

CASE NO.:
Appeal (civil) 7200 of 2002

PETITIONER:
Bharti Telenet Ltd.

RESPONDENT:
Union of India & Ors.

DATE OF JUDGMENT: 31/03/2005

BENCH:
ASHOK BHAN A.K.Mathur

JUDGMENT:
J U D G M E N T

With
Civil Appeal No. 1816 of 2003

BHAN, J.

These appeals are statutory appeals under Section 18 of the Telecom Regulatory Authority of India Act, 1997 [for short "the Act"] against the final judgments and orders dated 29.7.2002 and 19.12.2002 passed by the Telecom Disputes Settlement & Appellate Tribunal, New Delhi [for short "the Tribunal"] dismissing the appellant's applications for condonation of delay and consequently the statutory appeal No. 1 of 2002 and Appeal No. 9 of 2002 under Section 14 A read with Section 14A (2) of the Act challenging the order/determination dated 15.6.2001 and order/letter dated 29.8.2002 passed by the Telecom Regulatory Authority of India.

At the first instance Appeal No. 7200 of 2002 arising from the Appeal No. 1 of 2002 decided on 29.7.2002 will be taken up for consideration and thereafter the second appeal No. 1816 of 2003.

We are stating the facts as found by the Tribunal, as there is no dispute on them.

Appellant is a licensee to provide basic telephone services to subscribers in Madhya Pradesh. As a part of the licence agreement the appellant is expected to develop its own telecommunication network within its own service area, viz., Madhya Pradesh and also interconnect with the network of Bharat Sanchar Nigam Limited, respondent No. 2, [for short "the BSNL"] so as to provide national and inter-circle links which is currently available with only BSNL. This link is also required to connect the subscribers of the appellant with the subscribers of BSNL within the same service area, viz., Madhya Pradesh. The issue under dispute is the location of points of interconnection between the appellant and BSNL. The appellant claims that as per the terms and

conditions of its licence it is entitled to carry the traffic originating from its own subscribers to the farthest point through its own network before handing it over to BSNL at the point of interconnection [for short "the POI"]. BSNL, on the other hand, is of the opinion that the licence agreement clearly stipulates that the two respective networks and the points of interconnection of the appellant and BSNL would have to be at equivalent level. Thus within the short distance charging area [for short "the SDCA"], the interconnections would have to be at the level of local and tandem exchanges. In so far as long distance charging area [for short "the LDCA"] are concerned, the point of interconnection would have to be located between the trunk automatic exchanges of the long distance charging area of both BSNL and the appellant. For this, BSNL contends that the appellant would have to build up a parallel network within their long distance charging area on the same pattern as the network hierarchy of BSNL starting with the short distance charging area. In case the appellant does not have its own trunk automatic exchange in the long distance charging area it would have to bring the traffic from its own short distance charging area tandem with local exchange to the nearest to the trunk automatic exchange of BSNL for onward transmission/carriage to any other trunk automatic exchanges. Since BSNL has the trunk automatic exchange in each long distance charging area this practically means that the appellant would have to handover all long-distance traffic in the same long distance charging area in which it has originated.

The dispute arose in October 2000 when the Chief General Manager, Madhya Pradesh Circle, BSNL informed the appellant in a meeting about the manner in which BSNL would provide points of interconnection in handing long distance traffic originating from the subscribers of the appellant. Since mutual discussions held subsequently did not prove fruitful, the appellant approached Telecom Regulatory Authority of India [for short "the TRAI"] for appropriate orders and directions on 6.12.2001.

After hearing both the parties, TRAI decided the case as under:

"In the light of the foregoing the Authority has come to the following conclusions:-

(i) BSNL's refusal to accept at Ujjain and Indore, the STD inter network traffic for calls originating in other LDCAs is in accordance with the stipulations in the license agreement as well as interconnect agreement signed by both the contending parties.

(ii) Clause 1.7.6.5. of the licence agreement gives the licensee option of carrying a STD call entirely on his own network within the circle/service area.

