

Star LAW report

Maintainability of writ against GrameenPhone

High Court Division (Special Original Jurisdiction)
The Supreme Court of Bangladesh
Writ Petition No. 2528 of 1999
Zakir Hossain Munshi V
Government of the People's Republic of Bangladesh
Before Justice Md Joynul Abedin and Justice Sheikh Rezowan Ali
Date of Judgment: July 16, 2002
Results: Rule absolute.

Background

Md Joynul Abedin, J: This Rule Nisi under Article 102 of the constitution of the People's Republic of Bangladesh, issued at the instance of the petitioner, a subscriber of the GrameenPhone no. 017528070 and a practicing Advocate of the Supreme Court, seeks to impugn the imposition and realisation of royalty and licence fees every year as unlawful and without jurisdiction. By the same rule the respondents were called upon to show cause why they should not be directed to refund the money realised from the petitioner every year in the name of royalty and licence fees from him earlier.

It is stated in the writ petition that respondent no. 1, Government of Bangladesh, with a view to expand the telephone communication network all over the country, entered into a contract dated 11 November, 1996 with GrameenPhone Consortium now GrameenPhone Limited (hereinafter referred to as "GrameenPhone") and also granted Licence No. WL 0001 CELL. Se 0003 dated 28 November 1996 under section 4 of the Telegraph Act, 1885 on conditions contained therein. GrameenPhone by virtue of the said agreement and licence was required to install and place in operation all over Bangladesh the Multi-station Radio Service in order to provide digital cellular mobile phone services all over Bangladesh, which it did. In order to attract subscribers of its mobile phones GrameenPhone published advertisements in various national dailies as follows: (a) No incoming calls should be charged, no matter wherever those calls come from, (b) Government royalty fee of Tk. 1000/= should be paid only once during subscription, (c) Charge for NWD and that for ISD calls would be charged exactly at the same rate as that charged by the T&T Board.

The petitioner having seen the aforesaid advertisement and being satisfied as to the terms and conditions of services to be rendered by GrameenPhone to its subscribers purchased a Grameen Mobile telephone set from GrameenPhone on 10.7.97 by paying Tk. 1000/- as royalty fee, Tk. 100/- as licence fee, Tk. 2000/- as connection fee and Tk. 300/- by way of VAT on the connection fee and Tk. 5000/- as security money along with Tk. 19,500/- as price for the telephone set. Since the date of his purchase of the said mobile telephone set the petitioner became the subscriber of GrameenPhone and continued to pay the bills for normal charges payable by him for the services rendered in this regard by GrameenPhone. GrameenPhone for the first time included royalty and licence fee along with other normal charges by issuing a bill dated 27.5.99, asking the petitioner to pay for the same (royalty and licence fees) every year although royalty and licence fees were due to be paid by the petitioner only once during subscription.

Respondent no. 1, Government of Bangladesh, represented by the Secretary, Ministry of Posts and Telecommunications and respondent no. 2, Grameen Phone, entered appearance and contested the rule by filing separate affidavit-in-opposition. The Government of Bangladesh states in its affidavit-in-opposition that pursuant to the said agreement dated 11.6.96 and the licence dated 28 November, 1996, GrameenPhone has been providing mobile phone services throughout the country and in terms of the said agreement the GrameenPhone is under obligation to pay royalty and licence fees to the government every year and in turn it collects the same from its subscribers including the petitioner. The government, however, asserts that the realisation of royalty and licence fees is just and in accordance with the agreement made between the government and GrameenPhone and as such the rule was liable to be discharged.

GrameenPhone in its affidavit-in-opposition states that the imposition and realisation of royalty and licence fees every year by issuing bills while collecting usual charges from the petitioner for providing cellular mobile phone services was justified and in accordance with the agreement entered into in this regard between the petitioner and GrameenPhone. Since GrameenPhone is under contractual obligation to the government to pay royalty and licence fees every year to the government they are in turn enti-

tled and justified to recover the same from its subscribers including the petitioner. GrameenPhone has also taken up the stand while contesting the rule that since it is a company incorporated under the Companies Act it is not a person performing the functions in connection with the affairs of the Republic or of a local authority in imposing and realising royalty and licence fees every year.

