

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

Date of decision: 14th October, 2011

+ **W.P.(C) No. 11542/2009**

% **AIRCEL LTD.**

...Petitioner

Through: Mr. Sunil K. Jain with Mr. S.
Borthakur & Ms. Reeta Chaudhary,
Advs.

Versus

GOVT. OF NCT OF DELHI & ORS.

..... Respondents

Through: Ms. S. Fatima, Adv. for Ms. Anjana
Gosain, Adv. for UOI.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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

RAJIV SAHAI ENDLAW, J.

1. The petition impugns two notices, both dated 24.07.2009 and notices dated 31.07.2009, 07.08.2009 & 25.08.2009 issued by the respondent No.2 Controller of Legal Metrology (CLM), Government of NCT of Delhi

averring the petitioner to have committed a breach of Section 33 of the Standards of Weights & Measures (Enforcement) Act, 1985 (hereinafter called the Enforcement Act) and holding the petitioner guilty of offence punishable under Section 51 of the Enforcement Act and giving option to the petitioner to compound the said offence upon payment of fine of Rs.5,000/- for the offence mentioned in each of the five notices.

2. Notice of the petition was issued and vide order dated 14.09.2009, penal proceedings against the petitioner stayed. The petitioner has filed an additional affidavit in terms of the order dated 14.09.2009 and the respondent No.2 CLM and the respondent No.3 Department of Telecommunication (DOT), Government of India have filed their counter affidavits. The petitioner thereafter filed CM No.11376/2011 averring that it had been served with notice from the Court of Metropolitan Magistrate (MM), Karkardooma Court, Delhi of a complaint filed by the respondent No.2 CLM of offence under Section 51 of the Enforcement Act. Vide order dated 19.08.2011, the said proceedings were also stayed. None appeared for the contesting respondent No.2 CLM on 08.08.2011 and on 19.08.2011.

None appears for the contesting respondent No.2 CLM today also. Need is therefore not felt to await the contesting respondent No.2 CLM any further. The counsel for the petitioner has been heard.

3. The petitioner is a Cellular/Mobile Operator providing GSM/Mobile Telephony/Broadband Services *inter alia* in the National Capital Territory of Delhi under the licence granted by the respondent No.3 DOT, Government of India under the provisions of the Indian Telegraph Act, 1885 and the Indian Wireless Telegraphy Act, 1933. The petitioner, as a part of providing the said services, allots a number through a Subscriber Identification Module (SIM) Card to its customers and which SIM Card upon being inserted in a mobile phone instrument provides connectivity to the server/mobile phone network of the petitioner via electro-magnetic waves. The services provided by the petitioner can be either pre-paid or post-paid. While in post-paid connections, the validity of the SIM Card is unlimited (of course subject to payment of bills), in pre-paid connections, the SIM Card has a validity period and time utilization (talk time) and such pre-paid SIM Cards, to be kept alive and operative need to be recharged

from time to time. The petitioner, to enable its pre-paid customers to so recharge the SIM Cards sells pre-paid SIM Card and Recharge Coupons which contain a number and upon feeding which the SIM Card gets recharged for the value thereof.

4. The dispute subject matter of the present petition pertains to the sale by the petitioner of the SIM Cards and the Recharge Coupons. While the notices dated 24.07.2009 (supra) allege the petitioner to be in violation of Sections 33 & 51 of the Enforcement Act for the reason of the Recharge Coupons of the petitioner being sold in the market not bearing the date of manufacture thereof, the notices dated 31.07.2009, 07.08.2009 & 25.08.2009 allege the petitioner to be guilty for the reason of the SIM Cards of the petitioner available in the market not bearing the date of packing thereof. Similarly, the notice from the Court of MM (supra) is also on the complaint of the packaged commodity of the petitioner for sale in the market not complying with Sections 33 & 51 of the Enforcement Act.