(iii) This clause (1.7.6.5.) also gives the licensee the option of far end hand over of calls to BSNL for termination only. The licensee may, therefore, also use his network to carry inter-Network calls to the Far End and hand over in the terminating LDCA/SDCA to the DOT (now BSNL) in the same manner as is permitted to the DOT (now BSNL) in the license agreement. The BSNL should not refuse such Far End hand over from licenses received by them for termination within the LDCA.

(iv) Intermediate hand over of calls for terminating is not in conformity with the license agreement as well as interconnect Agreement and, therefore, neither the licensee nor the BSNL is obliged to accept any such hand over of calls.

Though this Order has been made in relation to the specific complaint relating to Madhya Pradesh Circle, it will have general applicability in similar interconnect scenarios."

[Emphasis supplied]

Since the Tribunal did not decide the dispute on merits and dismissed the appeals as barred by limitation we would also confine ourselves to the question as to whether "in the facts and circumstances of the case the appellant had shown sufficient cause to condone the delay in filing the appeal and the Tribunal has erred in the exercise of its jurisdiction in holding that sufficient cause for condoning the delay had not been shown and consequently dismissing the appeal barred by time.

Section 14A (2) and (3) of the Act which is relevant for this case are reproduced below:

"14A. Application for settlement of disputes and appeals to Appellate Tribunal.-(1) The Central Government or a State Government or a local authority or any person may make an application to the Appellate Tribunal for adjudication of any dispute referred to in clause (a) of section 14.

(2) The Central Government or a State Government or a local authority or any person aggrieved by any direction, decision or order made by the Authority may prefer an appeal to the Appellate Tribunal.

(3) Every appeal under sub-section (2) shall be preferred within a period of thirty days from the date on which a copy of the direction or order or decision made by the Authority is received by the Central Government or the State Government or the local authority or the aggrieved person and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain any appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period."

TRAI passed the order on 15.6.2001 and communicated the same to the appellant on that very day under a covering letter dated 15.6.2001. On 17.8.2001 a review application was filed which was dismissed by the TRAI on 27.11.2001. A copy of the said order was received by the appellant on 5.12.2001. The appeal was filed on 2.1.2002, i.e., within the period of 30 days from the communication of the order dismissing the review application and after a delay of 172 days from the passing of the order dated 15.6.2001 along with an application seeking condonation of delay in filing the appeal.

TRAI made its order under Section 11 (1)(b)(i) and (ii) of the Act. Though the order was made in relation to specific complaint relating to Madhya Pradesh Circle but was same was ordered that "it will have general applicability in similar interconnect scenarios." Since that order was made applicable generally to all the telecom operators, appellant forwarded a copy of the said order under cover of letter dated 17.06.2001 to its Association (Association of Basic Telecom Operators \026 'ABTO' for short), for

seeking review of the order in collective interest. ABTO circulated the said order among its members vide its circular dated 19.06.2001. Executive council of ABTO met on 20.6.2001 and 26.6.2001 in which the order/determination of the TRAI was discussed and deliberated. At the subsequent meeting held on 27.6.2001, Executive Council of ABTO observed that members had agreed for the need to file a petition challenging the order of the TRAI before the Tribunal. On 17.7.2001 appellant reminded the Secretary General of ABTO about the said decision of the executive council and requested to convey the action taken, if any.

On 26.7.2001 ABTO informed the appellant that some of the members of ABTO had reservation about filing the appeal before the Tribunal challenging the said order. It was contended by them that since the order was passed affecting all the members/basic service operators without affording an opportunity of hearing to the members (except the Appellant herein), it would be appropriate to file a review application before the TRAI. Appellant again represented to the ABTO that the said order dated 15.6.2001 was causing huge loss and financial hardship to the appellant and requested for collective action under the aegis of ABTO at the earliest. On 17.8.2001 ABTO filed a review application before the TRAI for review of the order dated 15.6.2001.

TRAI dismissed the review application on 27.11.2001. The order passed in review was again discussed amongst the members of the ABTO but no consensus was forthcoming till 2.1.2001. By way of abundant caution and since the appellant was the most affected by the order of the TRAI the appellant filed the appeal before the Tribunal on 2.1.2002 challenging the order of the Tribunal dated 15.6.2001 along with application seeking condonation of delay in filing the appeal. To the application filed by the appellant reply was filed by the respondent and on the direction issued by the tribunal the appellant filed a supplementary affidavit explaining the delay.

