, through office order dated 29-9-1986, the power to sign, verify pleadings including plaint, written statement, etc are conferred upon Chief Accounts Officers, Senior Accounts officers (legal) and Accounts Officers (Legal). This document relies on a general delegation issued at a time when the MTNL was a government department (1986). Having regard to the nature of the delegation, i.e that it was made when the MTNL was a part of the Central government, the fact that Senior Accounts Officers and Accounts Officers (legal) were later empowered by the circular does not lead to the conclusion that in the absence of the Minutes Book, the authority should be disputed. Since the basic circular of 1986 has not been disputed, the defendant's *locus standi* to question the authority of the Accounts Manager (Legal) to file the suit cannot be upheld. This issue is answered accordingly.

Issue No. 2:

13. The objection raised by the second defendant here is that he has not been joined properly in the proceedings, since he was not the subscriber and that the non-joinder of Ms. Sudesh Vig, who it is claimed, is a necessary party, is fatal to the suit.

14. In the suit, the plaintiff has averred in more than one place that the amounts could not be recovered due to the alleged wrongful acts of the second defendant; he is also alleged to have colluded with the second defendant to cause loss to the plaintiff. A number of documents have been relied upon; the defendants are sought

to be made jointly and severally liable for a decree. It therefore, cannot be said that the second defendant cannot be joined in the proceedings, as he is not a necessary party having no privity of contract with the plaintiff in regard to the issuance of telephone connection. Therefore, this plea has no merit. The second defendant was joined properly; his absence from the proceedings would have rendered the suit bad for non-joinder of necessary party.

15. As far as Ms. Sudesh Vig is concerned, it is no doubt true that she had applied for the telephone, and according to the plaintiff, she had asked for transfer of the telephone at the behest of the second defendant, who paid some money to her. Yet, no relief has been claimed against her; no allegation of collusion or conspiracy has been leveled against her. Therefore, she is strictly not a necessary party; she could have been impleaded, being a proper party. However, her absence from the suit cannot, in the view of the court, afford sufficient cause for its rejection. This is supported by Order 1 Rule 9, which decrees that a non-joinder of a necessary party is fatal to the suit, no such consequence in the case of non-joinder of a proper party has been enjoined by law. Therefore, this issue, too, is answered against the second defendant.

Issue Nos 3, 4 and 5

16. These issues can be conveniently discussed, since they hinge on an appreciation of facts. The plaintiff's claim is that the defendants were responsible

for the alleged cheating and fraud played on it. For this purpose, the plaintiff has relied upon the order of this court in WP No. 998/1996 dated 14-3-1996. The court recorded the statement on behalf of the MTNL . The court, after noticing the facts and the grievance of Ms. Sudesh Vig, who stated that she was asked by the second defendant to sign two applications for transfer the connections, recorded her statement; the MTNL file had been produced in court. The court noted that two applications appeared on the file, dated 19th July 1995, marked X and Y. Ms. Sudesh Vig, the subscriber and writ petitioner was present in court; she admitted to her signatures but stated that the second defendant had obtained the signatures on blank paper. On the basis of the observations and the statement of MTNL, two issues were framed and the matter was referred to investigation by CBI.

17. It is contended by Ms. Leena Tuteja, learned counsel that the above order of court, along with the concerned documents Exh. PW-1/3 and Exh. PW-1/4 (letters dated 19-7-1995) amply demonstrate the complicity of the second defendant and his connivance in installing the telephone after luring the allottee, Ms. Vig, into signing blank paper. Learned counsel relied on Exh. PW-1/3 and Exh. PW-1/4 (letters dated 19-7-1995) to say that *prima facie*, they disclose a discrepancy as the allotment existing on record was for a STD connection; yet the application again sought for the same facility along with ISD facilities.

18. Learned counsel submitted that the connivance and liability of both the

defendants is also established by the circumstance that the second defendant was aware of the entire controversy, and approached this court, by filing WP 1591/1997 for a direction that the telephone bills for the connection should be recovered from the concerned subscriber; that writ petition was dismissed on 21-4-1997. Ms. Tuteja also relied upon the mis-description of Ms. Sudesh Vig's name in Exh. PW-1/3 and Exh. PW-1/4; instead of "Sudesh" the name shown is "Shudish". She also relied upon the testimony of the plaintiff's witnesses to say that the telephone connection was misused by the first defendant; admittedly the second defendant was responsible for installing it in those premises. Both defendants therefore, are jointly and severally liable for the amounts claimed.

19. Mr. Ajay Chaudhary, learned counsel for second defendant contended that the plaintiff has failed to prove about the defendant's alleged complicity or involvement in the so called fraud. The connection, sanctioned to Ms. Vig, was shifted to another residence, at her request, in writing. The application was duly approved by a competent officer. The plaintiff failed to prove that the second defendant had in fact installed the telephone, or his knowledge or connivance with the first defendant. It was contended that the order of this court in the writ petition filed by Ms. Vig cannot be, in the absence of her testimony in the present proceeding, and proper opportunity to cross examine her, be used against the second defendant to fasten any liability, or conclude that he was party to a fraud, with the first defendant. It was

also contended that even the duplicate bills produced in the present case show that the subscriber was Ms. Vig. No attempt was made by the plaintiff, beyond filing a copy of the FIR and alleged statements of officials who had no personal knowledge in the matter, to establish that the defendants had colluded with each other to defraud MTNL, by using the telephone connection for STD and ISD calls.

