TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 25th February, 2010

Appeal No.3 of 2006

Cellular Operators Association of India & Ors. … Appellants

Versus

Telecom Regulatory Authority of India & Ors … Respondents

BEFORE:

HON'BLE MR. JUSTICE S.B.SINHA, CHAIRPERSON
HON'BLE MR. G.D. GAIHA, MEMBER

For Appellant	:	Mr. C.S. Vaidyanathan, Senior Advocate With Mr.Navin Chawla,Advocate Mr. Sharath Sampath, Advocate
For Respondent No. 1	:	Mr. Vikas Singh, Senior Advocate with Mr. Saket Singh, Advocate
For Respondent No. 2	:	Mr. Maninder Singh, Sr Advocate with Mrs. Prathiba M. Singh, Mr.Yoginder Handoo,

Mr.Tejveer Singh Bhatia, Advocates

For Respondent No. 3 : Mr. Arun Kathpalia, Advocate
Mr. Virender Singh Thakur, Advocate

JUDGMENT

-

S.B. Sinha

Legality and / or validity of a direction issued on 29.11.2005 by Telecom Regulatory Authority of India (TRAI) purported to be in terms of section 36 of the Telecom Regulatory Authority of India Act 1997 (hereinafter called and referred to for the sake of brevity as ‘the said Act’) as also a Show Cause Notices dated 06.03.2006 / 08.03.2006 asking the respondents nos. 2 to 8 to show cause as to why prosecution against them in terms of Section 29,30 and 34 thereof shall not be launched, is the question involved in this appeal.

The first appellant is an Association of Cellular Operators. Respondent Nos. 2 to 8 are the companies incorporated and registered under Indian Companies Act, 1956 having their respective offices mentioned in the cause title of the Appeal. They carry on their business in ‘telecom services’ having been granted licences therefor in terms of the provisions of the Indian Telegraph Act, 1885 (1885 Act) by the Union of India. TRAI in exercise of its powers conferred upon it under section 11 of the Act issued general orders known as Quality of Service (QOS) of Basic and Cellular Mobile Telephone Services, 2005 (11 of 2005) including benchmark for POI congestion at $<0.5\%$ i.e. not more than 1 out of every 200 calls transmitted through a POI

must fail on ground of congestion on or about 01.07.2005. In terms of the said order, TRAI was authorized to review or modify the same.

As the respondent no. 2 to 8 allegedly did not comply with the said QOS parameters, a direction was issued by the TRAI on or about 29.11.2005 to the effect that the same should be strictly met by 31.12.2005.

It is contended by the appellants that although such a direction was also issued to the BSNL, but whilst the POI congestion reports show excessive congestion with it, the same POI was not shown as congested in its own report. According to the appellants, the POI between the private operators and BSNL being a single pipe carrying both way traffic, it would be impossible that the same pipe can be shown as 60% congested for the private operator and nil (<0.5%) congestion for BSNL.

On or about 06.12.2005, the first appellant made a representation against the said direction highlighting the constraints faced by the Cellular Mobile Service Providers in providing the desired quality of service stating that in the absence of the compliance of pre-requisites by all the players the same cannot be complied with. It was requested that said direction be withdrawn till the said issue is adequately addressed.

TRAI rejected the said representation by an order dated 19.12.2005 asking the Cellular Mobile Service Providers to ensure speedy and effective interconnection in terms of the said Regulations.

It is accepted that BSNL and MTNL preferred Appeals before this Tribunal against TRAI being Appeal No. 11 of 2002 and 12 of 2002 questioning the validity of the letter dated 09.10.2002 conveying its approval for issuance of Reference Interconnect Offer (RIO) by them. The said appeals were filed interalia contending that after the amendment in the Act in 2000, TRAI had no authority to fix the terms and conditions of the interconnection under section 11 (1) (b) (ii) of the Act both for old

and new licences irrespective of stipulations contained therein. This Tribunal restricted the powers of TRAI in the matter relating to interconnect agreements. It furthermore appears that the BSNL had filed an appeal being Appeal No. 31 of 2003 before this Tribunal and by an order dated 03.05.2005, it was held that TRAI had no power to mandate direct connectivity. Yet again in Appeal No. 9 of 2005, this Tribunal by an order dated 19.07.2006 directed BSNL to provide interconnection within 90 days from the date of receiving payment from the interconnection seeker and in case, it was not in a position to provide for therewith, it should inform TRAI about the reasons therefor. This Tribunal also set aside the order of TRAI dated 21.04.2004 on disconnection of POIs in Appeal No. 2 of 2004.

