TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

DATED 28TH APRIL, 2005

APPEAL No.5 OF 2005
(M.A.Nos. 80 & 83 of 2005)

Videsh Sanchar Nigam Limited & Anr. … Appellants
Vs.
Telecom Regulatory Authority of India …Respondent

BEFORE:

HON'BLE MR. JUSTICE D.P. WADHWA,
CHAIRPERSON
MR. VINOD VAISH, MEMBER
LT.GEN.D.P.SEHGAL(RETD.),MEMBER

For Appellants : Mr.C.S.Vaidyanathan, Senior Advocate with Mr. U. Hazarika Mr.Vijay Datar, Mr.S. Bhoumick, Ms.Kajal Sharma,Advocates

For Respondent-TRAI : Mr.P.V.Kapur,Senior Advocate with Mr.Meet Malhotra, Mr.Raghvinder Singh and Mr.Jeevesh Nagrath, Advocates

Catchwords:

Section 11(2) of TRAI Act – Tariff Order (34th Amendment) – IPLC-half Circuit) reduction of rates – Held, appeal maintainable to TDSAT – plea that tariff fixation is price fixation and in the nature of legislative action and, therefore, appeal barred is negatived.

Privilege – claim of privilege and confidentiality of document/information – judgment of TDSAT in BSNL Vs. TRAI (Appeal No.31 of 2003) and TRAI (Access to Information) Regulation 2005 considered – plea of right of non-

disclosure of documents and information negatived – principles of natural justice and transparency under Section 11(4) of the TRAI Act held breached – matter remanded to TRAI.

ORDER

The Videsh Sanchar Nigam Ltd. (VSNL), the Appellant, has challenged the notification dated 11th March, 2005 of the respondent Telecom Regulatory Authority of India (TRAI for short) reducing the rates of international private leased circuit (half circuit), (IPLC-half circuit)*[1]. This has been done by Telecommunication Tariff (34th Amendment) Order 2005 to the Telecommunication Tariff Order 1999. This 34th amendment order added a Schedule*[2] fixing tariff of international private leased circuits. The impugned

[1] An IPLC (international private leased circuit) is a point-to-point private line used by an organization to communicate between offices that are geographically dispersed throughout the world. International Private Leased Circuits (IPLC) are the basic building blocks for international communications, providing raw bandwidth for global communications networks. These point-to-point private line services are dedicated to the customer's exclusive use providing quality reliable digital transmission seamlessly integrating data, voice and imaging services. A wide variety of applications are supported by IPLC including internet access, LAN-to-LAN connectivity, telemedicine, video and teleconferencing.

An IPLC can be used for Internet access, business data exchange, video conferencing, and any other form of telecommunication. IPLCs enable customers with a global reach into over 200 countries to serve their international requirements supported by an extensive range of bandwidth options underlined by a predictable cost structure. ***[Source: Software Technology Parks of India]***

[2] **SCHEDULE**

International Private Leased Circuit (IPLC)-(Half Circuit)

ITEM	TARIFF
(1) Date of implementation	1.4.2005

notification has been issued in the exercise of powers conferred on TRAI under Section 11(2)*[3] and Section 11(1)(b)(ii)*[4] of the Telecom Regulatory Authority

(2) Coverage	(a) All tariffs specified as ceilings (b) The prescribed ceiling tariff will be applicable for all destinations, capacities and types of cable systems used for carrying either voice or data. (c) Service providers may offer discount on the ceiling tariff. Discounts, if offered, shall be transparent, non-discriminatory based on laid down criteria and should be reported to TRAI. (d) It is mandatory for International Private Leased Circuit Service Providers to offer Half Circuits for all routes/destinations for which circuits are offered by them.
(3) Tariff for IPLC	Capacity/Speed Ceiling Tariff per annum (Rupees in Lakhs) E1 13 DS-3 104 STM-1 299
(4) Tariff for capacity/ speed below E1	Forbearance
(5) Tariff for IPLC through satellite media	Forbearance
(6) All other matter relevant to IPLC	Forbearance

[3] and

[4] Section 11. Functions of Authority. – [(1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to-

