

For Respondent : Mr. Meet Malhotra,
Mr. Raghvinder Singh, Advocates

Order

In these two appeals filed u/s 14A(a) of the Telecom Regulatory Authority of India Act, 1997 (for short, the Act) the appellants have challenged the directions dated 7.10.2002 issued by the Telecom Regulatory Authority of India (for short TRAI or Authority) issued u/s 13 read with Section 11(1)(b) of the Act. The directions, which have been issued by the TRAI, are as under:

“Subject: Direction under Section 13 read with Section 11(1)(b) of the Telecom Regulatory Authority of India Act, 1997 as amended by TRAI (Amendment) Act, 2000.

Whereas there have been cases of non-compliance with the provisions of the license as well as with Authority's Order/Regulations/Determinations/Directions and it has been found that even after such lapses having been pointed out, some service providers have not been prompt enough to take corrective action.

And Whereas it is considered necessary that in the interest of a healthy growth of a telecom service sector, service providers be made duly accountable for their failure to conform to licensing and regulatory regimes in force, specially if such failures are repeated.

The Authority, therefore, in exercise of the power conferred upon it under Section 13 read with Section 11(1)(b) of the Telecom Regulatory Authority of India Act, 1997 as amended by TRAI (Amendment) Act, 2000, hereinafter called “TRAI Act”, hereby directs that;

All service providers shall-

Comply with all Orders/Regulations/Directions/Determinations issued by the Authority from time to time.

fulfil requirements regarding publication of tariffs, notifications and provision of information as directed by the Authority through its Orders/Regulations/Directions/Determinations issued from time to time as per the provisions of TRAI Act.

Strictly adhere to and comply with the terms and conditions of their license(s).

The procedure as mentioned below shall be followed in case of a violation of any of the Orders/Regulations/Directions/Determinations:

In the first instance the delinquent service provider shall be asked to

furnish an explanation.

if the explanation furnished by the service provider is not satisfactory, the Chief Executive Officer will be called upon to appear in person before the Authority and to explain his point of view.

In the event of non-appearance by the Chief Executive Officer, an ex-parte decision shall be taken by the Authority and strictures, if circumstances so warrant, shall be passed against the service provider.

if after hearing the Chief Executive Officer, the explanation furnished to the Authority is found unsatisfactory, strictures may be passed against the service provider.

If a service provider persists in its acts of non-compliance with the Authority's Orders/Regulations/Directions/Determinations and terms of his license, and three successive and separate strictures are passed against the service provider, the Authority may:

initiate necessary action for imposition of penalty in terms of Section 29 of the TRAI Act by filing a complaint before the Chief Metropolitan magistrate or a Chief Judicial Magistrate of First Class, as the case may be, to take cognizance of the offence, and/or,

send suitable recommendations to the Licensor for taking action under the terms of the License including cancellation of the License.

The Authority reserves the right, in cases of serious violations, to pursue one of the two options, or both, as specified in clause B(v)(a)(b) above even in the event of a single violation.

TRAI is an Authority constituted u/s 3 of the Act. It is a body corporate, having perpetual succession with power to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued. All these powers are however subject to the provisions of the Act. The authority consists of a Chairperson, and not more than two whole-time members and not more than two part-time members, to be appointed by the Central Government. It is not necessary for the decision of the controversy raised in the present appeals to go into the qualifications, terms of service etc. of the Chairperson and the members of the Authority. Powers and functions of the Authority are prescribed in Chapter-III of the Act and are contained in Sections 11, 12 & 13.

