CASES

DECIDED BY

THE SUPREME COURT OF CYPRUS

IN ITS REVISIONAL JURISDICTION AND IN
ITS REVISIONAL APPELLATE JURISDICTION

[TRIANTAFYLLIDES, J.]

1969
Jan. 4
—
G. E. ANDRONICOU & CO. LTD.
v.
CYPRUS TELECOMMUNICATIONS AUTHORITY

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

G. E. ANDRONICOU & CO. LTD.,

Applicant,

and

THE CYPRUS TELECOMMUNICATIONS AUTHORITY,

Respondent.

(*Case No.* 70/68).

Telecommunications—The Cyprus Telecommunications Authority (CYTA)—The Telecommunications Service Law, Cap. 302, *as amended by the Inland Telecommunications Service (Amendment) Law,* 1962, (*Law* 34/62)—*Sections* 12 *and* 13 *of Cap.* 302 *as amended—Refusal of the Respondent Authority to provide exchange lines in relation to P.A.B.X. (Private Automatic Branch Exchange) systems—Alleged to have been based on "Rules and Regulations" derived from sections* 12 *and* 13 *of Cap.* 302 (supra)—*Whereas such "Rules and Regulations" never existed—Said refusal, therefore, vitiated by a material misconception—On the other hand, the Respondent has no power under section* 12(2)(*b*) *and* (*c*) *of the said Law Cap.* 302 *to establish a monopoly regarding supply or installation of P.A.B.X. systems—Decision of the Respondent's Board on which the refusal complained of is alleged to have been based is only a policy decision—Not a product of the powers vested in the Respondent under section* 12(1)(*a*) *and* (*e*) *of Cap.* 302 (supra)—*For all the above reasons the* sub judice *action has to be annulled as based on a material misconception as well as being contrary to law and in abuse and excess of powers—See, also, herebelow.*

Telecommunications Service Law (supra), *section* 12(1)—*Whether or not the Respondent Authority might validly provide by means of Regulations made under paragraph* (*e*) *of the said sub-section or by means of terms and conditions precisely and formally prescribed under paragraph* (*a*) *of the same sub-section, that P.A.B.X. systems are to be supplied, installed or maintained* only *by the Respondent—Question left open.*

Constitutional Law—Monopoly—Article 25 *of the Constitution—Monopoly is an exception to the right safeguarded under Article* 25—*Establishment of monopoly to be allowed only where provision has been clearly made by a Law—Section* 12(2) *of Cap.* 302 (supra) *has, therefore, to be construed in conformity with the letter and spirit of Article* 25 *of the Constitution.*

Monopoly—Statutes allegedly establishing monopolies have to be construed strictly—See, also, hereabove under Constitutional Law.

Statutes—Construction—Meaning of the word "may" in the opening sentence of section 12(2) *of Cap.* 302—*"May" does not mean "shall"—Statutes have to be construed, as far as possible, in conformity with the letter and the spirit of the Constitution—Monopolies—Statutes establishing monopolies must be construed strictly—See, also, above under Constitutional Law; Monopoly.*

Cyprus Telecommunications Authority (*CYTA*)—*See above, passim.*

Administrative Law—Decision null and void as based on a material misconception as well as being contrary to law and in abuse and excess of powers—See above under Telecommunications.

Abuse and excess of powers—See above under Administrative Law; Telecommunications.

Decision contrary to law—See above.

Costs—Unsuccessful Respondent having acted in good faith shall pay only part of the successful Applicant's costs.

By this recourse the Applicant company complains against the refusal of the Respondent Authority to provide the required exchange lines (i.e. lines connecting up with a public telephone exchange) in relation to two P.A.B.X. (Private Automatic Branch Exchange) systems proposed to be supplied to, and be installed and maintained for, customers of the Applicant by the Applicant itself. The reason for this refusal given in a

letter of the 23rd December 1967, by the Assistant Chief Accountant of the Respondent Authority, was to the effect that the proposal of the Applicant company could not "be entertained" as it was "contrary to the Authority's Rules and Regulations derived from the Telecommunications Law." The material parts of the relevant sections 12 and 13 of the Telecommunications Service Law, Cap. 302, as amended, in particular by the Inland Telecommunications Service (Amendment) Law, 1962 (Law 34/62), are quoted *post* in the Judgment of the Court.