Deliberation

In the background of this case, we would take up and examine the point of maintainability of the writ petition first.

In the instant case it is required to ascertain and find out whether GrameenPhone while imposing and collecting royalty and licence fees from the petitioner as its subscriber every year did so in performing functions in connection with the affairs of the republic or of a local authority.

We have already noted that the Government of Bangladesh acting through the Ministry of Posts and Telecommunications has granted GrameenPhone the authority under a licence and an agreement under



section 4 of the Telegraph Act, 1885 to establish, maintain and work mobile telephone communication system in Bangladesh. Accordingly GrameenPhone has installed and placed in operation Multi-station Radio System of Digital Mobile Cellular Telephone Service all over Bangladesh in order to provide cellular mobile phone services to its subscribers including the petitioner.

It is clear from section 4 of the Telegraph Act, 1885 that it is the exclusive power and the privilege of the Government to establish, maintain and provide mobile telephone system and services in the country. But the Government can grant this power and privilege to any person under a licence on condition and in consideration of payments by such person.

In the instant case, GrameenPhone has acquired the above right to establish, maintain and work mobile telephone communication system for and on behalf of the Government by installation and operation of the multi-station radio system of digital mobile cellular telephone service by dint of agreement and licence from the government. By virtue of this legal arrangement GrameenPhone has not only established and maintained mobile telephone services by way of an extension of the already existing telephone communication system in the country but also has been providing mobile telephone services to the customers/subscribers as the Government licensee and agent. GrameenPhone in providing the said services has in fact been performing governmental and sovereign functions. The function of the government under section 4 of the Telegraph Act to establish, maintain and provide mobile telephone services to its people never ceased to be government function after it was allowed to be performed by the GrameenPhone as a licensee of the Government. This factual position is also admitted by the Government.

In performing the functions GrameenPhone has acted in the affairs of the Government and as such GrameenPhone is required to ensure accountability, transparency and bona fide in performing such functions. The service agreement entered into by and between the subscribers including the petitioner and GrameenPhone in this case is not an ordinary trading agreement but a contract entered in this regard for providing mobile telephone services by GrameenPhone as an agent and licensee of the Government. Therefore any act of GrameenPhone in breach of the contract or showing lack or want of transparency and bona fide on its part as complained of by the petitioner is accountable in writ jurisdiction of this court.

In this modern age it does not always become possible or feasible for the government to cope with the multifarious governmental functions and activities. At times and in some cases it becomes not only necessary but also expedient that such sovereign and governmental functions and activities are assigned and allocated to various agencies and functionaries for necessary execution under government control not only in the interest of providing effective and meaningful service to the people but also to disburden itself of some of those sovereign functions. These functions are carried out and performed by the licensees or agencies under the Government as government functions. This concept has long been judicially recognised by the highest judiciary of the country.

We are of the opinion that GrameenPhone while providing mobile telephone services to the subscribers including the petitioner and collecting royalty and licence fees every year from them has been acting in the affairs of the government as government agency or licensee under the licence granted by the government. Hence the present writ petition under Article 102 of the Constitution is maintainable.

Now we would advert to the contention of the petitioner that the aforesaid bill made out by GrameenPhone calling upon him to pay, amongst others, royalty and licence fees every year was illegal. We find that the agreement entered into by and between the petitioner and the GrameenPhone does not include any stipulation making him liable to pay royalty and licence fees every year. We also do not find that this agreement was subsequently altered or modified incorporating such stipulation making the petitioner liable to pay for the same every year. In fact the statement of the petitioner in the writ petition that he was for the first time called upon to pay royalty and licence fees illegally and without jurisdiction by bill dated 27.5.99 has not been controverted by GrameenPhone nor any amended or altered agreement has been brought on record by it (Grameen Phone) showing justification of imposing royalty and licence every year by the said bill dated 27.5.99 except the assertion that GrameenPhone was entitled to impose and realise royalty and licence fees every year in accordance with the contract.