The authority of TRAI, thus, in three of the four aforementioned cases were limited by this Tribunal. According to the appellant, however, despite the same, TRAI went on to blame the service providers for not taking steps in reducing the time period in the matter of obtaining interconnection agreement through mutual discussions or legal measures.

The appellants contend that the stand taken by TRAI is wrong in as much as:

1. The appellants had been writing to TRAI as also the Department of Telecommunications (DOT) complaining of such delays and seeking such directions issued in this behalf.

2. The interconnect agreement entered into by and between the service providers and the BSNL provides for a period of 12 months for interconnection and thus they could not have taken any legal action in relation thereto.

3. Negotiations by and between the service providers themselves would not have been an answer to the problem as was also accepted by TRAI in its study paper dated 02.11.2005.

4. The appellant association as a party in the legal proceedings initiated before this Tribunal in the matters of 'RIO' and 'Direct Connectivity', support the stand of the Authority and in view of the fact that the power of TRAI was limited, the operators could not have achieved any effective interconnection.

5. The appellants could not have taken any legal measure to reduce the period of interconnection as the period during which such interconnection could have been provided was twelve months and although at the relevant point of time when the Show Cause Notice was issued, the reduced period of 90 days as directed by TRAI was the subject matter of an order passed by the Tribunal at the instance of BSNL but the same was directed to be stayed.

6. The contention of TRAI was that cases of congestion where there was a pending demand for E1 as also where there was no pending E1 demand as well as the stand of the TRAI that service providers had not taken any step as per the interconnection agreement for timely augmentation thereof, for the reasons noted hereinbefore, were incorrect.

7. The statement of TRAI that congestion at POI was not the only reason for not complying with the QOS parameters are not relevant having regard to the fact the impugned Show Cause Notice had been issued only for POI congestion.

By a letter dated 29.12.2005 the first appellant asked for further time to respond to the direction of TRAI. A prayer for review of the above decision was also made.

TRAI is said to have made a report for the period Oct and Nov 2005 on or about 17.01.2006 wherein it was noted that 80 POIs have congestion more than 40%, out of which 78 POIs (97.5%) were with BSNL. It was stated that POI congestion was on account of inadequate junctions between two networks. It was furthermore, noted that increased level of congestion was due to

delay in augmentation of inter network junctions. It is stated that the said congestion report of BSNL did not provide for details of congestion so far as private operators are concerned.

The first appellant submitted a detailed representation to TRAI on or about 10.02.2006 in respect of the aforementioned communication dated 19.12.2005 pointing out the initiatives which were said to have been taken by it for decreasing the congestion levels.

The impugned show cause notices were issued on 06.03.2006/08.03.2006 in relation to the POI congestion only, alleging that the appellant had failed to inform TRAI as regard concrete steps taken for the purpose of negotiating the time period and / or legal measures taken by petitioners. A representation against the said show cause notices was filed by the first appellant before TRAI on or about 14.03.2006 inter alia expressing concerns that it had made attempts to shift the blame on the cellular service providers and, thus, accusing the wrong party and blaming the victim for its desperate condition. It was submitted that POIs are two way exchange of traffic and if congestion is reported in one direction, the same degree of congestion would be bound to be present in the other direction and thus it would not be correct to blame only one party.

The said representation of the first appellant was rejected by TRAI by its order dated 16.03.2006 opining that it had no locus standi therefor and reiterating that operators should have taken steps for negotiations and / or taken legal measures in relation thereto.

