

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : **11.08.2016**

CORAM:

THE HONOURABLE MR.JUSTICE A.SELVAM
and
THE HONOURABLE MR.JUSTICE P.KALAIYARASAN

O.S.A.No.436 of 2008
and M.P.No.1 of 2008

Dr. (Mrs).Irfana Hameed .. Appellant
Vs.

The General Manager
Department of Telecommunications
Chennai Telephones,
Chennai - 600 001. ..Respondent

Original Side Appeal under Clause 15 of the Letters Patent read with Order XXXVI Rule 1 of Original Side Rules, to set aside the Judgment and Decree, dated 26.06.2008 made in Tr.O.P.No.451 of 2006 on the file of this Court.

For appellant : Mr.Zaffarullah Khan

For respondent : Mr.M.Govindaraj

J U D G M E N T

(Judgment of the Court was delivered by
P.KALAIYARASAN, J)

This Original Side Appeal is directed against the order of the learned single Judge, dated 26.06.2008 in Tr.O.P.No.451 of 2006, dismissing the petition filed under Section 34(1) of the Arbitration and Conciliation Act, 1996.

2. The brief facts leading to the filing of this Original Side Appeal are :

(i) The appellant, a medical practitioner was allotted Telephone No.8262499 and the same was changed to 8253821 and thereafter 8553469. The Department made a claim from the appellant for Rs.2,25,120/- through Bill, dated 15.06.1994, claiming short claim of LCC in Bill, dated 07.10.1990 and 07.12.1990. The appellant received it on 01.07.1994 and on the same day, she sent a letter requesting the Department for particulars for the claim. Since no reply was received, the appellant sent her representative on 04.07.1994 to whom it was informed that unless the bill is paid before 06.07.1994 telephone would be disconnected. The appellant filed W.P.No.11454 of 1994 and this Court granted interim injunction and later the writ petition was allowed with a direction to the appellant to deposit a sum of Rs.15,000/- towards charges for using the telephone for the period from 07.10.1990 to 07.12.1990 and the appellant also paid the said amount. The Department filed writ appeal against the above order and the same was allowed with a direction to resolve the dispute through Arbitrator as per the statutory provision of Section 7(B) of the Indian Telegraphic Act.

(ii) The respondent appointed the Divisional Engineer, K.K.Nagar, Sri.S.Narayanan as the Arbitrator, who entered into the arbitration proceedings and fixed the date for hearing. Even on the first hearing on 30.03.1998, the appellant filed a memo upon the respondent to furnish particulars on the ground on which the figure was arrived at. She also filed the objections and asked for the report of the Vigilance Officer and requested to grant him an opportunity to cross-examine the Vigilance Officer as to how he could attribute that the calls complained of by various subscribers had emanated from the appellant's Telephone No.8262499.

(iii) The allegation against the appellant is that foreign trunk calls emanated from the appellant's telephone routing through other numbers, namely 864808, 862490, 865798, 863217 and 477258. It was stated that Vigilance cell of the Department made thorough study of the affected lines and after careful analysis through various documents like detailed billing sheets, trunk call records, it was concluded that the telephone lines were unduly benefited at the cost of some others.

(iv) The Arbitrator after analysing the evidence and contentions of both sides, passed the Award fastening liability on the appellant to pay the demand of the Department.

(v) The appellant as petitioner filed petition under Section 34(1) of the Arbitration and Conciliation Act, 1996 and the learned single Judge, after considering the rival contentions dismissed the petition. Aggrieved by the order of the learned single Judge, the appellant / petitioner has come forward with this appeal.

3. The learned counsel appearing for the appellant contended in vehemence that the Arbitrator had misdirected himself and came to a conclusion that the appellant had been the beneficiary of the said international calls and had imposed the liability; that nothing has been placed to confirm that the appellant had made the calls and had been a beneficiary of all calls alleged to have been made to France. It is further contended that the concept being a technical impossibility, the Department had not demonstrated its stand that there was such operation and it was technically possible. It is also contended that the obligation is cast upon the Department to establish positively how the calls are construed to be emanated from the appellant's telephone. It is further argued that without furnishing the Vigilance Report and giving opportunity to cross-examine the Vigilance Officer, the Award passed by the Arbitrator is also not sustainable.

4. The learned counsel appearing for the respondent per contra contends that as per Telephone Rules, all sensitive access points involving revenue put are to be safely guarded against instruction and the arbitrator after analysing the documents submitted by the Department and after hearing the rival contentions passed the Award. He further contends that there is no violation of natural justice or perversity in the findings. The subscribers whose number is involved in the process of excess calling are professionals like Doctors, Bank of Madura and a Proprietor of a limited concern and that there has been a nexus in the calls to the appellant's telephone. It is also contended that the interference in the appeal under Section 37 of Arbitration and Conciliation Act is very limited.