It appears from the record that this court by order dated 11.11.1999, prior to the issuance of the Rule, directed GrameenPhone and its Billing Manager to certify and transmit the records of this matter specially in relation to royalty and licence fee and in this context the said Billing Manager was specifically directed to bring the records in this regard before this court at 10.30 am on 29.11.1999. But no record was ever produced in obedience to the said direction. Even during the hearing of the rule this court desired that relevant documents/papers be produced showing that GrameenPhone was empowered and within its right under the relevant contract between the parties to impose and collect royalty and licence fee every year. Even this desire of the Court as a last effort to see the record on this point went unheeded.

Since we have already held that Grameen Phone has been providing mobile telephone services and seeking to impose and realize royalty and licence fees every year in violation of the contract between the parties in this regard and in colorable exercise of the power under the contract as a person acting in the affairs of the republic, such act of imposition and realisation of royalty and licence fees every year by its bill dated 27.5.99 is declared to have been done and made without lawful authority and without jurisdiction and is of no legal effect.

Decision

The bill seeking to impose and realise royalty and licence fees every year is struck down. If any royalty and licence fees were realised every year in the past from the petitioner, the same is directed to be refunded to the petitioner forthwith. In the result, the Rule is made absolute in the foregoing terms without any order as to cost.

Mr Zakir Hossain Munshi with Mr Md Shamsul Huq, Advocates for the petitioner. Dr Kamal Hossain with Mr M Ziaul Hassan & Mr Tanjib-ul Alam, Advocates for Respondent No. 2. Mr Mashuque Hossain Ahmed, Advocate for Respondent No. 1.

LAW week



Supreme Court's direction to the Government

The Supreme Court directed the government to place the two draft rules for the two Commissions for the separation of judiciary by November 26. The two Commissions are the Judicial Service Commission and the Judicial Pay Commission. Formation of these two Commissions are the prerequisite to satisfy the 12-point directions of the court for the separation of judiciary. The full bench of the Appellate Division of the Supreme Court has passed the order while hearing the Government's petition for seeking more times. The government earlier had filed petition seeking 6 months time to implement the 12-point directions of the court for the separation of judiciary. It was noted that in an earlier writ petition challenging the PSC's authority to appoint judges through the BCS exam the Appellate Division directed the government to form Judicial Service Commission for the appointment of judges to the lower courts. This is the 14th time that the government is seeking time for the separation of judiciary. The court, however, rejected the petition of the government directing it to submit the progressive report for the separation. The court also said that if the government failed to determine the role of the magistrate, the court would determine it. -Law Desk.

Violence against women continues

Violence against women has not decreased despite various laws in this regard. At least 1650 women were subjected to various tortures and repression including domestic violation in the year of 2001. Among the victims 327 were murdered, 130 suffered acid attacks, 146 fell victim to unnatural death, 72 were physically tortured, and 122 were abducted during the said period. It was reported that 200 girls were raped during the first 8 months of the year mentioned above and 223 were used for prostitution. A total of 408 girls were trafficked to India, Pakistan and Middle East countries for forced prostitution. About 554 women were subjected to domestic violence during this period. The statistics of violence against women was revealed by a study report prepared by Bangladesh National Women Lawyers Association (BNWLA). BNWLA published the report in a seminar held in the CIRDP auditorium on 27 October. Speakers of the seminar said that a national consensus is needed to combat this social device. They also advocated for the amendment to the Shishu O Nari Nirjatan Damon Ain, 2000 to make the law more effective and friendly to the victims. They also advocated for the separation of the Judiciary. -Law Desk.

Army personnel punished for extortion

An army personnel was punished with one-year rigorous imprisonment for collecting money from common people by blackmailing them during the on going army drive. Corporal Abdul Kh Akhand who was in duty in the army camp of Karimganj Thana of the Kishorganj district was charged of extortion form some local people. It was reported that he claimed money from the people by intimidating that their names are in the list for arrest. He also threatened the common people to torture. The Field Court Martial, speedy trial court for the armed forces, found him guilty after investigating the matter and dismissed him from the army. He was transmitted to the district jail after awarded one-year rigorous imprisonment by the court. -Prothom Alo, 17 November.