Section 11, in relevant part, is as under:

Functions of Authority [(1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall

be to—

make recommendations, either *suo motu* or on a request from the licensor, on the following matters, namely;

need and timing for introduction of new service provider;

terms and conditions of licence to a service provider;

revocation of licence for non-compliance of terms and conditions of licence;

measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;

technological improvements in the services provided by the service providers;

type of equipment to be used by the service providers after inspection of equipment used in the network;

measures for the development of telecommunication technology and any other matter relating to telecommunication industry in general;

efficient management of available spectrum;

discharge the following functions, namely:

ensure compliance of terms and conditions of licence;

notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, fix the terms and conditions of inter-connectivity between the service providers;

ensure technical compatibility and effective inter-connection between different service providers;

regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;

lay-down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service;

lay-down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;

maintain register of interconnect agreements and of all such other matters

as may be provided in the regulations;

keep register maintained under clause (vii) open for inspection to any member of public on payment of such fee and compliance of such other requirement as may be provided in the regulations;

ensure effective compliance of universal service obligations;

levy fees and other charges at such rates and in respect of such services as may be determined by regulations;

perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act.

Provided that

Sections 12 & 13 are as under:

12. Powers of Authority to call for information, conduct investigations, etc.

Where the Authority considers it expedient so to do, it may, by order in writing—

call upon any service provider at any time to furnish in writing such information or explanation relating to its affairs as the Authority may require; or

appoint one or more persons to make in inquiry in relation to the affairs of any service providers; and

direct any of its officers or employees to inspect the books of account or other documents of any service provider.

Where any inquiry in relation to the affairs of a service provider has been undertaken under sub-section (1),—

every officer of the Government Department, if such service provider is a department of the Government;

every director, manager, secretary or other officer, if such service provider is a company; or

every partner, manager, secretary or other officer, if such service provider is a firm; or

every other person or body of persons who has had dealings in the course shall be bound to produce before the Authority making the enquiry, all such books of account or other documents in his custody or power relating to, or having a bearing on the subject-matter of such

inquiry and also to furnish to the Authority with any such statement or information relating thereto, as the case may be, required of him, within such time as may be specified.

Every service provider shall maintain such books of account or other documents as may be prescribed.

The Authority shall have the power to issue such directions to service providers as it may consider necessary for proper functioning by service providers.

Power of Authority to issue directions: The Authority may, for the discharge of its functions under sub-section (1) of section 11, issue such directions from time to time to the service providers, as it may consider necessary:

Provided that no direction under sub-section (4) of section 12 or under this section shall be issued except on the matters specified in clause (b) of sub-section (1) of section 11.

Section 29 of the Act provides for penalty for contravention of directions of Authority. Section 36 grants power to the Authority to make regulations. These two Sections are as under:

Section 29: Penalty for contravention of directions of Authority—If a person violates directions of the Authority, such person shall be punishable with fine which may extend to one lakh rupees and in case of second or subsequent offence with fine which may extend to two lakh rupees and in the case of continuing contravention with additional fine which may extend to two lakh rupees for every day during which the default continues.

Section 36 : Power to make regulations—(1) The Authority may, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the purposes of this Act.

In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:

the time and places of meetings of the Authority and the procedure to be followed at such meetings under sub-section (1) of section 8, including quorum necessary for the transaction of business;

the transaction of business at the meetings of the Authority under sub-section (4) of section 8;

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matters in respect of which register is to be maintained by the authority
2[under sub-clause (vii) of clause (b) of sub-section (1) of section 11;

levy of fee and lay down such other requirements on fulfillment of which a copy of register may be obtained 3[under sub-clause (viii) of clause (b)] of sub-section (1) of section 11;

levy of fees and other changes 4[under clause (c)] of sub-section (1) of section 11;

Under Section 36, regulations are to be laid down before the Parliament.

Appellants in both the appeals are service providers which means the Government as a service provider, and included a licence (clause (j) of sub section (1) of Section 2 of the Act).

When these appeals came up for admission, it was noticed that no action has been taken by the Authority in terms of its impugned directions but liberty was granted to the appellants to agitate the matter again if any action is taken by the Authority. Nothing happened. As per Authority necessity to issue the impugned directions arose as the service providers were found not to be complying with its Orders/Regulations/Determinations/Directions. What were those Orders/Regulations/Determinations/Disections have not been specified even in the reply to the notice issued by the Tribunal.

