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

Date of decision: 17.4.2018

+ **FAO(OS) (COMM) 68/2018, CM APPLN 14793-14794/2018 & and
CAV 325/2018**

DEPARTMENT OF TELECOMMUNICATIONS Appellant

Through **Mr.Vinod Diwakar, CGSC.**

versus

TATA TELESERVICES LIMITED Respondent

Through **Mr.A.S.Chandhiok, Sr. Adv. with
Mr.Mansoor Ali, Mr.Nitin Kala,
Mr.Jibran Tak, Ms.Chandhi Gher and
Ms.Ramya Kutty, Advocates.**

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT (Open Court)

1 The Department of Telecommunications' appeal is against the judgment of the learned Single Judge rejecting its objections under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter called "Act") to the Award of 13th October, 2016 (hereafter called "impugned award") made by sole Arbitrator (hereafter called "the Tribunal"). Pursuant to the 'New Telecom Policy' formulated in 1999 'Universal Service Support Policy' (USSP) was framed to provide

access to basic telecom services to all at affordable and reasonable prices. Under USSP basic rural telephoning at affordable price was visualized and to achieve its further objectives Universal Service Obligation Fund (USOL) was established under the Indian Telecom (Amendment) Act, 2003. This was with a view to provide financial support and subsidy to all kinds of telecom services including mobile telephoning and broadband connectivity. Responding to tender invitation for the Rural Household Direct Exchange Line (RDEL) the respondent, i.e. Tata Teleservices Limited offered its bids as a Universal Service Provider. After its bid was accepted, it was entitled to claim subsidy disbursement for providing RDEL specified in Short Distance Charging Area. The Tata Teleservices entered into contract with respect to eight different service areas, i.e. different States. This resulted in eight separate sets of agreement covering 12.172 Short Distance Charging areas (SDCAs). Consequently, on 24.3.2005 parties entered into an agreement for subsidy disbursement (hereafter referred to as the “subsidy agreement”) for Bihar, valid from 01.04.2007 to 31.03.2008. At the request of the Director, Tata Teleservices the period of installation i.e. the contract of the parties was extended three times i.e. last dated 31.3.2010. Correspondingly the provision for subsidy was extended up to 31.3.2010. The different rates of subsidy were envisaged in the agreement. The Department of Telecommunication (DoT) alleged that serious discrepancies pertaining to RDEL instalments were received and consequently issued two circulars dated 13.10.2010 and 06.07.2011 with respect to verification of the subsidies’ disbursement. It alleged that on a

special verification conducted by the Controller of Communication Accounts (CCA) for Bihar it emerged that only 3.58% of the RDEL claimed to have service of Tata Teleservices. This resulted in extrapolation of such results, in accordance with law in the latter circular dated 06.07.2011. A demand notice was therefore issued, by the DoT incorporating the Tata Teleservices to deposit the amounts allegedly paid in excess. Tata Teleservices declined to apply.

2 The dispute was referred to arbitration in terms of the agreement. DoT filed its statement of claims asking that it was entitled to a sum of Rs.27,74,53,532/- with interest and costs. Tata Teleservices filed a counter claim for Rs.84.1 lakhs along with interest and costs. After pleadings were competed, the Tribunal framed eight issues. During the proceedings, the DoT contended that issue nos.2 and 3 due to the binding nature of the circulars dated 13.10.2010 and 06.07.2011, could be tried as preliminary issue. The parties agreed.

3 The DoT contended that the circulars were valid and in accordance with law and notwithstanding that they were made to operate retrospectively. The terms of the agreement enable the administrator to issue them. Tata Teleservices naturally argued to the contrary contending that the terms of the agreement bound the parties and that any subsequent alteration – being based upon circulars or any other external event could not guide or operate or control operation of the contract. It was also contended that in terms of the agreement itself, the procedure for verification eluded to refer to statutory rules which incorporated and could not subsequently be altered.

4 The Tribunal by an elaborate preliminary award rejected the DoT's contention and held that the circulars relied upon could not control the contract. This preliminary award was challenged under Section 34 of the Act by the DoT. The impugned judgment rejected DoT's petition under Section 34 of the Act. The review petition preferred by the DoT too was rejected on the ground of delay.

5 It was urged by Mr. Vinod Diwakar, learned counsel for the DoT, that the preliminary award which is by way of an interim award, was in error in rejecting the DoT's contention with respect to the binding nature of the two circulars. It was submitted that having regard to the larger public interest, the administrator sought recourse to his conceded powers under Clause 18 of the agreement and issued the circulars which were applicable specifically to the contract in question and put in place a more intensive method for verification. Urging that the Tribunal and the Single Judge erred in law in holding otherwise, learned counsel relied upon the terms of the agreement and the circulars. He also sought to underscore his arguments by relying upon the documents produced before the Tribunal to suggest that the claims were made on fictional basis and were not grounded on actual services rendered.