Two new Bills passed

The Parliament has passed two Bills named Rural Electrification Board (Amendment) Bill 2002 and Depository (Amendment) Bill 2002. State Minister for Power has piloted the REB (Amendment) Bill changing the definition of the "Rural area". The Bill also re-defines the responsibility, power and function of the Power Development Board and the Rural Electrification Board in distributing electricity. The opposition members of the house criticised the government for continued load shedding and said that the Bill would squash supply of electricity instead of its expansion in the rural area. The house also passed the Depository (Amendment) Bill 2000 brought by the Finance Minister. The amended law will be granting the expansion of time from 2 years to 5 years for completing conversion of the existing paper certificate system to the depository system in stock trading. -Daily Star, 20 November.

Cabinet okays three amendments

The Cabinet has approved three draft bills seeking to amend the arms, narcotics control and explosive laws. The approval was given in a weekly meeting of the Cabinet chaired by the Prime Minister on 18 November. The draft bills are the Arms (Amendment) Act 2002, The Narcotic Control (Amendment) Bill 2002 and the Explosive Substances (Amendment) Act 2002. All the three draft bills were taken to the Cabinet by the Ministry of Home Affairs. -Bangladesh Today, 19 November.

Counter intelligence to monitor police

The government plans to form a counter intelligence agency to monitor the activities of the police department. The intelligence department will investigate the allegation against the police personnel and submit report to the government. There are a lot of allegations against the police department for corruption, abusing power and harassment to the common people. The government will take action against the accused police personnel as per the report and recommendations of this intelligence agency. -Ittefaq, 18 November.

Jails are overcrowded

The jails of the country are overcrowded with the extra prisoners detained during the ongoing joint operation. The jails of the country have capacity to accommodate 24 thousand detainees. But at present 73 thousand prisoners are detained in different jails of the country. The number of detainees was 41 thousand in 1993 and 64 thousand in 2001. It was reported that more than 6 thousand persons are detained during the on going joint operation. The excessive number of detainees in the jail is causing serious violation of the prisoner's rights. They suffer serious health hazards due to excessive number of prisoners in jail. Against the backdrop of the excessive number of prisoners in the jail the government plans to release the prisoners who are detained without trial for minor offence. -Ittefaq, 16 November.

Children are sexually abused

The children under age of 10-14 are sexually abused irrespective of their sex. Among 120 children at least 50 experienced sexual harassment. Children above the age of 8 years are not the targets of the violators. It was revealed by a report prepared by "Breaking the Silence" a voluntary organisation. The findings of the report also said that the children who had been sexually abused became juvenile delinquents. -Manavazamin, 16 November.

Argument of Bappi murder case concluded

The argument of the sensational Bappi murder case came to an end in the Special Court for Prevention of Women and Children Repression, Dhaka. The prosecution side made submission on some important statements of the prosecution witnesses in support of the charges. Rubayet Ahmed Bappi, 8, a student of class III was abducted by his cousin and some accomplices on 5 August for ransom. They murdered the innocent boy afterwards. The verdict of the case will be pronounced on 30 November. Law Desk.

Case against OC

A widow mother has filed a case before the Chief Metropolitan Magistrate Court against the Officer-in-Charge of the Sutrapur Thana to know whereabouts of her son. She submitted to the CMM that her son was arrested by the joint forces of the police and the army on 11 November during the on going joint operation against the crime. They took him to an unknown place after arrest. The complainant apprehended that her son was killed by the joint forces. -The Bangladesh Observer, 18 November.

BGMEA for anti crime drive

Bangladesh Garments Manufacturers and Exporters Association (BGMEA) had distributed posters among the common people in order to build up national consensus against extortion and other crimes. The distribution of poster was a part of massive anti crime campaign launched by the BGMEA. The campaign came on a massive loss of the garments sector around taka 2.34 crore to robbery and mugging from the last December. -Daily Star, 14 November.