It is the case of the Authority that the directions are uniform, non-discriminatory, transparent and consistent with the procedure as prescribed under the Act itself. It was submitted that these directions lay a procedure which would be applicable to all concerned and every service provider was put on notice of the consequences if the Orders/Regulations/Determinations/Directions of the Authority were not followed. It was submitted that the directions were the result of the experience gained by the Authority over the years and the procedure prescribed and the directions issued were not violative of the rules of natural justice. It was also submitted that all the directions issued were valid and can be related to various provisions under the Act, which empower the Authority to take action if there is any infraction of its directions.

It is not made clear to us as to why similar directions could not be made applicable if the infraction was committed by the Departments of the Government as Section 31 of the Act similarly applies to them as well.

As we see from the stand of the Authority, necessity to issue directions arose as indeed the Authority found itself in a helpless situation where there were cases of non-compliance with the provisions of the licence as well as the Orders/Regulations/Determinations/Directions issued by the Authority from time to time.

The Authority was also of the view that even when these lapses were pointed

out, some of the service providers were not prompt enough to take corrective action. Now except for generalizing, and as noted above, nothing has been pointed out in reply to the notice issued on the appeals as to what were those Orders/ Regulations/Determinations/Directions which prompted the Authority to issue the impugned directions. What prevented the Authority to take action if there was any violation of its orders etc., has not been made clear to us. We are unable to accept the submission of Mr. Meet Malhotra, learned counsel for the Authority that the directions in effect consolidates various provisions of the Act under which the Authority is empowered to take action. We have not been referred to any specific provision in the Act which authorizes the Authority to issue the impugned directions. Mr. Meet Malhotra then tried to justify the directions on the ground that at least no service provider could say that in one case the complaint has been filed and in the other no complaint has been filed. There is no basis for making such a submission. Ultimate action depends on the seriousness or otherwise of the breach. There cannot possibly be any uniform rule.

Under section 29 of the Act, an offence is committed when a person violates directions of the Authority. Section 12 (4) and section 13 are the only provisions in the Act under which the Authority can issue directions and violations of which would attract penalty u/s 29 of the Act. There is no requirement of law that before filing complaint u/s 29 Authority is to observe rules of natural justice though it may do so in its wisdom and give a show cause as to why action be not initiated u/s 29. In issuing the directions which are impugned before us Authority may be motivated with their desire to stimulate the service providers to comply with its orders and fulfill other requirements as contained therein. But then Authority is to act within the provisions of the Act. Authority is not the final Arbiter and its directions, decisions or orders are subject to appellate jurisdiction of the Appellate Tribunal. Each case of infraction of the Orders/ Regulations/Determinations/Directions has to be dealt with separately by the Authority and the order passed thereof would be subject to appeal as provided u/s 14(a)(2) of the Act.

You cannot lay down a rule that if answer to the show cause notice issued by the Authority is not satisfactory it must invariably call the Chief Executive Officer of the service provider to appear in person. How will the Authority know as to who is the Chief Executive Officer and then say that it could pass strictures if the Chief Executive Officer does not appear. There must be necessity to have the Chief Executive Officer to come and explain to the Authority if any action is proposed against the service providers. Chief Executive Officer has not been defined. Again, the Authority talks of strictures in case the explanation is

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

not found satisfactory as given by the Chief Executive Officer. Moreover, it appears that the Authority, while issuing directions, has not kept in view provisions of section 30 of the Act which provides for offences by companies. The impugned directions then record that in case of persistent action of non-compliance orders may be passed for prosecution u/s 29 of the Act or recommendations made to the licensor for taking action under the terms of the license conditions. Apart from the fact that the impugned directions are wholly unnecessary no power vests in the Authority to issue such directions. It can frame regulations u/s 36 of the Act. Section 13 limits the limits the directions on matters covered under sub clauses (i) to (ix) of clause (b) of Section 11 (1) of the Act. There is no sub-clause which would entitle the Authority under proviso to Section 13 to issue the impugned directions. There was no basis for the Authority to issue the impugned directions which are even otherwise rather unnecessary.

These Appeals are allowed and impugned directions are set aside.

Sd/
(D.P. Wadhwa)
Chairperson

Sd/-
(R.U.S. Prasad)
Member

Sd/-
(P.R. Dasgupta)
Member