

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

Date of Decision: 23rd February, 2012

+ W.P.(C) 1077/2012 & CM 2366/2012 (Stay)

.
UNION OF INDIA Petitioner
Through: Mr. A.S. Chandhiok, ASG with
Ms. Maneesha Dhir, Mr. K.P.S.
Kohli, Mr. Ritesh, Ms. Mithu
Jain, Advocates

versus

AIRCEL LIMITED AND ANR Respondents
Through: Mr. S. Ganesh, Mr. Meet
Malhotra, Sr. Advs. with
Mr. Gopal Jain, Mr. Ankur Sood,
Mr. R.S. Chauhan, Mr. Kaushik
Mishra, Advs.

+ W.P.(C) 1085/2012 & CM 2374/2012 (Stay)

UNION OF INDIA Petitioner
Through: Mr. A.S. Chandhiok, ASG with
Ms. Maneesha Dhir, Mr. K.P.S.
Kohli, Mr. Ritesh, Ms. Mithu
Jain, Advocates

Versus

IDEA CELLULAR LTD Respondent
Through: Dr. A.M. Singhvi, Mr. C.S.

Vaidyanathan, Mr. S. Ganeshan,
Sr. Advs. with Mr. Ajay Bhargava,
Mr. Aseem Chaturvedi,
Mr. Manjul Bajpai, Mr. Anees
Patnaik, Ms. Hanshita Verma,
Advocates

+ W.P.(C) 1086/2012 & CM 2376/2012 (Stay)

UNION OF INDIA

..... Petitioner

Through: Mr. A.S. Chandhiok, ASG with
Ms. Maneesha Dhir, Mr. K.P.S.
Kohli, Mr. Ritesh, Ms. Mithu
Jain, Advocates

Versus

VODAFONE MOBILE SERVICES LTD
AND ORS

..... Respondents

Through: Dr. A.M. Singhvi, Mr. C.S.
Vaidyanathan, Sr. Advs. with
Mr. Manjul Bajpai, Mr. Anees
Patnaik, Ms. Hanshita Verma,
Advocates

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

A.K. SIKRI, ACTING CHIEF JUSTICE (ORAL)

Caveat No. 190/2012 in WP(C) 1077/2012

Caveat No. 191/2012 in WP(C) 1085/2012

Caveat No. 192/2012 in WP(C) 1086/2012

Since the respondents/caveators have entered appearance, Caveats stand discharged.

C.M. No. 2367/2012 in WP(C) 1077/2012

C.M. No. 2375/2012 in WP(C) 1085/2012

C.M. No. 2377/2012 in WP(C) 1086/2012 (all for exemption)

Exemption allowed, subject to all just exceptions.

CMs stand disposed off.

WP(C) Nos.1077/2012, 1085/2012 & 1086/2012

1. In these three writ petitions, the challenge is to the common orders dated 24.12.2011, 20.1.2012 and 17.2.2012 of the Telecom Disputes Settlement & Appellate Tribunal (TDSAT) (hereinafter referred to as the Tribunal) in the proceedings, filed by respondent in each of these writ petitions, before the Tribunal. While orders dated 24.12.2011 and 17.2.2012 concern interim relief/stay granted by the Tribunal, vide order dated 20.1.2012, the Tribunal has decided the question pertaining to its jurisdiction to deal with the petitions filed by the respondents before the Tribunal and held that the Tribunal has jurisdiction over the matters.

2. For the purpose of present order, it may not be necessary to state in detail the controversy/dispute which is raised in those petitions before the Tribunal. It would serve our purpose to point out that the proceedings before the Tribunal have been filed impugning the order dated 23.12.2011 of the petitioner calling upon these respondents to stop

immediately the provision of 3G services in service areas where the said respondents were providing these services under the intra service area roaming agreements. The respondents felt aggrieved with the aforesaid orders as according to them, it was permissible for them to enter into such agreements and provide these services thereunder. Challenging this order, the respondents filed their respective petitions before the Tribunal in which impugned common orders have been passed.

3. Along with the petitions before the Tribunal, the respondents had also filed applications seeking interim stay of the aforesaid order dated 23.12.2011. It appears that the said petitions were mentioned for immediate hearing and having regard to the urgency, were taken up for hearing on 24.12.2011. On 24.12.2011, as per the impugned order passed on that date, the matter was heard at great length. The Tribunal, while adjourning the matter to 3.1.2012, directed that till the next date, the petitioner herein is restrained from taking any coercive steps against the respondents herein to enforce the impugned order dated 23.12.2011. Some other portions of this order dated 24.12.2011 which are relevant would be referred to and adverted at later stage.