The first appellant made another representation on or about 17.03.2006 stating that the functions of laying down QOS norms cannot be discharged in isolation and the authority has also to ensure the back up infrastructure support system. It was

furthermore urged that law does not impose an impossibility to be performed and for the purpose of approaching this Tribunal, the operators would have a right that either flows from the contract or from the statute.

Despite the fact that the matter was pending, a press release was issued by the then Chairman of TRAI on or about 18.03.2006 which, according to the appellants, would show that TRAI had already decided to take action against them.

It on the aforementioned grounds filed this Appeal inter alia praying for the following reliefs:

"(a) This Hon'ble Tribunal may be pleased to set aside and quash directive No. F.No. 303-1/2005-QOS dated 29.11.2005 as also the show cause notices dated 06.03.2006/08.03.2006 issued by the Respondent.

(b) This Hon'ble Tribunal may be pleased to restrain the respondent from taking any coercive action against the appellants on the basis of directive no. F.No.303-1/2005-QOS dated 29.11.2005 as also the show cause notices dated 06.03.2006/08.03.2006."

We may, however, notice that the appellants in sub-para (iv) of para 4 of the appeal stated as under:

"iv) That the appellants welcomed the above regulation and made all efforts to achieve the same as it was in their interest as well to achieve the above parameters as it would lead to customer satisfaction and in turn larger business for the appellants. However, for achieving the above parameters, the appellants needed inter alia adequate, timely and effective interconnection to keep pace with the aggressive growth that was being witnessed in their networks. Availability of points of interconnection is determined by the interconnection agreements executed between the parties. The bulk of the interconnection facilities are required from the incumbent operators BSNL/MTNL. As per the interconnection

agreements entered into with them, a time period of 12 months has been specified for provision of new Points of Interconnection (POIs).”

Presumably, on the basis of said statement this Tribunal by an order dated 21.11.2006 directed as under:

“During the course of hearing it has been felt that the BSNL and the MTNL would be proper parties in this petition. Let notice be issued to both of them through their respective counsels. Mr. Maninder Singh accepts notice on behalf of BSNL and Mr.Vivek Malik accepts notice on behalf of MTNL. Let the amended memo of parties be filed within two weeks. Reply be filed within two weeks. Rejoinder be filed within one week thereafter as prayed.

Mr.Meet Malhotra, appearing for the TRAI submits that he would like to file affidavit stating the latest position regarding the controversy involving in the present appeal. Let the same be filed by the next date of hearing. Counsels should supply copies of the affidavits to the counsel for appellants before filing them in the Registry. “

This Tribunal directed impleadment of the BSNL and MTNL as parties to this appeal; no reason, however, was assigned in support thereof.

During the pendency of these proceedings, a statement was made by the appellants that since issuance of show cause notices, ground realities have changed as a result whereof, the position with regard to the POI congestion and grant of E1 had improved whereupon the same was directed to be placed on record, pursuant thereto the appellant on 29.09.2008 filed an additional affidavit interalia stating that so far as congested POIs were concerned, except for 4 POIs no congestion has been reported for other POIs. It was furthermore, stated that so far as the said 4 POIs are concerned, the same was due to demand for

E1 pending with BSNL and congestion level was reduced to 1/3rd although a number of subscribers have grown four fold. It was reiterated that POIs are for two way traffic and responsibility for augmentation cannot be put solely on the appellants.

On 20.03.2009 TRAI issued a fresh standards of QOS which came into force on 01.07.2009.

In para 4.7.3 thereof it was stipulated:

> "As regards the suggestions to exclude issues that are not control of the service providers, the authority is of the view that only performance affected due to force majeure conditions need to be excluded for calculation purpose."

It has been urged that if the said condition was implemented retrospectively then the same would mean that submissions made in the appeal would have to be reconsidered in view of the fact that the defence raised by the appellant is in regard to 'force majeure' or not only.

By an order dated 26.03.2009, this Tribunal suggested as to whether TRAI would like to consider the issue of subsequent developments and the present condition on POI congestion afresh but TRAI stated that it would like to contest this appeal.