(a) …….
(b) discharge the following functions, namely:-

(i) ensure compliance of terms and conditions of licence;
(ii) 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;
(iii) ensure technical compatibility and effective inter-connection between different service providers;
(iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;
(v) 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;
(vi) lay-down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;
(vii) maintain register of interconnect agreements and of all such other matters as may be provided in the regulations;
(viii) 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;
(ix) ensure effective compliance of universal service obligations;

(2) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the Authority may, from time to time, by order, notify in the Official Gazette the rates at which the telecommunication services within India and outside India shall be provided under this Act including the rates at which messages shall be transmitted to any country outside India:

Provided that the Authority may notify different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid the Authority shall record the reasons therefore.
(3) While discharging its functions under sub-section (1) or sub-section (2) the Authority shall not act against the interest of the sovereignty an integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.
(4) The Authority shall ensure transparency while exercising its powers and discharging its functions.

of India Act (for short TRAI Act or the Act). Earlier to this Tariff 34th Amendment, no tariff was fixed for IPLC.

At the outset an objection has been raised by the Respondent-TRAI that the power to fix tariff is in the nature of price fixation and also is in the nature of subordinate legislation and beyond the purview of TDSAT and that there are no limits to the exercise of powers of TRAI under Section 11(2) of the Act and in fact the powers are unrestricted. In support of its contention the TRAI has cited a few decisions of the Supreme Court wherein Orders issued under the different Control Orders under Essential Commodities Act, 1955, were upheld and it has been laid that the Order fixing price is in the domain of legislative action.

Appellant disputes this proposition and says appeal is maintainable under Section 11(2) of the Act and further that the TRAI has violated the principles of natural justice and acted in breach of mandatory requirement of transparency while exercising its power and discharging its functions and on that very ground the impugned tariff order is bad in law. TRAI did not disclose various documents and information on which it acted. In its rejoinder appellant has specified the documents of which it seeks disclosure and these are:

> "a) Report by M/s. Ernst & Young or any other consultant engaged by the TRAI.
>
> b) Copy of articles /reports/information derived from Telegeograpny and copy of articles/reports/information derived from Primetrica and Gartner.
>
> c) The costing methodology and calculation for arriving at a cost of Rs.7.4 to 9 lakhs for E-1 circuit.

d) The manner in which the costing multiple of 1:8:23 has been worked out.

e) Any other report of consultant and/or information used in the determination of prices and not disclosed in the explanatory memorandum".

It is the contention of Mr.Kapur, learned senior advocate for TRAI, that reports of the consultant Ernst and Young and others were used merely to determine if there was any need to fixation of tariff for IPLC and those documents, therefore, could not be disclosed. Explanatory memorandum to the impugned tariff order does, however, show use of these reports. As to whether these reports have been used for limited purpose as contended by TRAI, appellant will have certainly a right to know. It was the submission of TRAI that fixation of tariff could only be challenged on the ground of unreasonableness or arbitrariness and not on demonstrative grounds. It is difficult to appreciate this argument. How could there be a challenge to the order unless all the records on the basis of which action was initiated and the impugned tariff order was based were made known to the appellant. Mr.Kapur submitted that TRAI has no objection to show all these documents to TDSAT but TRAI had certainly reservations to furnishing these to the appellant. We do not want to enter into the exercise of examining the records ourselves without the appellant having access to the same. If any such document influences us it will certainly be prejudicial and unfair to the appellant.

On the question how far TRAI can withhold information on the basis of confidentiality of document we had occasion to consider this question in the case

of Bharat Sanchar Nigam Ltd. vs. TRAI, in Appeal No.31 of 2003 decided on 13.12.2004. TDSAT observed:

> "Now the question arises how this Tribunal will look into the matter of the claim of non-disclosure of material. The Tribunal will look into the question of claim of confidentiality only if the party submitting information or material to TRAI made a request that such information be not disclosed to other service providers. It is not enough that a mere request is made; it should be supported with substantial reasons for withholding materials for inspection by the other party. It should be explained how the disclosure of information would result in substantial competitive harm to the information provider. Each case will have to be examined on the facts of that case. We have to balance the interest in disclosure and the interest in preserving the confidentiality of competitive sensitive material. What we find in the present case is that there is no request from any of the service providers from whom data has been collected for its non-disclosure and as a matter of fact during the course of arguments before us also, learned counsel for service providers stated that they had no objections to the data being shown to the BSNL, the appellant".