It is common ground that no Regulations under the said Law (section 12(1)(e)) have as yet been made by the Respondent Authority. Counsel for the Respondent has produced, however, as relevant, *inter alia,* a decision of the Board of the Respondent dated the 18th February, 1966 to the effect that in future, the installation of P.A.B.X. systems as aforesaid (*supra*) which belonged to private persons would be prohibited, and that such persons would have to rent the equipment from the Respondent Authority and pay to it rent therefor, in addition to the maintenance fees.

The case for the Respondent was that such decision was validly taken under paragraphs (b) and (c) of sub-section (2) of section 12 of the said Law, Cap. 302 (*supra*). Sub-section (2) provides:

"(2) For the purposes of sub-section (1) the Authority may, either by itself or..

(a) subject to the provisions of this Law, purchase, construct, reconstruct, install, maintain and operate installations and plant, and..

(b) sell, hire or otherwise supply installations and plant, and install, repair, maintain or remove any such installations and plant; and

(c) carry on all such other works or activities as may appear to the Authority requisite, advantageous or convenient for it to carry on for or in connection with the performance of its duties under this law or with a view to making the best use of any of its assets, or for providing an efficient telecommunications service".

It was submitted by counsel of the Respondent that:

(1) The word "may" in the opening sentence of sub-section (2) (*supra*) should be construed as meaning "shall".

(2) That by virtue of the aforementioned provisions in paragraphs (b) and (c) the Respondent Authority was authorised, in the proper exercise of its discretion to decide to monopolize the installation and maintenance of P.A.B.X. systems (*supra*).

Annulling the refusal complained of, the Court –

Held, (1). The *sub judice* action is vitiated by a material misconception, namely, that there existed "Rules and Regulations" of the Respondent preventing acceptance, or even consideration of the Applicant's request in relation to the two P.A.B.X. systems. But such "Rules and Regulations" never existed. This, in my view, constitutes by itself a sufficient reason for the annulment of the said action; and it is hereby declared accordingly.

(2) In my opinion, the proper construction to be placed on the word "*may*" in sub-section (2) of section 12 (*supra*) is its ordinary enabling meaning, and it does not mean "shall" as submitted by counsel for the Respondents.

(3)(a) Every Law in Cyprus (unless it is found as being unconstitutional) has to be construed and applied, as far as possible, with the letter and spirit of the Constitution; and in the case of section 12(2) of Cap. 302 (*supra*) it is particularly relevant to bear in mind the provisions of Article 25 of the Constitution, from which it is derived that a monopoly is an exception to the right safeguarded under that Article; with the necessary result that a monopoly should be allowed only where provision to that effect has been clearly made by a Law.

(b) Moreover, enactments allegedly establishing monopolies have to be construed strictly (see, *inter alia,* Maxwell on Interpretation of Statutes 11th edition p. 285 and *The Direct United States Cable Company, Ltd.* v. *The Anglo-American Telegraph Company, Ltd.* [1877] 2 A.C. 394, at p. 412).

(4) Approaching in this manner the enabling provision of section 12(2) of Cap. 302—and particularly paragraphs (b) and (c) thereof (*supra*) which have been specifically relied upon by counsel for the Respondent—I can find nothing therein

entitling the Respondent Authority to establish a monopoly regarding the supply or installation of P.A.B.X. systems.

(5)(a) The fact that the Respondent, by virtue of the said statutory provisions, is empowered to do certain things does not entail, as a proper juridical consequence, the proposition that the Respondent is entitled to exclude others from doing the same things.

(b) Nor is there, either, anything in section 13 (*post* in the judgment) of the said Law, Cap. 302, which could be construed as vesting such a right in the Respondent; thereby a duty of the Respondent is laid down but such duty does not necessarily entail a right to monopolize anything, if the Respondent is not otherwise expressly empowered to do so.

