

(1988) 06 GAU CK 0020

Gauhati High Court

Case No: Civil Rule No. 508 of 1988

Parag Engineering Works

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision: June 6, 1988

Acts Referred:

- Constitution of India, 1950 - Article 226
- Specific Relief Act, 1963 - Section 14

Citation: AIR 1989 Guw 77

Hon'ble Judges: A. Raghuvir, C.J; S.P. Rajkhowa, J

Bench: Division Bench

Advocate: D.D. Agarwal, R.P. Sarma and K.V. Gopalachari, for the Appellant; Chand Mahammad, Sr. Central Govt. Standing Counsel, for the Respondent

Judgement

A. Raghuvir, C.J.

The firm of Parag Engineering Works is a partnership firm with its Head Office at Tinsukia in District Dibrugarh. The firm runs a branch office at Gauhati where the firm subscribed a telephone bearing No. 27010 with STD facility. The controversy in this case relates to that telephone. In this judgment the firm will be referred as the "subscriber" of the telephone.

2. The performance of the telephone was frequently found by the subscriber faulty. The subscriber complained of the faults to the Telephone Department. The subscriber was informed that "there was some fault in the earthing." The subscriber complained of inflation of bills in letters of December 14, 1985, January 6 and April 17 of 1987 and in letters of March 17, May 2, June 1, and October 27, 1987 complained of non-performance of the apparatus unduly for over a long period but nothing was done to rectify the faults. The Telephone Department at one stage informed the subscriber of cable fault as a chronic problem by one of the officers of the Department. It was suggested the performance of apparatus could be improved

if only the indicator of the apparatus is changed. As to the indicator the local Chamber of Commerce at Gauhati organised a meeting at the instance of the subscriber with the Telecom District Manager on May 30, 1988. In that meeting the District Manager consented to change the indicator but to date it is complained it is not changed. The Sub-Divisional Officer was approached by the subscriber over a dozen times. Every time the subscriber was orally assured but promises were never redeemed. Finally on March 17, 1988 a legal notice was served on the Department and the instant writ petition is filed on April 4, 1988.

3. The prayers in the writ petition are far too many. The subscriber seeks to declare R. 443 as ultra vires of the Act. The Telephone Department is sought to be directed to change the indicator. One direction sought for is before telephone is disconnected at least 15 days time be added for payment of bills. The Department be directed not to charge rent during the period when telephone remained out of order. That 50% of the rental paid by the subscriber be refunded as complaints made by the subscriber were not properly attended to in time. That the present Sub-Divisional Officer, Telephone Department, Gauhati may be made responsible for the negligent acts of the Department which culminated in the non-performance of the apparatus. The Sub-Divisional Officer be ordered to refund the excess amounts paid by the subscriber.

4. In resisting the writ petition Shri D.P. Singh, Divisional Engineer, Phones (Maintenance), Panbazar admits on February 5, March 11, 14, 15 and April 30, 1985 complaints made by the subscriber were, received by the Junior Supervisor. The officer contacted S.D.O., D.E., C.O., and D.M.T. The complaints thus are shown to have been attended to by the Department. It is averred bills showing amounts of Rs. 664/-, Rs. 764/- and Rs. 1,540/- were not paid by the subscriber. The Divisional Engineer stated no complaint of excess billing was received by them therefore the claims made by the subscriber on that score are false and not correct. It is stated as per P. & T. Manual, Vol. XIV bills were despatched and the subscriber was given reasonable opportunity to make payments even after due date for payment was over. The contention that the telephone was out of order since installation is stoutly denied. This is the range of controversies.

5. The complaints enumerated by the instant subscriber if not all most of them are experienced on many a day by the 2,423,762 subscribers (as per 1979 census) in India. For the many complaints that are made in the instant writ petition Courts cannot order relief to the subscriber : in that sense "ubi jus ibi remedium has its limitation in this regard. Telephones have come into our lives in India very recently. The rights relating to the apparatus and performance have not been crystallised yet. It is hoped in future better state of affairs may prevail.

6. The telephone was invented by (a Scottish) American Scientist Alexander Graham Bell in 1876. The apparatus works on the principle "varying sound of the human voice can be made to vary the intensity of the current of electricity." In its elemental

form wires connected to telephones connect two persons separated by distance to talk to each other. The two persons can be anywhere on the globe and with a network of wires can be made to talk and it is seen inter-continental use of telephones commenced in Jan., 1878 with network of 21 telephones. There are 110 million telephones now all over the world. Today it is a marvel to see telephones enable to talk in a matter of minutes from all corners of the world. In recent years the era of transmission via satellites started in August, 1960. Curiously in India alone telephones are non-starters. Such complaints as are made by the instant subscriber are universally experienced in our country. Similar complaints are not noticed in other countries.