4. Matter was taken up on 3.1.2012 when the petitioner herein raised preliminary objection about the maintainability of those petitions filed by the respondents herein primarily on the ground that the Tribunal did not have the jurisdiction to adjudicate the dispute raised by the respondents. It appears that on this aspect, the matter was heard on few dates and ultimately the order dated 20.1.2012 has been passed holding

that the Tribunal has the requisite jurisdiction to deal with the dispute on merits.

5. Thereafter, issue relating to interim relief was again taken up for hearing. The issue relating to interim relief was heard on 16.2.2012. Since the hearing could not be completed, it was further resumed and took place on 17.2.2012. On 17.2.2012, the Tribunal observed that since the issue of interim relief which was argued at length was primarily of the same nature on which hearing on main matter could take place and the main petition itself could be disposed of, a suggestion was mooted to hear the main matter itself finally treating the hearing of the interim matter to be hearing on the main matter. This suggestion was agreed to and accepted by learned counsels for all the parties. The petitioner herein had already filed short reply to the interim applications. The Tribunal observed that as the questions which had arisen for consideration in the petitions were questions of law, the petitioner herein could file additional documents and no further pleadings needed to be filed, though it permitted the parties to raise all contentions making it clear that they would remain open. Having regard to the aforesaid course of action adopted by the Tribunal in proceeding with the final hearing of the matter and even treating the hearing which had already taken place on interim applications to be the hearing in the main matter, in the order dated 17.2.2012, the Tribunal opined that interim order was not required to be varied “at present”.

6. Aforesaid is the background in which the three orders dated 24.12.2011, 20.1.2012 and 17.2.2012 have been passed. These orders, as is apparent from the aforesaid narration, cover two facets, one dealing with the jurisdiction of the Tribunal to entertain the petitions filed by the respondents and the other relating to the interim relief/stay granted by the Tribunal.

7. In so far as order dated 20.1.2012 on the ruling upon the jurisdiction of the Tribunal is concerned, a preliminary objection is raised by the respondents herein to the maintainability of the present writ petitions. Dr. A.M. Singhvi, Mr. C.S. Vaidyanathan, Mr. S. Ganesh and Mr. Gopal Jain, who argued for the respondents, submitted that having regard to the provisions of Section 18 of the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as the Act) which provides for appeal to the Supreme Court against such an order, present writ petitions are not maintainable. Mr. Chandhiok, learned Additional Solicitor General appearing for the petitioner, on the other hand, submitted that the order dated 20.1.2012 is to be treated as an interlocutory order as no final order on the jurisdiction even has so far been passed. To bolster this submission, Mr. Chandhiok referred to para 18 of the impugned order dated 20.01.2012 wherein the Tribunal has observed that “*the jurisdictional facts have not yet been raised; issue of jurisdiction is yet to be framed*”. He also drew our attention to para 16 of the said order wherein the Tribunal has, inter alia, remarked that on consideration of the pleas taken by the parties and on evidences adduced by them at the trial, if it is found that the Tribunal cannot grant any

relief, the same itself cannot be a ground to hold at that stage that the Tribunal does not have jurisdiction to adjudicate on the questions raised. On the basis of these observations, learned ASG submitted that the Tribunal has itself observed that it has still to adjudicate and finally determine upon its jurisdiction in the matter and, therefore, it cannot be treated as an order which is appealable under Section 18 of the Act and should be treated as interlocutory order.

8. On behalf of the respondents, on the other hand, it is submitted that notwithstanding the aforesaid observations, when the order is read in its entirety, it would clearly reveal that the Tribunal has come to a conclusive finding that it does not lack jurisdiction in respect to the subject matter of the petitions before it and has, in fact, jurisdiction over the matter.

