

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

DATED 7th OCTOBER, 2010

**M.A. No. 33 of 2010
in
PETITION NO. 12 OF 2002**

Tata Teleservices (Maharashtra) Ltd. Petitioner
Vs.
Union of India. Respondent

BEFORE :

**HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON
HON'BLE MR. G.D. GAIHA, MEMBER
HON'BLE MR. P.K. RASTOGI, MEMBER**

For Petitioner : Mr. C.S. Vaidyanathan, Sr. Advocate
Ms. Ruchika Gupta, Advocate
Mr. Raghav, Advocate

For Respondent : Mr. Vikas Singh, Sr. Advocate
: Ms. Amrita Narayan, Advocate
: Mr. A.K. Srivastava, DDG
: Mr. J.S. Deepak, Joint Secretary
: Mr. Balvinder Singh, Director, AS-III

ORDER

G.D. Gaiha, Member

1. Whether this Tribunal in exercise of its power under Section 16(1)(a) of the Telecom Regulatory Authority of India Act 1997 (the Act) can levy Court Fees including ad-valorem is the question which arises for consideration in this application.

2. The applicant Union of India is the respondent in the main matter. Inter-alia on the premise that the respondent has illegally claimed a sum of Rs. 50 crores by way of bank guarantee on account of the petitioner's failure to sign/execute the license agreement in the Karnataka service area and consequent failure on its part to pay the prescribed license fee, the petitioner had filed this petition.

3. The Petition was allowed, by an order dated 12th Sept, 2003 opining:-

“Since it is the claim of set off it is for the Union of India to show as to how such a claim is sustainable. Let us see the sequence of events. In terms of the invitation to tender, Tata Teleservices submitted EMGB which was valid for six months and was extendible for a further period of six months. It is stated that by mutual agreement EMGB was extended till 21.3.99. Under the terms of clause 11 of the tender documents bank guarantee could be enforced “in case the bidder does not abide by his bid for the service area”. Assuming that there was such a breach where Tata Teleservices did not abide by its bid, the bank guarantee could have been enforced and the earnest money forfeited. This Union of India did not do during the validity of the bank guarantee period and it lost its right to enforce the same after the period of bank guarantee had expired. Union of India became remediless. Only if it could be said that the bank guarantee which was to be kept valid for agreed period was made invalid by certain act attributed to Tata Teleservices, then Union of India could claim the amount of bank guarantee in any separate proceedings even if the bank guarantee could not be enforced. The claim in the present case for the right to enforcement of bank guarantee is stated to have arisen because after Tata Teleservices gave unconditional acceptance of letter of intent, it was bound to sign the licence agreement of Karnataka circle and in default the case fell within clause 11 of the tender documents resulting in right to enforce of EMGB. We have not been shown any clause in the tender

document which provides that letter of intent would form part of the bid by the licensee and non compliance with LOI would tantamount to not abiding by the terms of the bid.. Moreover, there has not been any unconditional acceptance of the letter of intent. It is also pleaded by Mr. Vaidyanathan that after the bid was made, substantial changes were made in the terms of tender to which Tata Teleservices was not bound and was within its right not to accept the altered terms. There has not been any satisfactory reply to this by the Union of India. Since the demand of Rs.50.00 crores though ascertained is disputed one, Union of India could not appropriate the same exercising its right of set off. Even plea of equitable set off is not available inasmuch as, as noted above, licence for each telecom circle is separate and separate EMBG had been given. The decision of the Supreme Court in the Case of Jasraj Inder Singh vs. Hemraj Multanchand – (1977) 2 SCC 155 rather supports the case of Tata Teleservices.

Now when we examine the terms of clause 19 in the licence regarding Maharashtra circle any sum of money due and payable to Tata Teleservices under the licence may be appropriated by the Central Government by way of set off against any claim of the Central Government and that could be done whether under this licence or any other licence made by Tata Teleservices to the Central Government. But then for the purpose to invoke this Condition 19 there has to be licence of Karnataka circle. Admittedly, there was none. Condition 19 is inapplicable.

This petition is, therefore, allowed. Central Government will refund the amount of Rs.50.00 crores with interest @ 17% per annum from the date the amount of Rs.50.00 crores was appropriated by the Central Government till payment. Petitioner will also be entitled to cost, counsel fee Rs.10,000/-.”