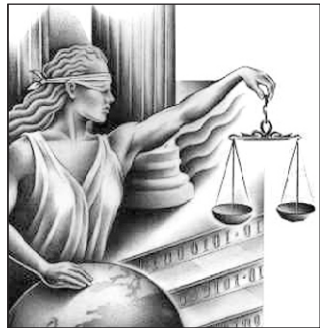
Corresponding Law Desk

Please send your mails, queries, and opinions to: post - Law Desk, The Daily Star, 19 Karwan Bazar, Dhaka-1215; telephone 8124944, 8124955, 8124966; fax 8125155, 8126154; email ds1awdesk@yahoo.co.uk; interactive email lawdesk20@hotmail.com

READER'S queries



Your Advocate



Your advocate is Mr. Probir Neogi of the Supreme Court of Bangladesh. His professional interests include civil law, constitutional law and banking law. Send your legal and human rights queries to the Law Desk, The Daily Star. A panel of lawyers will address your problems.

Q: In September '02 we purchased 20 shares of a Company in one howala in the name of one of my brothers and we desired that those shares be separately registered in the name of two of our brothers. We placed the said certificates for registration of transfer with the aforesaid Company but they declined to register the same in the name of my other brother because the howala did not bear his name and those shares were later registered in the name of my brother whose name appeared in the howala. Later we contacted the Dhaka Stock Exchange and three forms were made over to us. These forms are : 1) Notification for the gifting of shares of a public company listed with the exchange outside the trading floor, 2) Application for the conveyance of shares of a public listed company from an Administrator/Executor of a deceased estate to the person beneficially entitled thereto and 3) Application for the transfer of shares in a public Company listed with the stock exchange outside the trading floor. I would like to know under what law the aforesaid forms came into existence and were enforced, and what are the aims and objectives for introducing such forms. Please advise
Ziaul Haque
New Eskaton Road, Dhaka

Your Advocate: The aforesaid forms are introduced and enforced under the regulations made by the Dhaka Stock Exchange (DSE). Section 34 of the Securities and Exchange Ordinance, 1969 empowers a Stock Exchange to make such regulations. Relevant portion of section 34 reads as follows: "34. Power to make regulations. (i) A Stock Exchange may, subject to the previous approval of the Commission, make regulations not inconsistent with the rules to carry out the purpose of this Ordinance."

In the above-quoted section "Commission" means the Securities and Exchange Commission (SEC), Section 33 of the Ordinance empowers SEC to make such rules. Section 33(2) (b) contemplates that such rules may provide for any of the matters with respect to which a Stock Exchange may make regulations. Section 34(2) enumerates the matters which may be provided for by the regulations made by a Stock Exchange. After giving a long list from section 34(2)(i) through (xi) section 34 (2)(xx) provides, "any matter for which a regulation is required to be or may be made." Moreover, a Stock Exchange's power to make regulations regarding the matters mentioned in section 34(2)(i) to (xx) are "In particular and without prejudice to the generality of the foregoing power". The aims and objectives for introducing such forms are stemmed from the purposes of the Ordinance which are to provide for protection for investors, regulations of capital markets and issue and dealings in securities.

LAW letter

Of pending court cases

In an inaugural session of a day long national workshop on "Alternative Dispute Resolution (ADR)", held on 31 October, the Law, Justice and Parliamentary Affairs Minister Moudud Ahmed said that a total of 9,68,305 cases were pending in different courts of Bangladesh. The disposal of all pending cases through normal legal procedure would take as many as 86 years, showing that no new cases would be taken into account. This is the state of our judiciary, which really seems to be in a shamble. According to Article 35(3) of our Constitution "Every person accused of a criminal offense shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law". On the other hand, Justice delayed, Justice denied is one of the principles of equity. So, the government has to find out the causes of delay in justice delivery and it's solutions. Some of the main causes may be the huge quantities of cases in comparison to courts and Judges; non-cooperation from the parties and advocates for quick disposal of the cases; inherent weakness of laws; improper inquiry of cases as well as delay in inquiry; absence of honest, efficient and experienced Public Prosecutor and Government Pleaders, etc. Now the question arises how we can overcome this sorry plight. Establishment of courts with sufficient judges, time frame for disposal of cases, necessary amendments to remove the weakness of existing laws, appointment of efficient Public Prosecutors and Government Pleaders through fair appointment process, establishment of separate investigation agency for criminal cases, introducing Alternative Dispute Resolution (ADR) and setting up "Court Mediation Centre" may be considered in overcoming the backlog of cases. Previous AL Government took an initiative for appointment of magistrates from the lawyers for quick disposal of cases. Our present ruling echelon may actively consider the initiative of the past government.