5. The Department made a claim from the appellant through bill, dated 15.06.1974, a sum of Rs.2,25,120/- claiming short claim through bill, dated 07.10.1990 and 07.12.1990. The claim was based on the investigation of excess metering complaint preferred by subscribers of Telephone Nos. 864088, 862490, 865798, 863217 and 477258. The Vigilance cell, after analysis of various documents like detailed billing sheets, trunk call records concluded that the telephone lines were unduly benefited at the cost of some others. The appellant's telephone was in Nungambakkam

exchange and the excess metering telephones were in Haddows road exchange. The appellant was not in India during the time when calls were made.

6. The Court interference is circumscribed by Section 34 of the Arbitration and Conciliation Act, 1996. It is settled law that award could be decided if it is against public policy of India, that is to say, if it is contrary to (a) fundamental policy of Indian law; or (b) the interest of India; or (c) Justice or morality or (d) in addition, if it is patently illegal.

7. The Supreme Court in **Associate Builders v. DDA**, reported in **(2015) 3 SCC 49**, enumerated the purport of Fundamental Policy of India as follows :

"27...Without meaning to exhaustively enumerate the purport of the expression 'fundamental policy of Indian law', we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The *first and foremost* is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences,

the court or authority concerned is bound to adopt what is in legal parlance called a '*judicial approach*' in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

* * *

38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the

principles of natural justice. Besides the celebrated *audi alteram partem* rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of *Wednesbury* [*Associated Provincial Picture Houses Ltd., v. Wednesbury Corpn., (1948) 1 KB 223*] principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ

jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest.”

(emphasis in original)

29. It is clear that the juristic principle of a “judicial approach” demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

30. The *audi alteram partem* principle which undoubtedly is a fundamental juristic principle in

Indian law is also contained in Sections 18 and 34(2)(a)(iii) of the Arbitration and Conciliation Act."

8. Even in the Award, it is clearly mentioned that the appellant submitted that the ground on which the figure was arrived at was not furnished to her and that the report of the Vigilance Officer is not complete and the appellant was not given an opportunity to examine the files and cross-examine the concerned employees of the Department of Telecommunications. But the Arbitrator answered saying that the counsel submitted that in spite of categorical directions in Telephone Rules, all sensitive access points involving revenue put are to be safely guarded against instruction.

9. Thus it is clear that the appellant was not furnished with the copy of the Vigilance Report, based on which the claim was made from her and she was also not permitted to cross-examine the officer concerned. The main contention of the appellant is that it is technical impossibility emanating foreign call from her number through another exchange. When the Department makes a claim alleging fraud, is bound to establish how the foreign calls were construed to have been emanating from the appellant's telephone

number routed through other numbers, which are under an other exchange. There is absolutely no explanation on the side of the Department. Further, the appellant was not given opportunity even to clarify about the concept of Technical impossibility, either by furnishing the copy of the Vigilance Report or subjecting the concerned Officer for cross-examination.

10. The learned single Judge is also not correct in observing that the appellant had made no plea before the Arbitrator seeking permission to examine the Officials.

11. As per Section 19 of the Arbitration and Conciliation Act, 1996, the Evidence Act is not bound to be followed in Arbitral proceedings. However, the findings of the learned single Judge as well as the Arbitrator that when investigation pointed out to the undue benefit enjoyed at the cost of other numbers, the burden is on the appellant to prove her case is contrary to Judicial approach.

12. As already pointed out, the Department who made the claim from the appellant is to establish the basis on which such claim is made. Similarly, the appellant is not expected to establish that during her absence, the telephone was not used by anybody else, as observed by the learned single Judge.

13. The reasoning that foreign calls to the same numbers of foreign country were also booked from the appellant's telephone cannot be a basis to say that there is nexus.

14. The Award does not disclose on which material the Arbitrator fastened liability on the appellant. There is no whisper about filing of any Vigilance Report or Technical Report. Thus, the Award has been passed fastening liability on the appellant only on the basis of the allegations and statements of the Department people.

15. From the aforesaid discussions, it is very clear that there is non-application of Judicial mind and also finding is perverse on the basis of irrelevant materials ignoring relevant settled proposition of law.

16. This Court is of the considered view that this is a fit case to interfere with under Section 37 of the Arbitration and Conciliation Act, 1996. For the reasons stated supra, this Original Side Appeal has to be allowed.

In fine, this Original Side Appeal is allowed and the order passed in Tr.O.P.No.451 of 2006 by the learned single Judge of this Court is set aside and Tr.O.P.No.451 of 2006 is allowed and consequently, the Award, dated 03.06.1999 passed by the Arbitrator is set aside. No costs. Consequently, connected miscellaneous petition is closed.

(A.S.,J.) (P.K.,J)
11-08-2016

Index : Yes / No

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To

1. The General Manager
Department of Telecommunications
Chennai Telephones,
Chennai - 600 001.
2. The Sub-Assistant Registrar
High Court of Madras,
Chennai.

**A.SELVAM,J.
AND
P.KALAIYARASAN,J.**

tsvn

**Pre-Delivery Judgment
in O.S.A.No.436 of 2008**

11-08-2016