5. Section 33 of the Enforcement Act makes the provisions of the Standards of Weights & Measures Act, 1976 (hereinafter called the Standards Act) with regard to commodities in packaged form applicable to every commodity in packaged form which is distributed, sold, or kept, offered or exposed for sale in the States (there is no dispute that the Enforcement Act is applicable to the State of Delhi) as if the provisions of the Standards Act were enacted by or made under the Enforcement Act. Section 51 of the Enforcement Act provides for the penalties for contravention of Section 33 thereof.

6. The Enforcement Act does not define “commodity in packaged form”. The definition thereof is however to be found in Section 2(b) of the Standards Act which is as under:

“(b) “commodity in packaged form” means commodity packaged, whether in any bottle, tin, wrapper or otherwise, in units suitable for sale, whether wholesale or retail.”

7. Section 39 of the Standards Act prohibits any person from making, manufacturing, packing, selling, distributing, delivering, offering, exposing or possessing for sale any commodity in packaged form to which Part IV of

the Standards Act applies unless such package bears thereon or on a label securely attached thereto a declaration *inter alia* as to the identity of the commodity in the package, the net quantity thereof, the unit sale price thereof and the sale price of the package; the same also requires a declaration of the name of the manufacturer and certain other particulars viz. the date of manufacture, date of packing etc.

8. The question which thus arises for consideration is whether the SIM Cards and the Recharge Coupons of the petitioner sold in the market fall within the definition of “commodity in packaged form”. If the SIM Cards and Recharge Coupons can be said to be a commodity in packaged form, they would be required to comply with the provisions aforesaid; else not.

9. The respondent No.2 CLM in its affidavit, in opposition to the petition, has pleaded that since SIM Cards and Recharge Coupons are basic necessary access points for mobile telephony and are a commodity / merchandise / product, their sale is governed by the Enforcement Act and the notices impugned in the petition have been validly issued.

10. The respondent No.3 DOT has in its affidavit pleaded that it has no

concern with the dispute subject matter of the petition; it has in its additional affidavit however supported the respondent No.2 CLM and pleaded that the packaging of the SIM Card and the Recharge Coupon is required to comply with the provisions of the Standards Act and the Enforcement Act.

11. It is the case of the petitioner:

- (i) that the SIM Cards and the Recharge Coupons are not commodity or the goods; they are integral part of the services providing of which the petitioner is engaged in; neither the SIM Card nor the Recharge Coupon has any use save for availing the services/facilities;
- (ii) reliance is placed on the definition of “Commodity” in Black’s Law Dictionary;
- (iii) that the SIM Card and the Recharge Coupons are like a licence for availing the services;
- (iv) reliance is heavily placed on *Bharat Sanchar Nigam Ltd. Vs. Union of India* (2006) 3 SCC 1 where the issue was of levy of sales tax on such SIM Cards and Recharge Coupons and where

the Supreme Court held the same to be not goods so as to attract sales tax. While holding so, the Supreme Court *inter alia* held that the contract between a subscriber and a Mobile / Cellular Telephony Provider cannot be interpreted as transfer of right to use goods but is merely a contract for providing services;

- (v) detailed averments are made as to the way in which the SIM Cards / Recharge Coupons are sold and the manner of utilization thereof. It is pleaded that only the unique number which enables recharge upon being fed into the telephone is contained in the Recharge Coupon and which Coupon is worthless after the number has been so fed; that even without the purchase of the said Coupon, the pre-paid SIM Card can be got recharged upon making payment to the dealers of the petitioner who then recharge a particular SIM Card using the unique number allotted to each of the said dealers. Similarly, with respect to the SIM Card, it is pleaded that the same is but a micro chip which upon activation brings the mobile phone into

operation and capable of use;