9. On a reading of the order in its entirety, we are inclined to accept the submission of the respondents. No doubt, in para 16 to 18 of the order dated 20.1.2012, some observations are made which do not gel with the tenor of the order and the discussion which follows thereafter, however, the fact remains that in the impugned order, the Tribunal has discussed the contentions of both the parties touching upon the question of its jurisdiction and after detailed discussion in the order, which runs into 33 pages, it has come to a clear finding that it has the requisite jurisdiction to entertain the dispute subject matter of petitions before it. For this purpose, the Tribunal has discussed the issue involved, the provisions of the Act and has also referred to the judgment of the

Supreme Court in *Cellular Operators Association of India v. Union of India & Ors.*, (2003) 3 SCC 186 which has explained the scope of the jurisdiction of Tribunal under the aforesaid Act. Various contentions raised by the petitioner questioning the jurisdiction of the Tribunal have been dealt with elaborately and rejected. The final determination on this aspect can be gauged not only from a reading of the order in its entirety but specifically as stated in paras 33, 36, 38 and 39 of the said order.

10. We may clarify at this stage that by making the aforesaid observations, we have not gone into the question as to whether the Tribunal has rightly decided the issue or not. What we are emphasizing is that the Tribunal has, in fact, decided the issue of jurisdiction holding that the subject matter of dispute falls within the jurisdiction of the Tribunal and the Tribunal has requisite power to deal with this issue on merits. In view thereof, we are of the opinion that it is not an interlocutory order in the manner suggested by learned ASG. At this stage, we would like to reproduce the provisions of Section 18 of the Act which is to the following effect:

“18. Appeal to Supreme Court. (1) Notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in any other law, an appeal shall lie against any order, not being an interlocutory order, of the Appellate Tribunal to the Supreme Court on one or more of the grounds specified in Section 100 of that Code.

(2) No appeal shall lie against any decision or order made by the Appellate Tribunal with the consent of the parties.

(3) Every appeal under this section shall be preferred within a period of ninety days from the date of the decision or order appealed against:

Provided that the Supreme Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.”

11. The aforesaid Section lays down, in no uncertain terms, that appeal to the Supreme Court lies against ‘any order’ of the Tribunal. The only exception is that it should not be an interlocutory order. Whether a particular order is an order which becomes appealable under the aforesaid provision has been determined by the Supreme Court in a catena of judgments. Few judgments which were cited by counsel for the respondents in this behalf are as follows:

- (i) *Mohanlal Maganlal Thakkar v. State of Gujarat*, **AIR 1968 SC 733** (para 4),

“4. The question as to whether a judgment or an order is final or not has been the subject matter of a number of decisions; yet no single general test for finality has so far been laid down. The reason probably is that a judgment or order may be final for one purpose and interlocutory for another or final as to part and interlocutory as to part. The meaning of the two words "final" and "interlocutory" has, therefore, to be considered separately in relation to the particular purpose for which it is required. However, generally speaking, a judgment or order which determines the principle matter in question is termed final. It may be final although it directs enquiries or is made on an interlocutory applications or reserves liberty to apply [Halsbury's Laws of England (3rd Ed.) Vol. 22, 742-743]. In some of the English

decisions where this question arose, one or the other of the following four tests was applied.

1. Was the order made upon an application such that a decision in favour of either party would determine the main dispute?
2. Was it made upon an application upon which the main dispute could have been decided?
3. Does the order as made determine the dispute?
4. If the order in question is reversed, would the action have to go on?"

(ii) *McDermott International Inc. v. Burn Standard Co. Ltd. & Ors.*,
(2006) 11 SCC 181.

"68. The 1996 Act does not use the expression "partial award". It uses interim award or final award. An award has been defined under Section 2(c) to include an interim award. Sub-Section (6) of Section 31 contemplates an interim award. An interim award in terms of the said provision is not one in respect of which a final award can be made, but it may be a final award on the matters covered thereby, but made at an interim stage.

xxx xxx xxx

70. We cannot also lose sight of the fact that BSCL did not raise any objection before the arbitrator in relation to the jurisdiction of the Arbitrator. A ground to that effect has also not been taken in its application under Section 34 of the Act. We, however, even otherwise do not agree with the contention of Mr. Mitra that a partial award is akin to a preliminary decree. On the other hand, we are of the opinion that it is final in all respects with regard to disputes referred

to the arbitrator which are subject matter of such award. We may add that some arbitrators instead and in place of using the expression "interim award" use the expression "partial award". By reason thereof the nature and character of an award is not changed. As, for example, we may notice that in arbitral proceedings conducted under the Rules of Arbitration of the International Chamber of Commerce, the expression "partial award" is generally used by the arbitrators in place of interim award. In any view of the matter, BSCL is not in any way prejudiced. We may state that both the partial award and the final award are subject matter of challenge under Section 34 of the Act.”