Mr. C. S. Vaidyanathan, learned senior counsel appearing on behalf of the appellant would submit:

1. TRAI has wrongly relied upon regulations / directions which have been set aside by this Tribunal in view of the express provisions in the interconnect agreement providing for 12 months' period.

2. TRAI must be held to have committed an error in directing the appellants to take legal measures if the interconnection was being delayed, in as much as rights of the appellants were either to flow from a contract or a

statute, none being available to them,

3. Negotiations in these matters between parties would not have helped as interconnection was recognized by it in its study paper.

4. As in the absence of adequate E1 ports POI congestion benchmark was impossible to be achieved, the impugned notices are vitiated in law as law does not envisage compliance of an impossibility.

5. As TRAI had recognized the condition of force majeure in the amended regulation, there was no reason as to why the said authority should have taken into consideration the same even for the purpose of issuing the impugned directions.

6. The appellants cannot be said to have any mens rea in the matter of purported violation of QOS regulations and thus the impugned show cause notices are liable to be set aside.

7. TRAI in any event ought to have taken into consideration the subsequent events showing improvement in view of grant of E1 ports as thereby the POI congestion should have also considerably improved. Although TRAI in its reply affidavit stated that BSNL's RIO had provided for six months time for interconnection and the appellant did not choose the same, the blame on appellants must be held to be erroneous as vide its letter dated 12.11.2005, TRAI informed the appellants that BSNL's and MTNL's RIO did not have its approval.

Mr. Vikas Singh, learned senior counsel appearing on behalf of the respondent, on the other hand, would urge:

1. From a perusal of Sections 11, 12 and 13 of the Act, it would be evident that TRAI not only has the power to frame regulations but also is required to ensure compliance thereof and thus in case of non–compliance, it has the power to issue requisite directions and failure to comply with the same, would automatically entail penal consequences.

   In that view of the matter, issuance of Show cause notice cannot be said to be illegal or without jurisdiction warranting interference by this Tribunal at this stage.

2. The appellants could have approached this Tribunal even if earlier regulation have been struck down for the purpose of reconsideration of the time period for entering into interconnect agreement.

3. An interim order passed by this Tribunal directing compliance by BSNL to provide for interconnection within a period of 90 days being continuing, in case of violation thereof, there was absolutely no reason why the appellant could not have approached this Tribunal for a direction upon BSNL / MTNL to provide POI.

4. Reply affidavit filed on behalf of the BSNL and MTNL would show that Show Cause notice have been issued only in case where the operators have not been able to show an improvement in the performance as the respondent no. 2 to 8 has deteriorated, action is sought to be taken.

5. The contention of the appellant as to why no action had been taken by the TRAI against BSNL and MTNL has no merit as it is evident that BSNL and MTNL had shown sufficient improvement in the matter of meeting quality parameters.

The questions which, therefore, arise for our consideration in this Appeal, are:

1. Whether TRAI acted illegally and without jurisdiction in issuing the impugned direction?

2. Whether the impugned show cause notices are vitiated in law and would amount to an order or decision within meaning of Section 14 (b) of the Act so as to enable the appellants to invoke the jurisdiction of this Tribunal?

3. Whether the TRAI has prejudged the entire issue?

4. Whether the action taken against the appellants by TRAI are discriminatory in nature in so far as no action has been taken against BSNL/MTNL?

5. Whether non-compliance by the appellants was an impossible act?

6. Whether QOS regulations are directory or mandatory?

7. Whether Show Cause Notice are otherwise ultra vires in law?

Before adverting to the aforementioned contentions, we may notice the provisions of the statute.

The Act was enacted inter alia to protect the interest of service providers and consumers of the telecom sector, to promote and ensure orderly growth of the telecom sector and for matters connected therewith or incidental thereto.

TRAI has been constituted under section 3 of the Act. Section 11 occurring in Chapter III provides for powers and functions of the Authority. Sub-clause(a) of sub-section (1) of Section 11 empowers TRAI to make recommendations, whereas clause (b) contemplates discharge of functions by it.