TRAI has also framed regulations called the Telecom Regulatory Authority of India (Access to Information) Regulation, 2005. In this, 'information' has been defined to mean "information obtained or received by Authority from a service provider under the Act. Such information may include records, documents etc., whether in printed, electronic or any other form". TRAI (Authority) may decline or refuse to disclose any other information as contained in Regulation 6 and 7 which we reproduce:

"Telecom Regulatory Authority of India
A-2/14, Safdurjang Enclave,
New Delhi-110029

Notification

No. 14-1/2005-FA March 4, 2005

1…….
2……..
3……..
4……...
5……

6. Exemption from disclosure of Information

Information covered by any of the following categories shall be exempt from disclosure under the provisions of the Regulation:

(i) trade and commercial secrets and information protected by law;
(ii) Commercially and financially sensitive information, the disclosure of which is likely to cause unfair gain or unfair loss to the service provider; or to compromise his competitive position.

7. Grounds for refusal of access to information

Without prejudice to the provisions of regulation 6, the Authority may refuse access to information where:

(i) the request is too general in nature; or
(ii) the information required is so voluminous that its retrieval would involve disproportionate diversion of the resources of the Authority; or
(iii) the information has already been published, or is likely to be published soon, or is regularly published from time to time."

It may be seen that documents/information sought by petitioner neither fall in exempted category (Regulation 6) nor in the grounds for refusal (Regulation 7).

TRAI, therefore, cannot raise any plea of confidentiality as it did not receive any request from any service provider about non-disclosure of documents/information supplied or furnished by that service provider. In fact no other service provider has supplied any data on which TRAI has acted nor is the appellant requesting any such material. TRAI has acted only on the data supplied by the appellant itself. Disclosure of documents like, report of consultant appointed by TRAI and such other documents cannot be refused on the plea of

confidentiality. Appellant has certainly right to know what modalities went into in arriving at a particular figure. On supply of information and documents, appellant may point out any error in the reasoning in reaching a particular conclusion or even mistake in calculation. As a matter of fact when the law prescribes that TRAI shall ensure transparency while exercising its powers and discharging its functions, disclosure should be the rule and confidentiality an exception founded on sound grounds. It is difficult to appreciate the argument of TRAI that while fixing the tariff principles of natural justice have no application and that statutory requirements of transparency do not confer upon appellant any right of being satisfied about the adequacy of material based on which TRAI made the impugned order.

Under Section 14-B, TDSAT is to hear and dispose of appeal against any order, direction or decision of the Authority under this Act. It is not disputed that the impugned tariff order is appealable.

The question before us is, can there be any limitation on the power of the Appellate Authority while hearing and disposing of the appeal when the appellant challenges the impugned order and the challenge is on the ground that the order has been passed without giving proper opportunity to the appellant, in breach of the principles of natural justice and in breach of the mandatory requirement for the TRAI to ensure transparency while exercising its powers and discharging its functions.

It is interesting to note the Explanation to Section 23 of the Act which was added by the amending Act 2 of 2000. This Section 23 is in the Chapter dealing with finance, accounts and audit pertaining to the TRAI. The accounts of the TRAI are subject to audit by the Comptroller and Auditor General of India. There is, however, an explanation as to what decisions of the TRAI are not subject to audit and it is what is provided in the Explanation which is as under:

> "For the removal of doubts it is hereby declared that the decisions of the Authority taken in discharge of its functions under clause (b) of sub-section (1) and sub-section (2) of Section 11 and Section 13, being matters appealable to the Appellate Tribunal, shall not be subject to audit under this section".

Utilizing the public funds TRAI has engaged the services of Ernst and Young, an international consultant and gathered other material for the purpose of

examining the whole gamut of IPLC pricing as mentioned in its explanatory note to the impugned tariff order. Respondent has given international comparison of IPLC prices (Asian region) and the source of this international data is Ernst and Young.