6 The Arbitrator in the relevant para of the award, noticed that Section 9B and Section 7(2)(eea) of the Indian Telegraph Act – after its amendment, enable the Central Government to formulate rules for administration of the Universal Service Obligation Funds i.e. the funds. Pursuant to this power, the Rule 527 was framed specifically

in regard to the issue of verification. The Tribunal also took note of the other rules and held as follows:

“8.2.2 The Telegraph Act, 1951 was amended in the year 2003 (with effect from 01.4.2002) to insert Part IIA which dealt with “Universal Service Obligation Fund”. This part has four sections viz. 9A, 9B, 9C and 9D wherein 9A established USOF and 9D provided for administration and utilization of Fund under Section 7 of the Act, Central Government is empowered to make Rules for the conduct of Telegraph. Section 72(2)(ee) was inserted to provide power to the Central Government to make Rules for administration of the Fund. In exercise of power conferred under section 7(2)(ee), Central Government amended the Indian Telegraph Rules, 1951 and inserted Part X to lay down Rules for administration of Fund.

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8.2.4 Scope of the agreement is defined in Schedule II (Terms and Condition, Part I, Central Conditions), wherein, Clause 2 provides that USP shall provide, operate and maintain all such RDELs in the SDCAs in a Service Area for which the agreement is entered into.

8.25. Scheme of the Project/Agreement is mentioned in the Part II of the Agreement, which provides Technical Conditions wherein, Clause 16 provides for Quality of Service parameters to be maintained by the USP and also provides powers of the Administrator to carry out performance test, inspection etc. under Clauses 16.2, 16.3, 16.4 and 16.6.

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8.2.7 Claimant contended that all actions under Clauses 18.13, 20.1 and 22 were initiated in accordance with the Clause 22.1 of the Agreement. Clause 22.1 provides rights to the Administrator or his Authorized Representative to inspect the sites after giving due notice except in the case where, providing notice would defeat the whole purpose of inspection.

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8.2.29 Clause 22 of the Agreement provides the right to Administrator to inspect and conduct inquiries. But the said right is part of the Agreement with a term ending on 31.03.2010. Therefore, no Circulars could be issued after the expiry of the Agreement. Clause 22 does not give a right to the Claimant to extend the terms and conditions of the Agreement beyond its term.

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8.2.30 The agreement vide Clause 6 provides that “....except in case of conflict and inconsistency on any issue relating to this agreement the terms set out in the body of this agreement with schedule annex thereto shall prevail.” Thus, the right and liabilities of the parties herein are guided by the provisions of the Agreement, which also has the mandate of the Act and the Rules.

8.2.31 There are no such specific Statutory Rules which support the issuance of Circulars and that in absence of any such Rules, the Terms and Conditions with respect to the Fund cannot be regulated by the Circulars. Furthermore, none of the Rules provide for anything as contained in the Circular and hence, the same would not be applicable to the case.

8.2.32 *In the light of Rule 524(iv) & (v), Clause(s) 18.1, 18.2, 18.9, 18.10 and 18.11, 18.12, 18.13 and 20.3, contention of the Claimant that for timely release of subsidy, “due verification” was carried out only on the basis of documents and the Affidavit submitted by the USP and as such they have the power to conduct Special Verification. It can be understood from such contention that Claimant did not verify the Claims as mandated under various clauses of the Agreement and now contends that their inaction entitles them to re-write the expired Agreement and extend it beyond its term. The final adjustment has already been made as provided under the Agreement.*

8.2.33 *Further, object of Clause 18.13 of the Agreement is to ensure proper and correct verification. The mandate contained is applicable to alteration/modification provisions in Clause 18. It was stated that as per Clause 18 modification/alteration could only be for verification of claim statement and documents provided by the Claimant for subsidy claim.*

7 In the light of the above conclusions which were preceded by extensive discussion of the parties’ submissions and analysis of the terms of the agreement, entered into between them, the Tribunal rejected the DoT’s argument that the verification was proper and justified.

8 This Court is of the view that a plain reading of the award and the impugned judgment too show that the basic submissions of the DoT was that the terms of the circulars in effect superseded the written agreement. The Tribunal expressly held that the agreement incorporates the powers, the terms and the procedure prescribed in

Rules 524 and 527 framed under the Indian Telegraphs Act. These findings are based on a careful reading of the agreement and the working out of it by the parties during the contractual period. As such no illegality much less patent illegality can be attributed to this conclusion. The Tribunal further concluded that the procedure of “extrapolation” – upon which the claims rested, was alien and not agreed to by the parties. Now it is not the DoT’s case that the circulars superseded the rules nor did they express override them. Such being the case, the Tribunal’s award, in this case is justified because the rules are essentially part of law, being delegated legislation. It is axiomatic that provisions of law can only be supplemented by administrative instructions and not supplanted by them. The arguments of the DoT were therefore untenable. In rejecting this, the Tribunal acted within its jurisdiction and cannot be accused of committing illegality. Equally, the learned Single Judge did not commit any error which calls for interference. The appeal, in the light of the above discussion, is unmerited, it is accordingly dismissed. Pending applications too are disposed of.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

APRIL 17, 2018/ndn