Sub-clause (iii) thereof provides for ensuring technical compatibility and effective interconnection between different service providers.

Sub-clause (v) of the aforementioned provision envisage that the functions of TRAI are also to lay down the standards of QOS to be provided by the service providers and ensure the QOS and conduct periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunications services.

Section 12 of the Act provides for powers of Authority to call for information, conduct investigations, etc.

Subsection (4) thereof reads as under:

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

Section 13 of the Act empowers TRAI to issue directions in the following terms:

"13. Powers 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 matter specified in clause (b) of sub-section (1) of section 11."

Establishment of this Tribunal is for the purpose inter alia, of adjudication of any dispute between the parties mentioned in clause (i) to (iii) of Section 14 of the Act, clause (b) whereof provides for hearing and disposal of appeal against any direction, decision or order of the Authority under the Act.

Chapter VI of the Act provides for miscellaneous powers.

Section 29 provides for penalties for contravention of the directions issued by the Authority making it punishable with fine of Rs. 1 lakh and in case second or subsequent offence the same may extend to Rupees two lakhs and in case of continuing contravention with additional fine which may extend to two lakhs rupees for every day during which the default continues.

Section 30 provides for offences by Companies.

Section 34 restricts the power of any Court to take cognizance of any offence punishable under the Act or the rules or regulations made thereunder, save on a complaint made by the Authority.

Section 36 of the Act empowers TRAI to make regulation. The said Regulation is said to have been made by TRAI in exercise of its power sub-section (1) of Section 36.

Before adverting to the rival contentions made by the parties, we intend to place on record that although pursuant to the order of this Tribunal dated 21.11.2006, BSNL and MTNL were impleaded as parties pursuant whereto and in furtherance whereof detailed replies have been filed on their behalf raising a large number of factual contentions; We are of the opinion that in the facts and circumstances of this case, the jurisdiction of this Tribunal being limited, no necessity was felt to hear the counsel for BSNL and MTNL.

The prayers made in this appeal are limited. Indisputedly, directions have been issued to the appellants. Show Cause Notices have also been issued to the appellants. For one reason or the other, TRAI had not considered it necessary to issue any

direction upon BSNL and MTNL and / or some other cellular mobile service providers, justifiability whereof may be open to question.

But we are firmly of the view that it is not necessary to dwell thereupon in this case as it will not be proper to widen the scope of this appeal.

Section 14 (b) of the Act reads as under:-

Section 14

"**Establishment of Appellate Tribunal -** The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to-

(a) ....

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

The impugned direction has been issued by TRAI in exercise of its statutory power conferred on it under Section 13 of the Act. It is not in dispute that TRAI has the requisite jurisdiction to make regulations or issue general orders. The validity and/or legality of the regulations is not in question. What is in question herein is its implementation.

In terms of the provisions of the Act, TRAI, as a regulator, while exercising its functions, is not only required to ensure technical compatibility and effective interconnection between different service providers, as contained in sub-section (iii) of the Clause (b) of Section 11 of the Act but is also entitled to 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 provider so as to protect interest of consumers of telecommunication services.

The term 'ensure' would mean to secure, to make sure certain or safe (see Ram Nath Iyyer's Dictionary page 392).

There cannot be any doubt or dispute that ensuring some acts having regard to the provisions of the General Clauses Act would mean that the said function would be a continuous one. It is not a case where the functions performed by a statutory authority were to get exhausted. We are mentioning this only to show that TRAI will have the requisite authority to continue to ensure compliance with the regulations made by it from time to time as it is well known that if a statutory authority has the power to perform a function, the same can be exercised from time to time. It cannot, therefore, be said to be a case where the authority has lost its jurisdiction to issue direction after making the regulations. In discharge of its functions, thus, it became obligatory on the part of the Authority to ensure compliance of the regulations made by it.

We have no doubt in our mind that for the said purpose, the Authority will also have the requisite jurisdiction to issue direction.