M.H. Bari
Khulna

Delay in criminal justice

Criminal justice procedure developed in our country during British period. After independence India and Pakistan adopted British Judicial Procedure. These two countries made some changes in their criminal procedure but Bangladesh is following almost the original procedure floated by the British.

In our country criminal justice is conducted by three different tiers. The magistrates conduct the lower tier of criminal justice, secondary judicial tier is conducted by the judges of the Sessions court. The higher tier of criminal justice is controlled by the justices of the Supreme Court. Magistrates and judges of the Sessions court perform the full trial of criminal cases.

Criminal cases may be filed in our country in two ways. Firstly, a case may be filed with concerned police station and secondly, with the magistrate court. In police case police starts investigation, in complainant case magistrate may investigate by himself or direct any authorised agency to investigate, whichever he thinks fit. After getting report/police report magistrate takes cognizance and issues process. Then starts a criminal case.

There are two or three more stages to be observed by the court. If the accused appears before the cognizance magistrate, magistrate may grant bail or send him to the custody. After getting police report the magistrate can start trial of the case if the accused is present before the court. If the accused is not present before the court the magistrate has to issue two more processes for the ends of justice. Firstly, warrant of proclamation and attachment

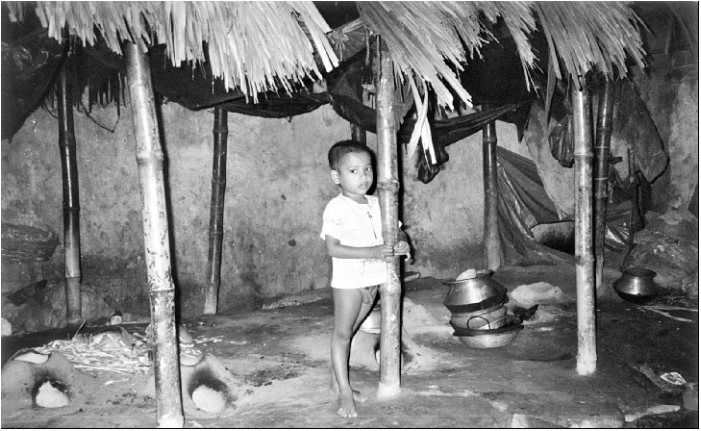
and secondly, gazette notification. Delay occurs firstly in investigation stage, secondly in issuance of process and its implementation and thirdly in trial stage.

Delay in criminal case hinders the ends of justice. Introduction of time limit in every stage of criminal proceeding may help eliminate unnecessary delay in criminal justice.

A K M Maksudur Rahman
First Class Magistrate,
Jhenidah

Who will save these hapless children

The news item "Caught in a Vicious Circle" by Nicle Meier published in the Daily Star on 16 November has noticed my attention. The children of the sex



workers are brought up in the brothel of Jessore district and subjected to exploitation at the very early age. These innocent kids are sexually abused and girl children are usually forced to enter the profession of their mothers. A study conducted by the Save the Children, Sweden, mentioned in the report, revealed that the children become habituated in the brothel life at an early age. They help their mothers in household chores and bring refreshments to their mother's clients. They have no opportunity to education or any refreshment. They are caught in a vicious circle. Bangladesh is a signatory to the UN Convention on the Rights of the Child. Bangladesh also has its own laws for the protection and promotion of the child rights. The Ministry of Women and Children Affairs has also been set up to look after the well-being of the children. But the government has not taken any noticeable initiative to rescue these vulnerable children from the vicious circle. The initiatives taken by some local NGO's are not enough. It is the primary duty of the state to ensure the rights of the child. Therefore, the government will be responsible for any violation of the child rights. Will the government come forward to rescue these ill-fated vulnerable children?

Khokon
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