The Tribunal dismissed the application for condonation of delay and held that the application for condonation of delay was speculative and was not bona fide. That the appellant had failed to make out a case for condoning the delay for 172 days in filing the appeal. The tribunal recorded the following three findings for coming to the aforesaid decision:

"It will be clear from this letter that BTNL abandoned its earlier decision to prefer an appeal and decided to extend full support to ABTO if a review petition was filed instead of an appeal. This review

petition was filed on 17.8.2001 well after expiry of the period of limitation for preferring an appeal i.e. 14.7.2001."

"In the review petition filed by ABTO before TRAI, the appellant did not separately join as a party even though TRAI had passed the determination order on the application made by the appellant. It is also significant that ABTO has kept itself away from the present appeal filed by the appellant. We are, therefore, of the opinion that the appellant has failed to furnish sufficient cause for not preferring the appeal within the statutory time limit."

"There is another aspect of this case. The review petition made by ABTO was dismissed by TRAI on 5.12.2001. The determination made by TRAI has been accepted by the other members of ABTO. A number of interconnect agreements with BSNL have been signed by the members of ABTO on the basis of the determination made by TRAI on 15.6.2001. The petitioner who has preferred this appeal before us also signed an interconnect agreement with BSNL on 6.12.2001 in respect of Haryana Circle. After filing this appeal in this tribunal, the petitioner on 15.2.2002 has entered into two more agreements with BSNL in which the determination made by TRAI has been accepted and made part of the agreements."

With respect we do not agree with either of these reasons recorded by the Tribunal for dismissing the application filed by the appellant in condonation of delay.

In the instant case before passing of the order dated 15.6.2001 the issue of BSNL's refusal to accept intermediate hand over of transit calls of long distance charging area in Madhya Pradesh Circle (licensed to the appellant), was specific and confined to the appellant and therefore the appellant directly approached TRAI for appropriate direction to BSNL. Since the order dated 15.6.2001 expressly stated that the order would have general applicability in similar interconnect scenarios, the appellant being a member of the Association not only had an option but was also bound by the spirit of unity to approach the Association and consult other members. In any event being a member of the Association the

appellant had the option to either challenge the order individually or through the aegis of its Association and neither course of action could be said to be inexplicable. The Tribunal has erred in holding that the appellant had abandoned its decision to prefer an appeal or its right of appeal merely because it conveyed to the Association that it will extend its support to the Association if a review is filed instead of an appeal against the said order. The appellant's support to the Association in filing review petition is not indicative of its abandonment of its right to file appeal. Mere acquiescence of the appellant at one stage to file the review petition instead of the appeal would not amount to the abandonment of its right to file the statutory appeal or to an estoppel disentitling it from claiming the relief in appeal.

This Court in *Sha Mulchand & Co. Ltd. vs. Jawahar Mills Ltd., Salem*, AIR 1953 SC 98 held:

" Further, whatever be the effect of mere waiver, acquiescence or laches on the part of a person on his claim to equitable remedy to enforce his rights under an executory contract, it is quite clear, on the authorities, that mere waiver, acquiescence or laches which does not amount to an abandonment of his right or to an estoppel against him cannot disentitle that person from claiming relief in equity in respect of his executed and not merely executory interest. [See per Lord Chelmsford in *Clarke's case* (supra) at p. 657.] Indeed, it has been held in *Garden Gully United Quartz Mining Co. v. McLister*', (1876) 1 A C 39 that mere laches does not disentitle the holder of shares to equitable relief against an invalid declaration of forfeiture. ..."

In the instant case, the mere letter of appellant stating that it would extend support to the Association if review petition is filed instead of appeal cannot amount to abandonment of its right to challenge the invasion of and interference with its legal/contractual right. The Tribunal failed to appreciate that filing of an appeal or review petition by the appellant or through its Association or joining itself or the Association as a party to the proceeding initiated by either of them to avail of either of the alternate procedures available to the aggrieved party in the given circumstances could not be said to be inexplicable or fatal for not choosing the other procedures.