Mr.Vikas Singh, the learned senior counsel appearing on behalf of the respondent has brought to our notice the decisions of a three-Judge-Bench of the Supreme Court of India in TRAI Vs. BSNL Mobile Cellular Ltd, Civil Appeal No. 6743/2003 disposed of on 28.3.2006 wherein it has been held as under:-

> "It appears to us on a reading of all these provisions that the word 'directions' had been used in a wide sense to cover orders/regulations which in effect direct an action to be taken if we were to limit Section 29 only to directions which were not directory orders or/ directory regulations this would mean that violation of such orders/regulations would not carry any penal consequence whatsoever. Consequently, the entire scheme of the Act would become unworkable. Besides Section 11(1)(b) in respect of which directions may be issued has itself also been widely framed. Indeed the order in question pertains to the provisions of Section 11(1)(b)(i) as we have already stated. It

may be that Section 29 creates an offence and therefore, must be strictly construed. However, that principle will not militate with the principle that the interpretation of a word must be made contextually. We have to ascertain the meaning of the word 'directions' in Section 29. The word 'directions' can take within its fold directory orders and regulations in the nature of directions as a matter of semantics. Besides in the context of the Act there is no reason not to include the orders and regulations containing directions within the word 'directions.' This would also be a logical corollary as such regulations and orders have appended to them a more serious mandate. In rejecting the view expressed by the TDSAT we would respectfully adopt the language used by the Constitution bench of this Court in Bashiruddin Ashraf vs The Bihar Subai Sunni Majlis-Awaqf and Anr. AIR 1965 SC 1206.

> "The Argument is not only new but is also utterly wrong. Orders and directions express the binding wish of the Majlis and the two words only differ in degree. An order is more peremptory than a direction and an argument can never be right which suggests that while disobedience of a direction should merit the punishment of removal disobedience of an order should go unpunished."

Consequently the appeal must be allowed. Since the appellant has already withdrawn the complaint filed against the respondent, we make it clear that our decision will not result in revival of those proceedings.

Mr.Vaidyanathan would submit that the regulations do not provide for any consequences and, thus, they are directory in nature and not mandatory. It is true that ordinarily a statute which is sought to be made imperative in character should provide for a consequence clause but the same in our opinion is not decisive. The question as to whether a provision shall be directory

or mandatory must be considered from the object and purport of the statute. Public interest involved in the matter also would have relevance.

Mr.Vaidyanathan has strongly relied upon a decision of the Supreme Court of India in Shaikh Salim Haji Abdul Khayumsab Vs Kumar and Ors [2006(1) SCC 46]. In that case, the question which arose for consideration was whether a Written Statement in a Suit should mandatorily be filed within a period of 30 days. It is in the aforementioned situation it was observed:-

> "It is also to be noted that though the power of the court under the proviso appended to Rule 1 of Order 8 is circumscribed by the words" shall not be later than ninety days" but the consequences flowing from non-extension of time are not specifically provided for though they may be read by necessary implication. Merely, because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form."

Our attention has also been drawn to the fact that TRAI in Standards of Quality of Service of Basic Telephone Service (wireline) and Cellular Mobile Telephone Service Regulations, 2009 has provided for such a consequence of Clause 9, which is in the following terms:-

> “**9. Reporting…….**Every service provider shall submit to the Authority its compliance reports of benchmarks in respect of each Quality of Service parameter specified under regulation 3 and regulation 5 in such manner and format, at such periodic intervals and within such time limit as may be specified by the Authority, from time to time, by an order or direction.”

A statute, as is well known, depends on its text and context. In a situation of this nature, the same would require a purposive construction. The regulations are framed by an independent regulator for the benefit of public. It is the public which would be benefitted if the quality control is enforced.

Mr.Vaidyanathan very fairly stated that the petitioner No. 1 association wanted such a regulation. If that be so, there is absolutely no reason as to why they should not be implemented in proper perspective. Even a directory statute, as is well-known, is required to be substantially complied with. We cannot say that no compliance whatsoever is envisaged even in respect of a statute which is held to be directory. We also fail to see any reason as to why the regulations would not be held to be mandatory. It may be that even in certain situation, a mandatory statute is incapable of compliance.