7. In the context of the disputes raised in the instant writ petition we extract relevant rules framed under the Indian Telegraph Act, 1885. The relevant rules read as under: "

"412. Supply and maintenance of equipment.-- (I) The Divisional Engineer, Telegraphs, shall instal and, subject to the observance of these rules by the subscriber, maintain in good working order the equipment and apparatus provided by the Department and when necessary, substitute a different apparatus with all reasonable despatch.

(2)

421. Disconnection of telephone.-- Where the Divisional Engineer is satisfied for reasons to be recorded in writing that it is necessary to do so, he may, after giving the subscriber a notice in writing for a period which shall not except in emergent cases be less than 7 days, disconnect the telephone, and in such case, the subscriber shall be entitled to refund of rent for the unexpired portion of the period for which the connection or service was given.

422. Right of disconnection in emergency.-- The Divisional Engineer may, in the event of any emergency, disconnect any subscriber, with or without notice. In case such disconnection exceeds a period of seven days, the subscriber shall be entitled to proportionate refund of rent.

439. Charges when payable. -- Charges for calls in message rate or measure rate system shall become payable on presentation of a bill therefor, The periods for which bills shall be prepared and the dates by which they shall be payable shall be fixed by the Telegraph Authority.

442. Service of notices and bills.-- Any notice, bill or demand from the Telegraph Authority for any fee or charges due from a subscriber may be served by delivery to the subscriber, or by sending it by post to the address of the subscriber or by leaving it at the premises in or upon which the apparatus is installed.

443. Default of payment.-- If, on or before the due date, the rent or other charged in respect of the telephone service provided are not paid by the subscriber in

accordance with these rules, or bills for charges in respect of calls (local and trunk) or phonograms or other dues from the subscriber are not duly paid by him," any telephone or telephones rented by him may be disconnected without notice. The telephone or telephones may, if the Telegraph Authority thinks fit, be restored, if the defaulting subscriber pays the outstanding dues and the reconnection fee together with the rental for such portion of the intervening period (during which the telephone remains disconnected) as may be prescribed by the Telegraph Authority from time to time. The subscriber shall pay all the above charges within such period as may be prescribed by the Telephone Authority from time to time."

8. One of the reliefs sought for in the instant writ petition is to declare Rule 443 as ultra vires of the Act. No argument is addressed as to why the Rule is to be declared ultra vires. In fact no argument is advanced to support any of the reliefs except the argument advanced is to order the Telephone Department and the Court to see telephone 27010 works properly, efficiently hereafter. To this aspect more anon.

9. We recollect in this regard restrictions on the Courts enumerated in Section 14 of the Specific Relief Act of 1963 (Act 47 of 1963). That Act recites where performance of which involves the performance of a continuous duty which the Court cannot supervise should not be ordered. This is set out in Clause (d) of Section 14 of the Act, and that provision we consider to bear in mind while exercising the powers of the Court under Article 226 of the Constitution.

10. In recent times the Courts are confronted with the litigation of varying types.

Courts are asked to adjudicate in even more unusual disputes; over adoptions, surrogate births and abortions. In United States of America Courts are to deal with cases where (Indian Courts will follow) boy-friends fight girl-friends. Fathers fight mothers. Potential fathers are lodging cases against potential mothers. Adoptive mothers fight surrogate mothers. Fathers are fighting against abortions of their unmarried daughters. A husband in New York claimed compensation and divorce from his wife because she had an abortion without his knowledge and consent. The American Supreme Court overturned a statute in Missouri which required a wife to obtain her husband's permission for abortion. One boy went to Court in Indiana to stop a woman having an abortion even though he was not the father of the expected child. In United Kingdom an Oxford student desired to preserve foetus in the womb of his girl friend who was his classmate. She sought for abortion not on the ground of legitimacy but on the ground of her health, A sensitive elderly woman in United Kingdom wanted her daughter not to be imparted knowledge about contraceptives. The House of Lords decided she cannot have, her way. While holding Courts have no power to help her the House of Lords held, a doctor if consulted may be the ultimate adjudicator of the controversy raised. In India in one extraordinary case in [State of Himachal Pradesh and Another Vs. Umed Ram Sharma and Others](#), under Article 21 of the Constitution in Himachal Pradesh in an affirmative action a group of villagers sought for the construction of a road against the wish if not policy

of the State Government. The road was to be constructed through a private owned piece owned by persons who objected to the construction. The land in question was acquired but the road was not completed. It is in this regard the Supreme Court considered "the spirit of the law" in the case. Finally it is the Himachal Pradesh High Court and the Supreme Court of India decided whether the road should be laid. It was not left to the Government to lay the highway which is ordinarily expected to decide the issue. We have adverted to those aspects only to show many causes are melting in the crucible of law and in law Courts and new methods have to be thought out for according relief to litigants.