There are various grounds of challenge to the impugned order but we are confining ourselves to the objections raised by TRAI as to the maintainability of the appeal itself and in that process we also examined if the principles of natural justice and mandatory requirement of transparency have been violated. If we hold in favour of the appellant, it will not be necessary for us to examine other grounds as in that eventuality, in our view, the matter has to go back to TRAI for fresh application of mind, after due observations of the natural justice and following the mandatory law regarding transparency:

We may refer to some of the decisions cited at the Bar which would also throw light on the jurisdiction of the TDSAT as held by the Supreme Court.

In Shri Sitaram Sugar Company Ltd. & Anr. Vs. Union of India & Ors. – (1990)3 SCC 222, the Constitution Bench was considering the plea of the petitioners alleging that fixation of price of sugar by clubbing petitioners' factories with dissimilar factories in the same zone for the purpose of price fixation was discriminatory, arbitrary and unreasonable. It is not necessary for us to go into various averments noted in the judgment except to note that the

Central Government had issued the order under Section 3(3-C) of the Essential Commodities Act, 1955. This sub-section reads as under:

> "(3-C). Where any producer is required by an order made with reference to clause (f) of sub-section (2) to sell any kind of sugar (whether to the Central Government or a State Government or to an officer or agent of such Government or to any other person or class of persons) and either no notification in respect of such sugar has been issued under sub-section (3-A) or any such notification, having been issued, has ceased to remain in force by efflux of time, then, notwithstanding, anything contained in sub-section (3), there shall be paid to that producer an amount therefore which shall be calculated with reference to such price of sugar as the Central Government may, by order, determine, having regard to—
>
> (a) the minimum price, if any, fixed for sugarcane by the Central Government under this section;
> (b) the manufacturing cost of sugar;
> (c) the duty or tax, if any, paid or payable thereon; and
> (d) the securing of a reasonable return on the capital employed in the business of manufacturing sugar,
>
> and different prices may be determined from time to time for different areas or for different factories or for different kinds of sugar.
>
> Explanation--For the purposes of this sub-section, "producer" means a person carrying on the business of manufacturing sugar."

We record observation of the Court as under:

> Para 45. Price fixation is in the nature of a legislative action even when it is based on objective criteria grounded on relevant material. No rule of natural justice is applicable to any such order. It is nevertheless imperative that the action of the authority should be inspired by reason. Saraswati Industrial Syndicate Ltd., - [(1974)2 SCC 630, 633: (1975) 1 SCR 956, 959] [at SCR pp.961,962; SCC p.636, para 13]. The Government cannot fix any arbitrary price. It cannot fix prices on extraneous considerations: Renusagar [(1908) 1 KB 441: 77 LJ KB 236]
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> Para 46. Any arbitrary action, whether in the nature of a legislative or administrative or quasi-judicial exercise of power, is liable to attract the prohibition of Article 14 of the Constitution. As stated in E.P. Royappa v. State of Tamil Nadu [(1974) 4 SCC: 1974 SCC (L&S) 165:(1974) SCR

348], "equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch." Unguided and unrestricted power is affected by the vice of discrimination: Maneka Gandhi v. Union of India & Anr., [(1978) 1 SCC 248, 293-294: AIR 1978 SC 597]. The principle of equality enshrined in Article 14 must guide every state action, whether it be legislative, executive, or quasi-judicial: Ramana Dayaram 'Shetty v. The International Airport Authority of India, [(1979) 3 SCC 489, 511-12: (1979) 3 SCR 1014, 1042]; Ajay Hasia & Ors. v. Khalid Mujib Sehravardi .[(1981)1 SCC 722: 1981 SCC (L&S) 258] and D.S. Nakara v. Union of India, [(1983) 1 SCC 305: 1983 SCC (L&S) 145].