(6) I am leaving entirely open the question of whether or not the Respondent might validly provide, by means of Regulations under section 12(1)(e) of the same Law Cap. 302 or by means of terms or conditions precisely and formally prescribed under paragraph (a) of the same sub-section (paragraphs (a) and (e) are quoted *post* in the judgment), that P.A.B.X. systems are to be supplied, installed and, a fortiori maintained only by Respondent. The aforementioned decision of the Respondent dated the 18th February, 1966 (*supra*), can neither be held to be nor has it been put forward by counsel for the Respondent as being, a product of the powers vested in the Respondent under those paragraphs (a) and (e).

(7) In the result, for all the foregoing reasons I find that the *sub judice* action of the Respondent has to be declared to be *null* and *void* and of no effect whatsoever, as being contrary to law and in abuse and excess of powers being in this respect also the product of a misconception as already pointed out in this judgment (*supra*).

(8) Regarding costs, the Respondent having acted in all good faith will have to pay only £10 towards Applicant's costs.

Sub judice action annulled;
Order for costs as aforesaid.

Cases referred to:

The Direct United States Cable Company, Ltd. v. *The Anglo-American Telegraph Company, Ltd.* [1877] 2 A.C. 394, at p. 412 (*applied*).

Recourse.

Recourse against the refusal of the Respondent Authority to provide the required exchange lines in relation to two P.A.B.X. (Private Automatic Branch Exchange) systems to be supplied to and be installed and maintained for customers of the Applicant, by the Applicant.

G. Cacoyiannis, for the Applicant.

A. HjiIoannou, for the Respondent.

Cur. adv. vult.

The following judgment was delivered by:

TRIANTAFYLLIDES, J.: By this recourse the Applicant company complains against the refusal of the Respondent Authority to provide the required exchange lines (i.e. lines connecting up with a public telephone exchange) in relation to two P.A.B.X. (Private Automatic Branch Exchange) systems to be supplied to, and be installed and maintained for, customers of the Applicant, by the Applicant.

A P.A.B.X. system is a combination of internal and external telephone systems, i.e. an internal extension number of such a system can dial directly another internal extension number of the system and, also, by dialling an extra digit—such as '9' or 'O'—an internal extension number can dial directly an outside number of the public telephone exchange.

The events which gave rise to this recourse are as follows:-

On the 15th December, 1967, the Applicant addressed a letter to the Respondent stating that the Applicant had secured two orders for P.A.B.X. systems and would like to have an assurance that the Respondent would rent the required exchange lines to the Applicant's customers; it was added that all internal telephones would be installed and maintained by the Applicant (see *exhibit* 1).

On the 23rd December, 1967, the Assistant Chief Accountant of Respondent replied stating that the proposal that Applicant would install P.A.B.X. systems, as well as maintain them, and that the Respondent would rent the required exchange lines could not "be entertained", as it was "contrary to the Authority's Rules and Regulations derived from the Tele-

communications Law". It was pointed out, however, that the Respondent would not interfere if the equipment in question would be used exclusively for intercommunication purposes and without connection to the Respondent's telephone network (see *exhibit* 2).

On the 26th January, 1968, counsel for the Applicant wrote to the Respondent requesting to be informed "which Rules or Regulations of the Telecommunications Law" prevented the course sought to be taken by the Applicant; it was stated, in such letter, that this information was necessary so as to enable counsel to give proper advice to the Applicant (see *exhibit* 3).

On the 2nd February, 1968, the Chief Accountant of Respondent replied to counsel for the Applicant stating that "the Authority's rules and regulations, are derived from the provisions of sections 12 and 13 of the Telecommunications Law (Cap. 302)".

This recourse was filed on the 7th March, 1968.