20. Counsel contended that the entire attempt by MTNL has been to fasten liability on the second defendant without having to prove any of the allegations made. Though the FIR has been relied upon, no witness has been produced to establish the allegations contained there. Similarly, the mere circumstance that a criminal case is pending cannot be the basis of a civil liability, especially when the consumer or subscriber continues to be the same, ie. Sudesh Vig. The second defendant is admittedly not a subscriber. In these circumstances, no finding about his being party to a fraud to cheat MTNL can be rendered.

21. Now, the mainstay of the plaintiff's case seems to be the statement of Ms. Sudesh Vig, recorded in WP No. 998/1996 dated 14-3-1996. The court, first noted the facts as well as the grievance of Ms. Sudesh Vig. She had stated that she was asked by the second defendant to sign two applications for transfer the connections. The court also noticed that two applications appeared on the file, dated 19th July 1995, marked X and Y. Ms. Sudesh Vig, the subscriber and writ petitioner was present in court; she admitted to her signatures but stated that the second

defendant had obtained the signatures on blank paper. These are serious enough allegations, and if the court is to accept their credibility and admit the document as recording the statement in evidence, perhaps it would be damaging to the plaintiff. Yet, the fact remains that the court merely had recorded in its order about the statement of the subscriber; her statement on oath had not been recorded. Moreover, the defendants were not given opportunity to impeach the statement. The MTNL could well have taken care of this position by producing Ms. Vig as a witness in support of its case in this suit; significantly, this was not done. Thus, the allegations recorded as statements of Ms. Vig, in her absence, cannot be relied upon. The allegation that signatures were obtained on blank paper, by the second defendant, therefore remains an uncorroborated version of the plaintiff.

22. It had been urged on behalf of the plaintiff that the discrepancies in the applications, in terms of mis-description of the name of the subscriber as well as the request for STD/ISD facilities are also an indicator about the involvement of the second defendant with the first defendant concerning misuse of the telephone connection. In the opinion of this court, nothing can be established from such discrepancy. The documents, Ex.P-2/2 to P-2/5 series are duplicate copies of bills, issued in the name of Ms. Sudesh Vig. However, no attempt has been made to produce that witness, or even the evidence of anyone having visited the place where the telephone was actually transferred or shifted, to say that she does not live there,

and that the first defendant lives there. In the absence of such evidence, or the testimony of Ms. Vig, it was necessary for the plaintiff to establish, with some credible material, that the actual user of the telephone was first defendant, who was living, or even had lived in the said premises. Yet, no such testimony of any witness, or any independent material to such effect is forthcoming.

23. It may be true, as alleged by the plaintiff that the phone was installed without authority of the subscriber, and actually misused to make ISD and STD calls, which were not paid, leading to huge revenue loss for the MTNL. Yet, this court cannot allow itself to deviate from the established procedure, which requires the plaintiff to prove its case with legally admissible evidence, in support of the allegations of the defendants' joint and several liability and their having defrauded and cheated the plaintiff. It is trite law that a plaintiff has to positively prove his case. Here, the statements of the subscriber could have been of relevance had they been recorded under oath and the defendants given opportunity to test it in cross examination. The plaintiff has not only failed to adopt that course, it has even sought to place reliance upon the testimony and evidence of four witnesses who had no connection with the transaction, and no personal knowledge. The assertion of one such witness that the bills issued could also be on the basis of actual user's usage of the telephone, therefore, cannot be taken at face value. Here again, the plaintiff has to chosen to rely on documents which show that Ms. Sudesh Vig was the subscriber. Fraud and

cheating are fairly serious allegations; even the Civil Procedure Code prescribes specific standards for pleadings; such allegations have to be established. All that can be inferred, and said to have been proved, is that the subscriber allottee was Ms. Sudesh Vig; she asked for the phone to be shifted to Manak Pura, which was done. The phone was apparently misused; bills to the tune of over Rs. 17 lakhs were unpaid. However, the plaintiff has not proved that the defaults were on account of the defendants' complicity, or that they were jointly and severally liable for a decree in that regard.

24. In view of the above the finding on issue Nos. 3 to 5 is that the plaintiff has not been able to prove that the defendants are jointly or severally liable to pay MTNL the sum of Rs. 17, 83,056/- with interest at 24% p.a; the plaintiff has also been unable to prove that the defendants colluded or connived with each other to cheat and defraud the MTNL. The plaintiff, therefore, cannot claim any relief in the present suit .

25. For the foregoing reasons and findings, the suit has to fail; it is therefore dismissed with costs.

DATED: 15th February, 2008

S. RAVINDRA BHAT, J