Para 47. Power delegated by statute is limited by its terms and subordinate to its objects. The delegate must act in good faith, reasonably, intra vires the power granted, and on relevant consideration of material facts. All his decisions, whether characterised as legislative or administrative or quasi-judicial, must be in harmony with the Constitution and other laws of the land. They must be "reasonably related to the purposes of the enabling legislation". See Leila Mourning v. Family Publications Service [411 US 356: 36 L Ed. 2d 318]. If they are manifestly unjust or oppressive or outrageous or directed to an unauthorised end or do not tend in some degree to the accomplishment of the objects of delegation, courts might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires". per Lord Russel of Killowen, C.J. in Kruse v. Johnson, [(1988) 2 Q.B. 91, 99: 78 LT 647]

Para 52. The true position, therefore, is that any act of the repository of power, whether legislative or administrative or quasi-judicial, is open to challenge if it is in conflict with the Constitution or the governing Act or the general principles of the law of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it.[see the observation of Lord Russel in Kruse v. Johnson, (1898) 2 AB 91 and that of Lord Greene, M.R. in Associated Provincial Picture Houses Ltd. V. Wednesbury Corporation, (1948) 1 KB 223. See also Chertsey UDC v. Mixnam Properties Ltd., (1965) AC 735; Commissioners of Customs and Excise v. Cure and Deeley Ltd., (1962) 1 QB 340; …]

In Rayalaseema Paper Mills Ltd. & Anr Vs. Govt.of A.P. & Ors. – (2003) 1 SCC 341, there was challenge to Government Order of the Andhra Pradesh Government fixing the increase in rates of royalty for bamboo. The Court said:

> 15. This Court was examining the scope of judicial scrutiny in the matters of price fixation where it was governed by statutory provisions. The scope of judicial scrutiny would be far less where the price fixation is not governed by the statute or a statutory order. Where the legislature has prescribed the factors which should be taken into consideration and which should guide the determination of price, the courts would examine whether the considerations for fixing the price mentioned in the statute or the statutory order have been kept in mind while fixing the price and whether these factors have guided the determination. The courts would not go beyond that point. In the present appeals, there is no law, or any statutory provision laying down the criteria or the principles which must be followed, or which must guide the determination of rates of royalty. No doubt, any arbitrary action taken by the State would be subject to the scrutiny by the courts because arbitrariness is the very antithesis of rule of law. But this does not mean that this Court would act as an appellate authority over the determination of rates of royalty by the government. Government is the owner of the products. While it had agreed to supply a particular quantity every year for specified period, it had never agreed to supply at a particular rate; not did it stipulate with the mill owners the basis upon which it would determine the rates of royalty. It is open to the government to fix such price as it thinks appropriate having regard to public interest, which interalia, may include interest of revenue, environmental, ecology, the need of mills and the requirements of other consumers. The price is not to be fixed keeping in mind the requirements of the mills alone".

The Court, thereafter, did go into the merit of the controversy. It did not find any infirmity in the impugned judgment of the Andhra Pradesh High Court against which appeal was filed in the Supreme Court. It is not necessary to multiply judgments. Most of the cases cited deal with price fixation under Section 3(3-C) of the Essential Commodities Act, 1955. In these judgments it has been held that price fixation is a legislative function. However, there is no right of

appeal against any Order provided in that Act after the price is fixed. The only remedy for the aggrieved party is either to approach the High Court for judicial review under Article 226/227 of the Constitution or approach the Supreme Court under Article 32 alleging breach of fundamental right. It has been held, however, that any arbitrary action, whether in the nature of legislative or administrative or quasi judicial exercise of power, is liable to attract the prohibition under Article 14 of the Constitution. When we look at the case under the Control Orders made under the Essential Commodities Act we find that certain principles have been laid down on which price can be fixed. The Essential Commodities Act was enacted to provide, in the interest of general public, for control of production, supply and distribution of, and trade and commerce in, certain commodities. The Act was enacted in 1955 and there has been thereafter numerous amendments and all these amendments gave the objects and reasons to the effect that Essential Commodities Act provides that, for maintaining or increasing supplies of essential commodities or for securing their equitable distribution and availability at fair price, the Central Government may issue orders for regulating or prohibiting the production, supply and distribution of such essential commodities and trade and commerce therein. In order to achieve these objectives Central Government has been vested with plenary powers under that Act to issue orders for regulating production, storage, transport and distribution of such essential commodities for controlling the price, etc. Essential commodities have also been defined in that Act. It may, therefore perhaps, not be useful to incorporate principles set out in