- 4.** The respondent (applicant) had filed a counter claim. The same, however, was rejected by this Tribunal by the said order.
- 5.** The respondent preferred an appeal thereagainst. It was marked as Civil Appeal No. 1033 of 2004.

By a Judgment and Order dated 23.8.2007, the Supreme Court of India while setting aside the said order opined that this Court not only exercises a very wide jurisdiction in terms of Section 14 and 14A of the Act, even a counter claim would be maintainable, directing:

“In the light of our finding that the counter claim was maintainable and it requires to be investigated, we think that the proper course is to set aside the finding rendered by the TDSAT on the plea of set off raised by the appellant. This is in view of the fact that acceptance of the counter claim or even a part thereof might throw open the question of legal or equitable set off, to be considered in the light of the finding on the counter claim. Therefore, we think this to be an appropriate case where we should reopen the whole matter without going into the merits of the contentions of parties on the plea of set off raised by the appellant and leave the question to be decided by the TDSAT along with the counter claim that has been made by the appellant. On taking note of the objection that the counter claim has not been made specific and has not been put forward in a proper manner, we are satisfied that it would be appropriate to direct the appellant to make a proper counter claim before the TDSAT within three months from today. The TDSAT thereafter will give the respondent an opportunity to file its written statement to the counter claim and then decide the claim made by the respondent and the counter claim afresh in accordance with law.”

- 6.** Pursuant thereto and in furtherance thereof, the respondent herein filed a counter claim for a sum of Rs. 2015.04 crores as calculated upto 31.3.2008 alongwith further payment of

interest till the date of payment besides claiming a sum of Rs. 50 crores by way of set off.

By an order dated 18th Sept, 2008 the respondent was directed to pay court fee on the said amount.

7. It however, appears that a question as to whether this Tribunal has any jurisdiction to levy any court fees on ad-valorem basis in terms of Section 16(1)(c) of the Act was orally raised. The counsel for the parties, however, took several adjournments to argue on the said question from time to time.

8. When the matter came up for consideration again before us on or about 15th January, 2010, the respondent was asked to seek instructions on the following questions:

1. Whether in the event the contention of the Union of India is accepted that this Tribunal has no jurisdiction to levy any court fees in original petition, it would be ready and willing to refund the entirety of the amount of court fee to those petitioners who had deposited court fees in the original proceedings i.e. about a sum of Rs. 3 crores or more ?

2. Whether in raising this contention, the Department of Telecommunication has consulted the Ministry of Law as also the Ministry of Finance?

3. If such purported lacuna in the Act was known to the authorities of the DOT, why appropriate step was not taken to amend the TRAI Act in consultation with the Ministry of Law, particularly when most of the original petitions are in the nature of recovery suits?

9. In relation to the said questions although Mr. Vikas Singh submitted that no instruction in the matter was necessary, the learned counsel was asked to make a positive statement thereof.

Pursuant to the said direction an additional affidavit has been filed only on 23rd February, 2010 affirmed by one Shri Balwinder Singh whereit it was stated as under :

“5. Query No. 1:

Whether in the event the contention of the Union of India is accepted that this Tribunal has no jurisdiction to levy any court fees in original petition, it would be ready and willing to refund the entirety of the amount of court fee to those petitioners who had deposited court fees in the original proceedings i.e. about a sum of Rs. 3 crores or more?

In reply to this query, it is submitted that as far as refund is concerned, the Respondent i.e. Union of India, has not levied any Court fee. Hence there is no liability of the Respondent to refund the Court fee.

6. Query No. 2:

Whether in raising the contention, the Department of Telecommunication has consulted the Ministry of Law as also the Ministry of Finance?

In reply to the said query, it is submitted that there is no reason to consult Ministry of Law as also the Ministry of Finance because the legislative intent of not imposing court fee in respect of petitioner under section 14(a) is quite clear.

7. Query No. 3:

If such purported lacuna in the Act was known to the authorities of the DOT, why appropriate step was not taken to amend the TRAI Act in consultation with the Ministry of Law, particularly when most of the original petitions are in the nature of recovery suits?

In reply to the said query, it is submitted that according to DOT, there is no lacuna in the Act and accordingly there was no occasion to seek any amendment.