Lex non cogit ad impossibilia is a well-known doctrine. Thus, if a person faced with a penal proceeding is able to show that the same was impossible/impracticable to be complied with, he may not be punished.

In Dove Investment Pvt. Ltd. Vs. Gujarat Industrial Investment Corporation [**2006(2) SCC 619]**, the Supreme Court of India held as under:-

> “**13.** Whether a statute would be directory or mandatory will depend upon the scheme thereof. Ordinarily a procedural provision would not be mandatory even if the word “shall” is employed therein unless a prejudice is caused. (See *P.T.*

Rajan v. *T.P.M. Sahir*)

14. In Chandrakant Uttam Chodankar v. Dayanand Rayu Mandrakar this Court observed: (SCC p. 212, paras 74-75)

"*74*. In this case it is not necessary for us to go into the question as to whether Section 83 is imperative in character or not inasmuch it is settled law that even where the expression 'shall' is used, the same may not be held to be mandatory. Even a mandatory provision having regard to the text and context of the statute may not call for strict construction.

75. In U.P. SEB v. Shiv Mohan Singh this Court stated the law in the following terms: (SCC p.440, paras 96-97)

'*96*. Ordinarily, although the word 'shall' is considered to be imperative in nature but it has to be interpreted as directory if the context or the intention otherwise demands. (See Sainik Motors v. State of Rajasthan AIR para 12.)

97. It is important to note that in *Crawford on Statutory Construction* at p.539, it is stated:

"*271. Miscellaneous implied exceptions from the requirements of mandatory statutes, in general*.—Even where a statute is clearly mandatory or prohibitory, yet, in many instances, the courts will regard certain conduct beyond the prohibition of the statute through the use of various devices or principles. Most, if not all of these devices find their jurisdiction in considerations of justice. It is a well-known fact that often to enforce the law to its letter produces manifest injustice, for frequently equitable and humane considerations, and other considerations of a closely related nature, would seem to be of a sufficient calibre to excuse or justify a technical violation of the law." ' "

Having regard to the fact that the regulations framed were to protect the interest of the consumers, there cannot be any doubt that they are mandatory in character. If the Regulations are mandatory and the Authority had the jurisdiction to issue the

direction, we are of the opinion that it is not necessary to go into any other question(s).

So far as the show-cause notices are concerned, we are of the opinion that the same is not a decision or an order, whereagainst an appeal can be filed before this Tribunal.

It is true that when the show cause notice suggests that the same had been issued, with a pre-conceived notion or the authority had prejudged the issues, the person aggrieved may have the remedy. We, however, are of the opinion that the same may not be inferred only because a statement to the press has been issued. Before us, parties had argued that virtually TRAI has a closed mind in the matter but we are sure that the Members of the Authority would proceed with an open mind.

We further are of the opinion that as all their contentions shall remain open, the petitioners shall not be prejudiced in any manner whatsoever if they file their show causes before TRAI. We have deliberately not entered into the merit of the matter as any observations made by us one way or the other may prejudice the parties hereto. Show cause by the petitioners may be filed within two weeks from date.

For the reasons aforementioned, we dispose of this matter directing TRAI to consider the show cause filed by the petitioner and take appropriate decision thereon. We have no doubt in our mind that TRAI shall give a fair opportunity of hearing to the petitioners and shall take into consideration all their contentions including the subsequent events. Even otherwise, we are of the opinion that in a case of this nature, where cooperation of all the operators is necessary, it will be reasonable to opine that TRAI shall issue appropriate directions for undertaking a consultative process so as to obtain the viewpoints of all the players in the field. The jurisdiction of the TRAI is very wide, and, thus, it may seek for the cooperation of all concerned, including the major players in the field.

With the above observations, this Appeal is disposed of, with no order as to costs.

…………..... J
(S.B. Sinha)
Chairperson

……………….....
(G. D. Gaiha)
Member