the judgments under the Control Orders under the Essential Commodities Act and particularly when there is no right of appeal provided against any such Order. TRAI Act does not deal with any essential commodity and it is difficult to imagine that tariff fixation can be done under the Act without following the principles of natural justice and functioning in transparent manner. Section 11(2) of the Act does not itself lay down any factors, principles or guidelines for fixing tariff. The only guiding principle would appear to be the preamble to the Act where the interest of service provider is also required to be protected. Can it still be argued that no right of appeal lies against the order of TRAI fixing tariff? Would not in that case Section 11(2) be struck down by the courts as conferring arbitrary powers? Only safeguard is the observance of principles of natural justice and acting in transparent manner with right of appeal. Moreover, if that was so as is contended by TRAI, there was also no need for explanation to Section 23 of the Act aforementioned. How could a legislative function be subject to any audit? It shows that the stand of TRAI is not correct.

The Section 11(2) does not lay down any guidelines on the basis of which tariff has to be fixed by TRAI. Tariff is fixed by an order of TRAI which is thereafter notified. Under sub-clause (4) of Section 11 of the Act TRAI is required to ensure transparency while exercising its powers and discharging its function. Under clause (b) of Section 14*[5] TDSAT is empowered to hear and

[5] 14. The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to -

dispose of appeal against any direction and decision and order of the TRAI under the Act. There is no limit imposed by the Act on the exercise of power of the TDSAT as an appellate body hearing appeal from the order of TRAI made under Section 11(2) of the Act. Appeal against the order of TDSAT lies to Supreme Court only on a substantial question of law. It is the TDSAT which is the final fact finding body. In the decision of the Cellular Operators Association of India & Ors. vs. Union of India & Ors. – (2003) 3 SCC 186 Supreme Court defined the powers of the TDSAT. Sinha J in his concurring judgment said as under:

> "TDSAT was required to exercise its jurisdiction in terms of Section 14-A of the Act. TDSAT itself is an expert body and its jurisdiction is wide having regard to sub-section (7) of Section 14-A thereof. Its jurisdiction extends to examining the legality, propriety or correctness of a direction/order or decision of the authority in terms of sub-section (2) of Section 14 as also the dispute made in an application under sub-section (1) thereof. The approach of the learned TDSAT, being on the premise that its jurisdiction is limited or akin to the power of judicial review is, therefore, wholly unsustainable. The extent of jurisdiction of a court or a tribunal depends upon the relevant statute. TDSAT is a creature of a statute. Its jurisdiction is also conferred by a statute. The purpose of creation of TDSAT has expressly been stated by Parliament in the amending Act of 2000. TDSAT, thus, failed to take into consideration the amplitude of its jurisdiction and thus misdirected itself in law." (Para 27)
>
> Pattanaik, CJ speaking for himself and Sema J. said:
>
> "At the outset, it may be stated that the Tribunal committed an error by holding that it exercises supervisory jurisdiction. As has been stated earlier, the jurisdiction of the Tribunal under Section 14 cannot be held to be a supervisory jurisdiction, in view of the language of the statute as well as the fact that it is the only forum for redressing the grievance of an aggrieved party inasmuch as the appellate jurisdiction to this Court is only on a substantial question of law and the jurisdiction of a civil court for

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(a) ……
(b) hear and dispose of appeal against any direction, decision or order of the Authority under this Act.

> filing a suit is also ousted. It has already been held by us that the Tribunal has the power to adjudicate any dispute but while answering the dispute, due weight has to be given to the recommendation of TRAI, which consists of experts. The Tribunal also committed yet another error in holding that the jurisdiction of the Appellate Tribunal cannot be wider than that of the Supreme Court. A bare comparison of the provisions of Section 14, which confers jurisdiction on the Tribunal and Section 18, which confers jurisdiction on the Supreme Court, would unequivocally indicate that the Tribunal has much wider jurisdiction than the jurisdiction of this Court under Section 18, as this Court would be entitled to interfere only on the substantial question of law, which arises from the judgment of the Tribunal and not otherwise." (Para 11)