(iii) *Usmanbhai Dawoodbhai Memon v. State of Gujarat*, (1988) 2 SCC 271 (para 24)

“24. At the conclusion of the hearing on the legal aspect, Shri Poti, learned counsel appearing for the State Government contended, on instructions, that an order passed by a Designated Court for grant or refusal of bail is not an 'interlocutory order' within the meaning of Section 19(1) of the Act and therefore an appeal lies. We have considerable doubt and difficulty about the correctness of the proposition. The expression 'interlocutory order' has been used in Section 19(1) in contradistinction to what is known as final order and denotes an order of purely interim or temporary nature. The essential test to distinguish one from the other has been discussed and formulated in several decisions of the Judicial Committee of the Privy Council, Federal Court and this Court. One of the tests generally accepted by the English Courts and the Federal Court is to see if the order is decided in One way, it may terminate the proceedings but if decided in another way, then the proceedings would continue. In *V.C. Shukla vs State through C.B.I.*, 1980 Cri LJ 690, Fazal Ali, J. in delivering the majority judgment reviewed the entire case law on the subject and deduced therefrom the following two principles, namely, (i) that a final order has to be interpreted

in contra-distinction to an interlocutory orders; and (ii) that the test for determining the finality of an order is whether the judgment or order finally disposed of the rights of the parties. It was observed that these principles apply to civil as well as to criminal cases. In criminal proceedings, the word 'judgment' is intended to indicate the final order in a trial terminating in the conviction or acquittal of the accused. Applying these tests, it was held that an order framing a charge against an accused was not a final order but an interlocutory order within the meaning of Section 11(1) of the Special Courts Act, 1979 and therefore not appealable. It cannot be doubted that the grant or refusal of a bail application is essentially an interlocutory order. There is no finality to such an order for an application for bail can always be renewed from time to time. It is however contended that the refusal of bail by a Designated Court due to the non-fulfillment of the conditions laid down in Section 20(8) cannot be treated to be a final order for it affects the life or liberty of a citizen guaranteed Under Art. 21. While it is true that a person arraigned on a charge of having committed an offence punishable Under the Act faces a prospect of prolonged incarceration in view of the provision contained in Section 20(8) which places limitations on the power of a Designated Court to grant bail, but that by itself is not decisive of the question as to whether an order of this nature is not an interlocutory order. The Court must interpret the words 'not being an interlocutory order' used in Section 19(1) in their natural sense in furtherance of the object and purpose of the Act to exclude any interference with the proceedings before a Designated Court at an intermediate stage. There is no finality attached to an order of a Designated Court granting or refusing bail. Such an application for bail can always be renewed from time to time. That being so, the contention advanced on behalf of the State Government that the impugned orders passed by the Designated Courts refusing to grant bail were not interlocutory orders and therefore appealable Under Section 19(1) of the Act, cannot be accepted.”

12. Even a learned Single Judge of this Court, in the context of this very Act, has determined the issue in the case of *Star India P. Ltd. v. Life Style Communication P. Ltd.*, **146 (2008) DLT 230**.

13. We would also like to refer to a recent judgment dated 7.12.2011 rendered by the Apex Court in the case of *Nivedita Sharma v. Cellular Operators Association of India & Ors.*, **Civil Appeal No.10706/2011**. That was a case under the Consumer Protection Act, 1986. Against the order of the State Consumer Disputes Redressal Commission, a writ petition was entertained by the High Court though under Section 19 of the Consumer Act, appeal to the National Consumer Disputes Redressal Commission has been provided. The Supreme Court held that the order in question was appealable and the High Court should not have entertained the writ petition in exercise of its power under Article 226 of the Constitution.

14. Thus, in so far as order dated 20.1.2012 is concerned, present writ petitions are not maintainable in view of the aforesaid statutory remedy available to the petitioners to challenge that order before the Supreme Court.

15. Vide the other two orders dated 24.12.2011 and 17.2.2012, the Tribunal has granted an interim relief whereby the petitioner herein is restrained from taking any coercive steps against the respondents herein

to enforce the order dated 23.12.2011. This order was initially passed on 24.12.2011 and is continued vide order dated 17.2.2012.