11. We have adverted to some of the above aspects as the counsel who represented the subscriber almost believed and stated if the Court ordered in this case telephone will be in order. The performance of telephones will improve.

12. The long and short of the discussion is to demonstrate powers of the Court under Article 226 are circumscribed by numerous limitations. Broadly the powers of Courts are delineated by an American Judge in 67 Lawyers Edn. 1978 at p. 1084 as to have been hedged in the status and rights of persons and property and not beyond. May be the future will unveil the shape of things to come. Here we quote a passage from Halsbury's Laws of England (Fourth Edition), Vol. 44 -- "It has been held the Court does not enforce the performance of contract which involves continuous acts and require the watching and supervision of the Court, and that, in particular, the Court does not normally order the specific performance of a contract to build or repair." A case in England (1972) 1 All ER 960 at p. 970, C. H. Giles and Co. Ltd. v. Morris speaks of the evolution in this regard. -- "However, more recent cases indicate that the Courts are now more ready to enforce contracts requiring supervision. The question is whether the contract sufficiently defines the work to be done, expressly or by implication, to permit the Court to make an order which enables the defendant to know what he has to do to comply with it." Accepting the ratio in the instant case the work required to be ordered to the Telephone Department is not sufficiently defined in the instant case.

13. In this regard a decision of Calcutta High Court is cited [Naresh Chandra Roy Vs. Union of India \(UOI\) and Others](#), for adoption and the counsel for the subscriber prayed for a similar order. The passage relied on reads :

"The rental is charged for telephone service provided. Ex hypothesi, there seems no liability to pay when telephone service is not provided at all. This is all the more so when the telephone authorities do not do their duty. In spite of repeated complaints, they just sit tight. They act with alacrity when this Court directs them to restore the telephone. Then they forget their complaint about lack of space, constant diggings etc. and restore the telephone almost immediately. In such cases to allow them to demand payment of rental appears to be gross violation of all notions of justice and fair-play and also of the true import of the Rules. It will only whet their appetite for callous disregard of statutory duties no doubt. The telephone

department will suffer loss of revenue. The department will be free to compensate the loss by directing recovery from the salary payable to the negligent officers of the department. It is time some such action is taken. It may then inspire them to take their duties seriously."

14. We are not persuaded to order directions in such a broad manner as to repeat again when we cannot supervise the performance of the directions. It is in this regard we point out the provision of arbitration in Section 7-B of the Act. That section contemplates of arbitration of disputes between the subscriber and the Telephone Department,--

"(1) Except as otherwise expressly provided in this Act, if any dispute concerning any telegraph line, appliance or apparatus arises between the telegraph authority and the person for whose benefit the line, appliance or apparatus is, or has been provided, the dispute shall be determined by arbitration and shall, for the purposes of such determination, be referred to an arbitrator appointed by the Central Government either specially for the determination of that dispute or generally for the determination of disputes under this section."

15. When we pointed out the arbitration as a remedy to the counsel for the subscriber he argued in earnest terms to order the Telephone Department to see the telephones perform properly. The counsel argued if we should order the department will remedy the situation. One is reminded of King Canute of England in this situation. He was Danish by Birth but ruled England between 1017-42.

The historians recount him to have given England a just rule and promoted institutions but he was also vain. He while standing in the sea water at Southampton to show his power to his subjects ordered sea waves not to touch his feet. There are two versions of the story. The one that is recounted in legal parlance is the sea waves oblivious of sovereign command obeyed the laws of nature. The King the emperor said "Look how little power I have. I cannot command stop so much as this small portion of water." The other version of the story has no relevance to law.

16. For all the aforesaid reasons no directions are ordered. Before parting with the case we must however express our hope fastened to the rules of the Telephone framed under 1885 Act and good sense of the officers of the Department. If technically it is possible to trace the defects of telephone 27030 to "the indicator" we have reason to believe the telephone Department and its officers will do all that is necessary to change the indicator. We have expressed only hope because the counsel who represented the subscriber repeatedly when asked said he knows no better than both of us as to the significance of the indicator in the working of a telephone.