Supreme Court in West Bengal Electricity Regulatory Commission vs. CESC Ltd. – (2002) 8 SCC 715 was considering somewhat the same issue under the provisions of Electricity Regulatory Commission Act, 1998. Under that Act appeal lies to the High Court against an order of the State Electricity Regulatory Commission. The Court referred to the decision in Sitaram Sugar Co. Ltd. (supra.) case and observed as under:

> "39. Having considered the finding of the High Court, we are of the opinion that though generally it is true that the price fixation is in the nature of a legislative action and no rule of natural justice is applicable [see Shri Sitaram Sugar Co. Ltd. v. Union of India – (1990)3 SCC 223, the said principle cannot be applied where the statute itself has provided a right of representation to the party concerned. Therefore, it will be our endeavour to find out whether, as contended by learned counsel for the appellants, the statute has provided such a right to the consumers or not.

In the case of West Bengal Electricity Regulatory Commission, High Court as an appellate body under Section 27 of the Electricity Regulatory Commission Act, 1998 redetermined the tariff fixed by the West Bengal Electricity Commission and in fact enhanced the same on appeal filed by the aggrieved

Company. A question was raised before the Supreme Court as to the extent of appellate power of the High Court under Section 27 of that Act. The Court observed:

> "Para 68. A perusal of the said section shows that appeal to the High Court under the said section is on facts also because it is unlimited. Thus there is no doubt that the power of the High Court as an appellate court is coextensive with that of the trial court. But then the next question would be: is such power wholly unlimited or in any manner controlled by any principle in law? Learned counsel for the appellants urged that in view of the fact that the appeal to the High Court under Section 27 of the 1998 Act arises from a special forum consisting of expert members, the appellate court, normally, should be hesitant to interfere with the findings of fact because the Judges of the appellate court may have knowledge of the special factors required for determining the tariff but may not necessarily have the experience which members of the Commission have. Learned counsel for the respondent Company submitted that it is clear from the wording of the statute that the appeal to the High Court is not limited by any restriction and the power of the High Court being coextensive with that of the Commission, the High Court is at liberty to reassess the evidence considered by the Commission, as also take additional evidence and either remand the matter to the Commission or on consideration of such evidence including the additional evidence proceed to determine the tariff itself as has been done by the High Court in the instant case. Learned counsel for the appellants relied on the judgment in Yorkshire Copper Works Limited's Application for a Trade Mark, 71 RPC 150: (1954) 1 ALL ER 570; (1954 1 WLR 554 (HL), "Bali" Trade Mark – Berlei (UK) Ltd. v. Bali Brassiere Co.Inc., 1969 RPC 472: (1969 2 All ER 812: (1969) 1 WLR 1306 (HL), Registrar of Trade Marks v. Ashok Chandra Rakhit Ltd.: AIR 1955 SC 558: (1955) 2 SCR 252 and Reliance Silicon (I) (P) Ltd. v. CCE: (1997) 1 SCC 215. Learned counsel for the respondent Company in support of its contention relied on State of Kerala v. A.C.K. Rajah: 1994 Supp(3) SCC 250:1994 Supp(2) SCR 679, Murli Manohar & Co. v. State of Harayana (1991) 1 SCC 377 , Ebrahim Aboobakar v. Custodian General of Evacuee Property:AIR 1952 SC 319:1952 SCR 696 and Nafar Chandra Jute Mills Ltd. v. United bank of India (2000) 9 SCC 545.

Thereafter, examining the various judgments cited before it, the Court held:

> "Para 69: We have perused the above judgments as also the arguments of learned counsel, and we have no hesitation in holding that the appellate

> power of the High Court statutorily is not hedged in by any restriction, but in our opinion, the High Court merely because it has unrestricted appellate power, should not interfere with the considered order of the Commission unless it is an expert body".

Here lies a difference between the High Court and the TDSAT, an expert appellate body. As we will see hereinafter the Supreme Court commended on the constitution of the TDSAT and in fact, suggested constitution of a similar appellate body under the Electricity Regulatory Commission Act, 1998 to hear appeals against the order of the State Electricity Commissions.