8. *Lastly, as to the fact that court fee in original petition was being realized by the Hon'ble TDSAT, was an issue to be taken by parties who were being asked to pay the same and not by DOT. It is only when DOT has been asked to pay the court fee that DOT has raised the objection regarding the same at the very first instance."*

10. This Tribunal thought, the Central Government may have a different view and by an order dated 23.02.2010 asked the Joint Secretary in the Department of Telecommunication to appear before us. Shri Deepak, the then Joint Secretary of the Department of Telecommunication did so and very fairly answered all our queries some of which we may notice.

Statement of Mr. J. S. Deepak, Joint Secretary in Department of Telecommunication on S.A.-

“Q. When did you join the department in the present capacity ?

A. 8th April 2008.

Q. Do you know that cases with regard to MIB come here for adjudication?

A. Yes I am aware.

Q. Matter relating to court fees covers both the ministries? Do you know?

A. The administrative matters related to TDSAT are dealt in DOT.

Q. Matter relating to court fee in relation thereto comes before us? Do you know?

A. Yes.

Q. Have you seen our order dated 15.01.2010?

A. Yes. We have also consulted our Legal Advisor.

Q. Do you think Ministry of Finance should have been consulted ?

A. The Legal Advisor has opined that since one of the points raised by this Tribunal relates to the issue of refund of the court fee collected by this Tribunal, the Ministry of Finance should be consulted.

Q. Does the DOT consider TDSAT within part of the Administrative control of it.

A. No.

Q. By filing this application jurisdiction of this Tribunal is questioned on its Administrative side. Do you agree?

A. This is administrative decision of TDSAT subject to provisions of TRAI Act.

Q. With respect to decision of the Supreme court of India like ONGC case, Committee of Secretaries is to be constituted? Who will be the competent person?

A. I am aware that if one department files a case against another department, there is a procedure to obtain an approval from the committee constituted by the Cabinet Secretariat, called the 'Committee on Disputes'.

Q. Are you aware that such an approval has been taken or committee has been constituted.

A. I have not seen the file on which that decision has been taken.

Q. Have you gone through Rules of Executive Business ?

A. Yes Sir, For filing affidavits, the decision is taken at the Secretary level.

Q. Who is the competent authority under the Rules of Executive Business where the Rules of Executive business under Article 77 of the Constitution of India?

A. I think it is Secretary, but I have to check on this.

Q. Even if it may involve two ministries, who would be the competent authority?

A. However, if it would be between the two ministries, the ministry piloting the case would consult the other ministry.

Q. Have you seen the file which has been produced before us?

A. Yes, after the obtaining the opinion of the Legal Advisor, we had to submit it to this Tribunal that is why it is not forwarded to Ministry of Finance.

Mr. Deepak sees the record and says that after obtaining the opinion of Legal Advisor, Dr. Santokh Singh, the matter was not processed further as the file was submitted to TDSAT.

Q. Have you noticed statement made by Hon'ble Law Minister that quantum of court fees should be enhanced in respect of the commercial disputes?

A. I am not aware of such statement.”

- 11.** Despite the fact that the matter should have been referred to the Ministry of Finance, the learned counsel for the applicant argued the matter before us on merit without any further instructions.

- 12.** Mr. Vikas Singh, the learned senior counsel appearing on behalf of the appellant urged that the term 'prescribed' means 'prescribed by rules' and having regard to the fact that Section 16 of the Act confers only an administrative jurisdiction on this Tribunal to regulate its procedure, it must be held to have no jurisdiction to levy court fee as the same does not come within the purview of the Regulatory regime. Strong reliance in this

behalf has been placed on M. Chandru V. Met Dev. Authority (2009) 4 SCC 72.

13. Mr. C.S. Vaidyanathan, the learned senior counsel appearing on behalf of the respondent, on the other hand, would urge:

- (i) Section 16 of the Act read with the other provisions thereof must be held to have conferred very wide jurisdiction upon this Tribunal both on the judicial side as also the administrative side.
- (ii) This Tribunal has prescribed the court fee which were otherwise payable and the amount of court fees levied is equivalent to the amount of court fee levied by the Delhi courts.
- (iii) The levy of court fees has been done to provide for a level playing field, in as much as a litigant who moves a civil court for redressal of its grievances and/or recovery of the amount due from the other side, would have been required to pay court fees and if it is held that the before this Tribunal no court fee is payable, the same would not be just.
- (iv) Under some other statutes also power has been conferred on the respective Tribunals like DRAT Act under which power has been conferred to levy court fee.