Tribunal has misconstrued the fact that the ABTO kept itself away from the present appeal

filed by the appellant. Firstly, action of an Association was guided by the majority opinion of its members. Secondly, in the given circumstances of stiff competition amongst members it was the lack of consensus amongst the members and the failure/delay on the part of the Association which drove the appellant to file the appeal itself before the Tribunal. Hence whether or not the Association joined the appeal filed by the appellant is irrelevant for considering the merits of the appellant's case much less for deciding whether or not to condone the delay in filing the appeal. Acceptance of TRAI's determination dated 15.6.2001 by other members of ABTO signing of interconnect agreements with BSNL by other members on the basis of the said determination or signing of such agreement by the appellant in respect of Haryana Circle or any other service area except the Madhya Pradesh circle, have no relevance to the case at hand. Merely because the interconnect scenarios in other service area/circles permit or enable the licensees there to sign the interconnect agreement even though such agreement is contrary to the express provisions in the licence agreement for the M.P. Telecom Circle the appellant cannot be denied its legal/contractual right flowing from the subsisting licence agreement. Therefore, the Tribunal erred in holding that having accepted and acted upon the determination made by TRAI in Haryana, Karnataka and Tamil Nadu Circles, the appellant cannot contend to the contrary in respect of Madhya Pradesh circle alone. The licensees have varying levels of network in the various licensed areas and if the network in one service area permits the licensee to accept the said determination, it does not follow that the licensee in another service area could be denied his contractual rights regardless of the nature and extent of its network there.

In our view, the Tribunal erred in holding that on the facts of the case a ground of condonation of delay of 172 days in preferring the appeal was not made out. The point in issue was of general importance and since there was no authoritative pronouncement of the Tribunal or of this Court on the point in our view the Tribunal should have condoned the delay and decided the appeal on the merits.

CIVIL APPEAL NO. 1816 OF 2003

The Tribunal has dismissed the appeal filed by the appellant relating to Haryana Circle by holding that there was an enormous delay of more than 450 days in preferring the appeal from the earlier order of the TRAI dated 15.6.2001 although the licence for Haryana Circle was granted to the appellant on 8.10.2001, the interconnect agreement which gave rise to the issues in dispute was signed on 6.12.2001 and the appellant's representation was rejected by the TRAI on 29.8.2002. Appellant filed the appeal on 27.9.2002 within the period of

limitation, i.e., 30 days. In our considered view the Tribunal has erred in dismissing the appellant's appeal on the ground of bar of limitation.

The licence agreement was signed on 6.12.2001. The appellant's representation was put on hold by the TRAI by its order dated 24.7.2002 awaiting the decision of the Tribunal in appellant's appeal No. 1 of 2002 relating to the Madhya Pradesh Telecom Circle. Thereafter, by letter dated 29.8.2002 TRAI rejected the appellant's representation upon dismissal of Appeal No. 1 of 2002 by the Tribunal on 29.8.2002. The appeal was filed on 27.9.2002. In this case there was no delay in filing the appeal. The appeal has been filed within 30 days of the rejection of the appellant's representation finally by the TRAI on 29.8.2002. The Tribunal has erred in taking the starting point for limitation from the determination made by the Tribunal on 15.6.2001 which was in relation to Madhya Pradesh circle. The order dated 15.6.2001 and the order dated 29.8.2002 are two separate orders passed by the TRAI relating to different circles and the starting point for limitation for the same could not be taken from the previous order passed by the TRAI in relation to the Madhya Pradesh circle.

For the reasons stated above, both the appeals are accepted. The orders passed by the Tribunal in Appeal No. 1 of 2002 and Appeal No. 9 of 2002 dated 29.7.2002 and 19.12.2002 are set aside, delay in filing the appeals is condoned and the case is remitted back to the Tribunal for a fresh decision on merits of the dispute and in accordance with law.

Nothing stated herein-above be taken as an expression of opinion on merits of dispute. The Tribunal shall be at liberty to decide the dispute on merits and in accordance with law without being influenced by any of the observations made in this judgment touching upon the merits of the dispute. There will be no order as to costs.