Supreme Court thus did not doubt the power of the appellate body to interfere in tariff fixation and said as under;

> "Having discussed the various statutory provisions of the enactments involved in the procedure of tariff fixation and the duties and obligations of the Commission and the High Court under the 1998 Act, we will now take up for consideration certain factual issues which have arisen in these appeals".

Supreme Court in appeal under Article 136 of the Constitution itself went into various parameters fixing the tariff like budge-budge cost, transmission and distribution losses, employees cost, working capital, auditors report etc. fixing the tariff.

As noted above, against any order or decision, appeal against the order of TRAI lies to TDSAT. No limitation can be imposed on the power of the TDSAT while hearing the appeal. An appellate body can confirm the order appealed against, modify it, reverse it or even remand the matter to the lower authority.

TDSAT can certainly go into the question if there was any need for the TRAI to examine any issue, the procedure adopted by it and the correctness of its order. TDSAT in itself, can modify the tariff fixed by TRAI. It would be difficult to hold in that case that TDSAT is also exercising legislative function and the order passed by the TDSAT will be immune from the appellate jurisdiction of the Supreme Court under Section 18 section of the Act.

Supreme Court in the case of West Bengal Electricity Regulatory Commission also made observations for an effective appellate forum and in fact commended the constitution of TDSAT as appellate body as under (para 102):

> "We notice that the Commission constituted under Section 17 of the 1998, is an expert body and the determination of tariff which has to be made by the Commission involves a very highly technical procedure, requiring working knowledge of law, engineering, finance, commerce, economics and management. A perusal of the report of ASCI as well as that of the Commission abundantly proves this fact. Therefore, we think it would be more appropriate and effective if a statutory appeal is provided to a similar expert body, so that the various questions which are factual and technical that arise in such an appeal, get appropriate consideration in the first appellate stage also. From Section 4 of the 1998 Act, we, notice that the Central Electricity Regulatory Commission which has a judicial member as also a number of other members having varied qualifications, is better equipped to appreciate the technical and factual questions involved in the appeals arising from the orders of the Commission. Without meaning any disrespect to the Judges of the High Court, we think neither the High Court nor the Supreme Court would in reality be appropriate appellate forums in dealing with this type of factual and technical matters. Therefore, we recommend that the appellate power against an order of the State Commission under the 1998 Act should be conferred either on Central Electricity Regulatory Commission or on a similar body. We notice that under the Telecom Regulatory Authority of India Act, 1997 in Chapter IV, a similar provision is made for an appeal to a Special Appellate Tribunal and thereafter a further appeal to the Supreme Court on questions of law only. We think a similar appellate provision may be considered to make the relief of appeal more effective".

It has been held and is not disputed as well that TDSAT is itself an expert body and can certainly go into all the questions relating to fixation of tariff.

We must, therefore, overrule the objection of TRAI that this appeal is not maintainable inasmuch as tariff fixation under Section 11(2) of the Act is a legislative function. Such a submission is patently against the provisions of the Act, under which an order of the TRAI including an order under Section 11(2) is appealable to TDSAT. That being the position, it is difficult to appreciate the argument that TRAI is not required to comply with the principles of natural justice and therefore, not required to disclose the material relied upon or methodology and the data used for working out the costs of E1, DS-3, STM-1 circuits nor give reasons in support of such functions in exercise of its power of price fixation.

We, therefore, direct that all the documents and information as asked for by the VSNL, the appellant, be supplied it by TRAI. In this view of the matter we are of the opinion that in the absence of non-disclosure of information to the appellant principles of natural justice have been violated and so also TRAI has breached the mandatory requirement of transparency in its functioning as required under Section 11(4) of the TRAI Act.

We could ourselves have heard the matter finally after the documents and information are supplied to the appellant but then the appellant would be deprived of its right to be heard by TRAI and their further statutory right of appeal. We are, therefore, of the opinion that the matter should be heard by the TRAI. We

accordingly set aside the impugned order and remand the matter to TRAI to have fresh look after giving full opportunity to the appellant keeping in view the observations made by us in this order.

In the circumstances, there will be no order as to costs.

..……..J
(D.P. Wadhwa)
Chairperson

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(Vinod Vaish)
Member

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(D.P.Sehgal)
Member