Sections 12 and 13 of the Telecommunications Service Law (Cap. 302), as amended, in particular, by the Inland Telecommunications Service (Amendment) Law, 1962 (Law 34/62), read, in their material parts, as follows:–

"12. (1) Subject to the provisions of this Law, it shall be the duty of the Authority to –

(a) operate a good and sufficient telecommunications service in the Republic for the Government, public bodies, and the public generally, on such terms and conditions as the Authority may deem expedient;

(b) ....;

(c) ....

(d) Promote the development of the telecommunications service in accordance, as far as practicable, with recognized international standard practice and public demand;

(e) make regulations, in accordance with the provisions of this Law, governing the telecommunications service;

(f) ....

(2) For the purposes of sub-section (1) the Authority may, either by itself or through any duly authorized agent in this respect –

(a) subject to the provisions of this Law, purchase, construct, reconstruct, install, maintain and operate installations and plant, and all buildings and works used in connection therewith;

(b) sell, hire or otherwise supply installations and plant, and install, repair, maintain or remove any such installations and plant; and

(c) carry on all such other works or activities as may appear to the Authority requisite, advantageous or convenient for it to carry on for or in connection with the performance of its duties under this law or with a view to making the best use of any of its assets, or for providing an efficient telecommunications service.

(3) ....

13. Subject to the provisions of this Law, or of any Regulations made thereunder, in so far as it is able to do so, and having due regard to economic considerations, the Authority shall, either by itself or through duly authorized agents, provide a telecommunications service and the necessary installations and plant for use by any person (in this section referred to as 'the subscriber'), at any place in the Republic to enable the subscriber to communicate by telecommunications service with any other person".

It is common ground that no Regulations have as yet been made and published by the Respondent under sub-section 1(e) of section 12.

Counsel for the Respondent has produced, however, as relevant, two decisions of the Board of the Respondent (see *exhibit* 5):

The first one was taken on the 17th February, 1965; it refers to P.A.X.S. systems (which admittedly are closely similar P.A.B.X. systems) and it states that it was decided to continue the existing practice—entailing the purchase and installation of such systems by private persons and the payment by the

subscribers to the Respondent of maintenance fees—but that the subject would be reconsidered as soon as the General Manager of Respondent would put forward a full report on the whole matter.

Apparently, no such report was ever prepared, in writing, by the General Manager; but on the 18th February, 1966, a second decision was taken in the matter, stating that after explanations given by the General Manager, it was decided that the current practice would remain in force regarding the already existing P.A.B.X. systems, but that, in future, the installation of these systems which belonged to private persons would be prohibited, and that such persons would have to rent the equipment from the Respondent and pay to the Respondent rent therefor, in addition to the maintenance fees.

No decision of the Board of the Respondent, relating specifically to the present case, has been produced, and it has not been alleged that such a decision was ever taken. The matter seems to have been handled by the managerial staff of the Respondent.

The first thing to be noticed, at once, is that the *sub judice* action is vitiated by a material misconception, namely, that there existed "Rules and Regulations" of the Respondent preventing acceptance, or even consideration, of the request of the Applicant; as counsel for the Respondent has not referred in the Opposition to, produced, or sought to rely on, any such "Rules and Regulations" it may safely be taken for granted that they were non-existent. This, in my opinion, constitutes, by itself, a sufficient reason for the annulment of the said action, and it is, therefore, hereby so declared accordingly.

Let it be assumed, next, that the action in question was, in reality, taken as a result of the aforementioned decision of the Board of the Respondent, dated the 18th February, 1966 (*exhibit* 5):

Such decision amounts to nothing more than a policy decision. It cannot be treated, by any means, as Regulations made under sub-section 1(e) of section 12 of Cap. 302. Nor can it be properly taken to be a formal decision laying down terms and conditions under sub-section 1(a) of section 12, because it is too vague and lacking in essential particulars (such as the specific rental to be paid); and, actually, it has not even been suggested by counsel for the Respondent that

the decision of the 18th February, 1966, was ever meant to be a step taken under either paragraph (a) or paragraph (e) of sub-section (1) of section 12.