(v) Section 16(1)(a) does not provide for a negative provision that no court fee at all can be charged.

(vi) The Central Government has been conferred power to levy court fee only in relation to the appeal against an order or direction of TRAI and in that view of the matter other matters should be governed by the provisions of the Act.

14. At the outset, we may notice the relevant provisions of the Act.

“The Act has been enacted inter-alia for the establishment of this Tribunal, to regulate the telecommunication services, adjudicate disputes, dispose of appeals and to protect the interests of service providers and consumers of the telecom sector.”

Section 14 of the Act provides for the constitution of this Tribunal to adjudicate any dispute :-

- (i) Between a licensor and licensee;
- (ii) Between two or more service providers;
- (iii) Between a service provider and a group of consumers.

Clause (b) of Section 14 of the Act empowers this Tribunal to dispose of appeal against any direction, decision or order of the Authority under the Act.

- 15.** Section 14A provides for application for settlement of disputes and appeals to Appellate Tribunal.

“(1) The Central Government or a State Government or a local authority or any person may make an application to the appellate Tribunal for adjudication of any dispute referred to in clause (a) of Section 14.

(2) The Central Government or a State Government or a local authority or any person aggrieved by any direction, decision or order made by the Authority may prefer an appeal to the Appellate Tribunal.

(3) Every appeal under sub-section (2) shall be preferred within a period of thirty days from the date on which a copy of the direction or order or decision made by the Authority is received by the Central Government or the State Government or the local authority or the aggrieved person and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain any appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing within that period.”

Sub-section (2) refers to clause (b) of Section 14. Sub-section (3) refers to such fees as may be prescribed by the Central Government.

The term ‘prescribed’ has been defined in Section 2(h) to mean prescribed by rules under the Act.

16. Section 16 of the Act provides for the procedure and powers of the Appellate Tribunal.

We may notice sub-section (1) thereof.

“(1) The Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Appellate Tribunal shall have powers to regulate its own procedure.”

There cannot, however, be any doubt or dispute that this Tribunal does not possess any rule or regulation making power.

It has been provided with the power to regulate its own procedure only. The power to make rules by way of subordinate legislation has been conferred upon the Central Government by reason of Section 35 of the Act. TRAI has been conferred power to make regulations by reason of Section 36 thereof.

Neither the Central Government nor TRAI had made any rules or regulation in regard to levy of court fee on an original petition.

The Central Government has, in exercise of its rule making power, however, prescribed a fee of Rs. 10000/- in respect of the appeals filed before this Tribunal.

17. In absence of any statutory power, this Tribunal on its administrative side made the rules known as TDSAT Procedure, 2005. The relevant provision of the said Rule is as under:

“4(ix)(A) The amount of fees payable on petitions, next hereinafter mentioned, filed before Telecom Disputes Settlement and Appellate Tribunal shall be Rs. 5000/-.

- (i) Petition seeking declaratory relief with consequential relief.*
- (ii) Petition seeking directions, injunction and permanent injunction.*
- (iii) Petition seeking enforcement of regulations framed by Telecom Regulatory Authority of India under the Telecom Regulatory Authority of India Act, 1997 (as amended)*
- (iv) Any other petition not covered above shall also be accompanied with fees of Rs. 5000/-.*

Provided that the fees for filing petitions/claims /suits in the nature of recovery of money or an outstanding amount, before Telecom Disputes Settlement and Appellate Tribunal shall be computed as follows :

- (i) In petitions/claims/suits for money (including those for damages or compensation or total outstanding) due on the date of filing of petitions/claims/suits and*

- (ii) *In petitions/claims/suits for money payable periodically under the terms of the agreement between the parties,*
- (a) *Rs.5000/- or an ad valorem rate of 1.5% of the total amount / sum total of all periodical amounts claimed, including interest, if any, where the sum total of all amounts claimed, including interest, is upto Rs. 2 crore, whichever is more;*
- (b) *An ad valorem rate of 1%, over and above the fees computed at (a) above, of the total amount / sum total of all periodical amounts claimed, including interest, if any, where the sum total of all amounts claimed, including interest, is more than Rs. 2 crore but upto Rs. 5 crore;*
- (c) *An ad valorem rate of 0.5%, over and above the fees computed at (b) above, of the total amount / sum total of all periodical amounts claimed, including interest, if any, where the sum total of all amounts claimed, including interest, is more than Rs. 5 crore, subject to a maximum fees of Rs. 50 lakhs.”*