- (vi) the petitioner along with CM No.11376/2011 (supra) has also filed a judgment dated 08.01.2010 of the Karnataka High Court in W.P. No.11486/2007 titled *M/s Bharati Airtel Ltd. Vs. State of Karnataka* holding that the provisions of the Standards Act intended for commodities in packaged form are not applicable to SIM Cards / Recharge Coupons;
- (vii) reliance is also placed on orders in W.P. No.6765/2010 titled *AIRCEL Ltd. Vs. State of Uttar Pradesh* of the Allahabad High Court where upon similar challenge being made, the Department of Legal Measurement Science of the State of Uttar Pradesh agreed that SIM Card is not covered by the Standards Act and the Standards of Weights & Measures (Packaged Commodities) Rules, 1977 notified thereunder and withdrew the notices earlier issued to the petitioner;
- (viii) that the date of manufacture or the date of packing have no relevance to SIM Cards or Recharge Coupons as it may have to

packaged goods.

The counsel for the petitioner has thus contended that the present petition is entitled to succeed.

12. During the hearing on 08.08.2011, attention of the counsels was also invited by this Court to the recent dicta of the Supreme Court in ***Idea Mobile Communication Ltd. Vs. C.C.E. & C., Cochin*** MANU/SC/0898/2011.

13. Though the Apex Court in ***Bharat Sanchar Nigam Ltd.*** (supra) had left the question whether the SIM Cards can be said to be goods or not, open for adjudication but subsequently in ***Idea Mobile Communication Ltd.*** (supra) has held that SIM Card has no intrinsic value and is supplied for providing Mobile services and is never sold as goods independent from services provided and is a part and parcel of the services provided and further that the dominant position of the transaction is to provide the services and not to sell the SIM Cards which on its own but without the service would hardly have any value at all.

14. Thus, it stands settled that SIM Card as also Recharge Coupons are not goods but an integral part of the Mobile services.

15. However, what intrigues me is that the expression used in the Standards Act is “commodity” and not goods. It was felt that just like there can be goods in packaged form, so can a service be sold/offered for sale in a packaged form. The root question therefore is whether the word commodity would include services. The meaning of “commodity”, neither in the Black’s Law Dictionary relied upon by the petitioner nor in the Oxford English Dictionary as a thing of use or object of trade or a thing one deals in is found to be such so as to exclude services therefrom.

16. However, the Preamble to the Standards Act is as under:

“An Act to establish standards of weights and measures, to regulate inter-State trade or commerce in weights, measures and other goods which are sold or distributed by weight, measure or number, and to provide for matters connected therewith or incidental thereto.”

The same is indicative of the services being not within the purview of the said Act. The various provisions of the Standards Act also are with reference

only to goods and not with reference to services. It is only in Section 31 thereof that while describing the applicability of Part IV of the Act is it mentioned that the provisions of Part IV shall apply *inter alia* to goods intended to be sold etc. in the course of inter-State trade as also to services rendered by weight, measure or number in relation to inter-State trade. However Section 39 of the Standards Act, as aforesaid in para 7 applies to “commodity in packaged form” to which Part IV applies. The same has made me wonder whether the provisions of Section 39 apply to services also.

17. However, I find this Court in ***Federation of Hotels and Restaurants Association of India v. Union of India*** AIR 2007 Delhi 137 to have, after holding the sale of food products including packaged drinks/water in hotels/restaurants to be a sale of service and not a sale of goods, to have held that in the absence of the Standards Act containing a deeming definition calculated to bring within its statutory sweep services, the same cannot be held to be covered thereby.

18. Also, though Section 39(9) of the Standards Act as also Section 33(2) of the Enforcement Act empower the Central Government and/or the State

Government to regulate packaging of any particular commodity but no Rules regulating the packaging of services as commodity are found to have been framed. The Rules framed for packaging of goods as commodities are found to be inapplicable and to be serving no purpose qua packaging of services as in the present case.

19. Before parting with the case, I may notice that both the Standards Act as also the Enforcement Act stand repealed vide Section 57(1) of the Legal Metrology Act, 2009 which has come into force on 1st April, 2011.

20. The petition accordingly succeeds and is allowed. The notices/ proceedings impugned are quashed.

No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

OCTOBER 14, 2011

‘gsr’

(corrected and released on 3rd November, 2011)