The case for the Respondent has been (see paragraph 4 of the grounds of law in the Opposition) that such decision was taken under paragraphs (b) and (c) of sub-section (2) of section 12. It was submitted, in this respect, that by virtue of such provisions the Respondent was authorized, in the proper exercise of its discretion, to decide to monopolize the supply, installation and maintenance of P.A.B.X. systems.

In relation to sub-section (2) of section 12, it was, further, submitted, by counsel for Respondent, that the word "may", in the opening sentence thereof, should be construed as meaning "shall".

Counsel for the Respondent has, also, tendered evidence to show that, in the circumstances, the decision of the 18th February, 1966, was reached in the course of a proper exercise of the relevant discretionary powers. But, I ruled that before hearing such evidence I should decide, first, whether or not the aforesaid decision was in law open to Respondent; only if I were to decide this in the affirmative it would be necessary to hear the evidence tendered by counsel for the Respondent.

In my opinion, the proper construction to be placed on the word "may" in sub-section (2) of section 12 is its ordinary enabling meaning, and it does not mean "shall"; and this is the view which has been adopted—and correctly so—in practice by the Respondent itself; otherwise there could never have arisen any question of considering, in the light of the views of its General Manager, what policy to adopt regarding the supply and installation of P.A.B.X. systems; if "may" meant "shall" then the Authority would have to do—in all cases, and without possessing a discretion or choice in the matter—all the things set out in sub-section (2).

Every Law in Cyprus (unless it is found to be invalid as being unconstitutional) has to be construed and applied in conformity, as far as possible, with the letter and spirit of our Constitution; and in the case of section 12(2) of Cap. 302 it is particularly relevant to bear in mind the provisions of Article 25, from which it is derived that a monopoly is an exception to the right safeguarded under such Article; with

the necessary result that a monopoly should be allowed only where provision to that effect has been clearly made by a Law.

Moreover, enactments allegedly establishing monopolies have to be construed strictly (see, *inter alia*, Maxwell on Interpretation of Statutes, 11th ed. p. 285, and *The Direct United States Cable Company, Ltd.* v. *The Anglo-American Telegraph Company, Ltd.* [1877] 2 A.C., 394, at p. 412).

Approaching in this manner the enabling provision of section 12(2) of Cap. 302—and particularly paragraphs (b) and (c) thereof which have been specifically relied upon by the Respondent—I can find nothing therein entitling the Respondent to establish a monopoly regarding the supply or installation of P.A.B.X. systems.

The fact that the Respondent, by virtue of the said statutory provisions, is empowered to do certain things, does not entail, as a proper juridical consequence, the proposition that the Respondent is entitled to exclude others from doing the same things.

Nor is there, either, anything in section 13 of Cap. 302 which could be construed as vesting such a right in the Respondent; thereby a duty of the Respondent is laid down, but such duty does not necessarily entail a right to monopolize anything, if the Respondent is not otherwise expressly empowered to do so.

I am, of course, leaving entirely open, in this judgment, the question of whether or not the Respondent might validly provide, by means of Regulations made under paragraph (e) of sub-section (1) of section 12 of Cap. 302 or by means of terms and conditions precisely and formally prescribed under paragraph (a) of the same sub-section, that P.A.B.X. systems are to be supplied, installed and, a fortiori, maintained only by the Respondent; as already pointed out, the aforementioned decision of the 18th February, 1966, can neither be held to be, nor has it been put forward by counsel for the Respondent as being, a product of the powers vested in the Respondent under such paragraphs (a) and (e).

In the result, for all the foregoing reasons I find that the *sub judice* action of the Respondent has to be declared to be *null* and *void* and of no effect whatsoever, as being contrary to law and in abuse and excess of powers, being, in this respect,

also the product of a misconception, as already pointed out in this judgment.

Regarding costs I have decided to order the Respondent to pay the Applicant only £10 towards Applicant's costs, taking into account the undisputed fact that the Respondent has acted in all good faith in this matter.

Sub judice action declared null and void and of no effect whatsoever; order for costs as aforesaid.