18. The levy of court fee inter-alia is governed by Entry 3 of list II, 7th Schedule to the Constitution of India. It reads as under :

“Officers and servants of the High Court; procedure in rent and revenue courts; fees taken in all courts except the Supreme Court.”

19. Court Fees Act was enacted in the year 1870 laying down different fees for different nature of suits.

Section 6 of the Act reads as under :

“6. Fees on documents filed, etc., in Mofussil Courts or in public Offices. – Except in the Courts hereinbefore mentioned, no document of any of the kinds specified as chargeable in the First or Second Schedule to this Act annexed shall be filed, exhibited or recorded in any Court of Justice, or shall be received or furnished by any public officer, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said Schedules as the proper fee for such document.”

- 20.** The Schedule appended to the said Act provides for levy of court fee in the matters enumerated therein. Article 1(a) of the Schedule appended to the Court Fees Act, provides for levy of the court fees as prescribed therein.
- 21.** Different ‘States’, however, amended the said Schedule from time to time.
- 22.** Court fee being a state subject, whether levied on ad-valorem basis even without any upper limit, does not amount to imposition of tax vis-à-vis the provisions of Entry 3 List-II of the 7th Schedule of the Constitution of India. It was so held by the Supreme Court of India in Secretary, Government of Madras vs. Zenith Lamp & Electrical Ltd. 1973(1) SCC 162.

The aforementioned decision of the Apex Court in the Government of Madras (supra) was again considered by the

Supreme Court of India in Secretary to the Government of Madras vs. P.R. Sriramalu & Anr. Reported in 1996(1) SCC Pg. 345 wherein it was held as under :-

“12. Apart from the aforementioned decisions the points in controversy and questions raised before us, as referred to above, are squarely covered by a decision of this Court in P.M. Ashwathanarayana Setty v. State of Karnataka⁷. While dealing with the distinction between a ‘fee’ and a ‘tax’ and after reviewing all the earlier pronouncements of this Court on the conceptual distinction between a fee and a tax, it has been observed in paragraph 35 of the report as under: (SCC p. 712)

“What emerges from these pronouncements is that if the essential character of the impost is that some special service is intended or envisaged as a quid pro quo to the class of citizens which is intended to be benefited by the service and there is a broad and general correlation between the amount so raised and the expenses involved in providing the services, the impost would partake the character of a ‘fee’ notwithstanding the circumstance that the identity of the amount so raised is not always kept distinguished but is merged in the general revenues of the State and notwithstanding the fact that such special services, for which the amount is raised, are, as they very often do, incidentally or indirectly benefit the general public also. The test is the primary object of the levy and the essential purpose it is intended to achieve. The relationship between the amount raised through the ‘fee’ and the expenses involved in providing the services need not be examined with a view to ascertaining any accurate, arithmetical equivalence or precision in the correlation; but it would be sufficient that there is a broad and general correlation.”

In paragraph 66 of the said report while repelling the arguments with regard to the alleged arbitrariness and inequities in the

imposition of the ad valorem impost without an upper limit this Court in paragraph 67 of the report observed as follows: (SCC p. 720)

“The anomalies that the policy behind the impugned provisions can produce in conceivable cases could, indeed, be inequitable or even quite startling. But the arguments, in the last analysis, becomes indistinguishable from the contention that the correlation of the services to the fee would have to be decided on the basis of how the correlation operates in each individual case. It would be an insistence on testing the conceptual nature of the fee on the basis of the degree of the quid pro quo in the case of each individual payer of the fee. That is the peccant part of the argument. Once a broad correlation between the totality of the expenses on the services, conceived as a whole, on the one hand and the totality of the funds raised by way of the fee, on the other, is established, it would be no part of the legitimate exercise in the examination of the constitutionality of the concept of the impost to embark upon its effect in individual cases. Such a grievance would be one of disproportionate nature of the distribution of the fees amongst those liable to contribute and not one touching the conceptual nature of the fee.”