16. Mr. Chandhiok, learned ASG submitted that except recording the fact that the matter was heard at length, no reasons are given while passing the stay order dated 24.12.2011. Such an order, it was submitted, is perverse and non est. His further submission was that same error has crept in the order dated 17.2.2012. Further submission of learned ASG is that merely because the petitioner had agreed that the matter be heard finally would not mean that while passing the stay order or continuing with the order, the Tribunal was not supposed to give its reasons in support of such an order, more particularly when it was accepted that matter was heard at length which would mean that various contentions were raised by the petitioner in support and in justification of the order dated 23.12.2011 impugned in the petitions before the Tribunal, asking the respondents to stop the user of those services. Learned ASG referred to a judgment of the Supreme Court in *Special Director & Anr. v. Mohd. Ghulam Ghouse & Anr.*, (2004) 3 SCC 440, wherein the interim order passed by the High Court without giving any reasons was set aside.

17. To appreciate this contention, we will have now to traverse to the proceedings which took place on different dates. As already pointed out above, impugned order of the Government is dated 23.12.2011 and it was challenged by the respondents by filing the petitions immediately. Even when 24.12.2011 happened to be a Saturday, having regard to the

urgency involved in the matter, the case was taken up for hearing on that date on which date first order was passed granting stay which is challenged herein. The order records that matter relating to grant of interim relief was heard at great length. It further records that “*at this juncture, we do not have any time to pass a detailed order keeping in view the terms of the order dated 23.12.2011 passed by the Respondents herein*”. That was the last day before the Tribunal was going to have Christmas vacations and was to re-open on 3.1.2012. The matter was kept for hearing on the very next working day, i.e., 3.1.2012 for further hearing on the prayer for interim relief. As already stated above, when the matter was taken up on 3.1.2012, the question of jurisdiction of the Tribunal to hear these matters cropped up and the attention was diverted thereto. After ruling on the jurisdiction vide order dated 20.1.2012, the Tribunal fixed the matter for hearing on interim relief. Detailed arguments were heard on 16.2.2012 and again on 17.2.2012. While hearing the counsel for the parties on interim relief, the Tribunal sensed that the hearing required for interim relief was the same which could be the hearing if the matter was to be heard finally. In order to avoid duplicacy and in its desire to finally dispose of the main petitions itself, the Tribunal mooted the suggestion as to whether the petitions should be disposed of finally treating the hearing on interim applications to be the hearing on the main matter. This suggestion was readily accepted by counsel for all the parties. However, since Union of India/petitioner herein had filed only short reply and for final hearing of the matter it wanted to file additional documents, some time was granted to the Union

of India to do the needful in this behalf. It was the request of the petitioner that they be allowed to file the documents by 22.2.2012 which was accepted and the date of 23.2.2012 (i.e. today) was fixed for final hearing. Having regard to all these aspects, the Tribunal in para 6 of the orders dated 17.2.2012 stated as under:

“6. Mr. Chandhiok and Mr. Tankha urged that the Petitioners may be restrained from enlisting new customer. Keeping in view that this Tribunal is treating the matters on Board, as part heard matters, we are, of the opinion that the Interim Order need not be varied at present.”

18. Once it is accepted that the arguments which have been heard so far, even on interim matter are to be treated as arguments in the main matter, it would lead to the effect that the main matter itself has been substantially heard. During the course of hearing, we were informed that the hearing is underway today also.

19. It is not in dispute that the respondents herein had started providing the services (objected to in order dated 23.12.2011) sometime in June/July, 2011. The petitioners passed impugned orders on 23.12.2011, i.e., after a lapse of 4-5 months banning the respondents from providing these services. Within two months, the Tribunal has reached the stage where final hearing itself may be concluded within few days. It is clear from the approach adopted by the Tribunal that it is inclined to hear the matter on day to day basis and we are confident that when the hearing concludes within few days, the final decision shall also

be pronounced within few days thereafter. Having regard to all these circumstances, in exercise of our extra ordinary jurisdiction under Article 226 of the Constitution of India, we are not inclined to interfere with the aforesaid interlocutory orders dated 24th December, 2011 and 17th February, 2012 at this stage. We, thus, dismiss the writ petitions *in limine*.

ACTING CHIEF JUSTICE

RAJIV SAHAI ENDLAW, J

FEBRUARY 23, 2012
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