It has been further observed in paragraph 72 of the said report as under: (SCC p. 721)

“What emerges from the foregoing discussion is that when a broad and general correlation between the totality of the fee on the one hand and the totality of the expenses of the services on the other is established, the levy will not fail in its essential character of a fee on the ground alone that the measure of its distribution on the persons or incidence is disproportionate to the actual services obtainable by them. The argument that where the levy, in an individual case, far exceeds the maximum value, in terms of money, of the services that could at all be possible, then, qua that contributor, the correlation breaks down is a subtle and attractive argument. However, on a proper

comprehension of the true concept of a fee the argument seems to us to be more subtle than accurate. The test of the correlation is not in the context of individual contributors. The test is on the comprehensive level of the value of the totality of the services, set off against the totality of the receipts. If the character of the 'fee' is thus established, the vagaries in its distribution amongst the class, do not detract from the concept of a 'fee' as such, though a wholly arbitrary distribution of the burden might violate other constitutional limitation."

In this connection it will also be appropriate to have a look at the observations made in paragraph 79 of the said report which are as follows: (SCC p. 723)

"The problem is, indeed, a complex one not free from its own peculiar difficulties. Though other legislative measures dealing with economic regulation are not outside Article 14, it is well recognised that the State enjoys the widest latitude where measures of economic regulation are concerned. These measures for fiscal and economic regulation involve an evaluation of diverse and quite often conflicting economic criteria and adjustment and balancing of various conflicting social and economic values and interests. It is for the State to decide what economic and social policy it should pursue and what discriminations advance those social and economic policies. In view of the inherent complexity of these fiscal adjustments, courts give a larger discretion to the legislature in the matter of its preferences of economic and social policies and effectuate the chosen system in all possible and reasonable ways. If two or more methods of adjustments of an economic measure are available, the legislative preference in favour of one of them cannot be questioned on the ground of lack of legislative wisdom or that the method adopted is not the best or that there were better ways of adjusting the competing interests and claims. The legislature possesses the greatest freedom in such areas. The analogy of principles of the burden of tax may not also be inapposite in dealing with the validity of the distribution of the burden of a 'fee' as well."

23. The said decision appears to have been followed in BSE Brokers Forum, Bombay vs. Securities and Exchange Board of India 2001(3) SCC pg 482 at 504 in the following terms

“35. In the case of Secy. to Govt. of Madras v. P.R. Sriramulu testing the validity of the Court Fee Act involved therein, this Court negated the contention that the expenses incurred by the administration of justice in criminal courts should not be treated as sufficient quid pro quo for the levy of court fee in civil cases. It held that such levy should not be examined so minutely or be weighed in golden scales to discern any difference between the two. It also held that there could not be any scientific method by which levy of fee may be made exactly corresponding to the expenditure in a particular year relating to the administration of civil justice. It held that it is not the requirement of law that the collection raised by the levy should exactly tally or correspond to the expenditure in the administration of civil justice. It further held that the test of correlation of the collection with the services rendered is to be reckoned at the aggregate level and not at the individual level.”

24. The question which has been raised before us, namely the impost is in the nature of fee or tax has also been considered in M. Chandru vs. Member Secretary, Chennai Metropolitan Development Authority & another reported in 2009(4) SCC Pg 72, whereupon strong reliance has been placed by Mr. Vikas Singh.

We may notice paragraph 24 thereof.

“24. It is not contended before us that IDC is not a fee but a tax. If it is a fee, the principle of quid pro quo shall apply. Like a State, all other authorities which are statutorily empowered to levy the same must spell out as to on what

basis the same is charged. The State has not placed any material before the High Court. The High Court has also not addressed itself properly on the same issue. It failed to pose unto itself a relevant question. It proceeded on the basis as if overall development charges by itself is sufficient to levy a fee without spelling out how the services rendered will satisfy the equivalence doctrine for the purpose of levy and collection of fees.

However, the question, in our opinion, which must be posed and answered is as to whether this Tribunal has the requisite jurisdiction to prescribe levy of court fee on original petitions or not. Before, however, we make an attempt to answer the said question, we may notice the provisions of certain other Acts, namely Section 92 of the Trademarks Act vis-à-vis Section 3 of Trade Marks (Applications and Appeals to the Intellectual Property Appellate Board) Rules, 2003.

“3. Fees : The fees for filing applications and appeals before the Appellate Board shall be as specified in the Second Schedule to these rules which shall be paid by way of bank draft payable at Chennai drawn in favour of the Deputy Registrar, Intellectual Property Appellate Board.”

- 25.** The Electricity Appellate Tribunal also levies court fee as provided by Section 176 of the Electricity Act, 2003.

26. Levy of court fee, therefore, comes within the domain of the legislature. It is possible only for the Legislature to delegate its powers on the Executive Government or any other Statutory Authority/ Tribunal in relation thereto. There cannot, however, be any doubt or dispute that in absence of any such power no court fee can be levied.

The levy of court fee although is necessary for different purpose, the same creates a hurdle on the litigant's right to approach the court directly. Having regard to the doctrine of 'Access of Justice', therefore, the common litigant should not be asked to pay a very heavy price by way of court. In *Gujarat State Financial Corpn. v. Natson Mfg. Co. (P) Ltd.*, reported in (1979) 1 SCC 193, the law was laid down in the following terms:

"15. When dealing with a question of court fee, the perspective should be informed by the spirit of the magna carta and of equal access to justice which suggests that a heavy price tag on relief in Court should be regarded as unpalatable."

27. The question as to whether the access to justice is a constitutional right, a statutory right or a common law right was debated in different jurisdiction in different manner. Whereas the Supreme Court of India in *Tamilnad Mercantile Bank Shareholders Welfare Assn. (2) v. S.C. Sekar* reported in

(2009) 2 SCC 784 has held that access to justice is a human right which in certain situations, may also be considered to be a fundamental right, the question with regard to the constitutional aspect of the matter vis-à-vis the power of judicial review, we may notice had been considered in many cases.

28. In *Arunima Baruah v. Union of India*, reported in (2007) 6 SCC 120, it was held that :

“10. On the one hand, judicial review is a basic feature of the Constitution, on the other, it provides for a discretionary remedy. Access to justice is a human right. (See Dwarka Prasad Agarwal v. B.D. Agarwal and Bhagubhai Dhanabhai Khalasi v. State of Gujarat) A person who has a grievance against a State, a forum must be provided for redressal thereof. (See Hatton v. United Kingdom. For reference see also Zee Telefilms Ltd. v. Union of India.)

11. The court’s jurisdiction to determine the lis between the parties, therefore, may be viewed from the human rights concept of access to justice. The same, however, would not mean that the court will have no jurisdiction to deny equitable relief when the complainant does not approach the court with a pair of clean hands; but to what extent such relief should be denied is the question.”

(See Also *Sardar Associates v. Punjab & Sind Bank*, (2009) 8 SCC Page 257)

29. The evolution of law in this behalf although sporadic but on a positive note. The judiciary acts as a defender of individual

liberties wherever a person raises a concern with regard to violation or protection of his right, the Court shall step in.

- 30.** Even an accused, be he terrorist or otherwise has the right to approach the court of law. In *R v Secretary of State for the Home Department, ex parte Leech* reported in [1994] Q.B. 198, Steyn LJ said:

'It is a principle of our law that every citizen has a right of unimpeded access to a court'. Further in Raymond v Honey [1983] 1 AC 1, Lord Wilberforce at described the right of access to the courts as a 'constitutional right'.

- 31.** Laws, J in *R v The Lord Chancellor, ex p Witham*, [1997] 2 All ER 779 after discussing various decisions including *Ex parte Leech* (supra) equated the right to access to justice to the right of speech and expression in the following words:

'I cannot think that the right of access to justice is in some way a lesser right than that of free expression; the circumstances in which free speech might justifiably be curtailed in my view run wider than any in which the citizen might properly be prevented by the State from seeking redress from the Queen's courts. Indeed, the right to a fair trial, which of necessity imports the right of access to the court, is as near to an absolute right as any which I can envisage'.

Laws, J referred to the proposition that:

'the executive cannot in law abrogate the right of access to justice, unless it is specifically so permitted by Parliament; and this is the meaning of the constitutional right'.

It was furthermore held that 'access of right to a court is a constitutional right', which can only be denied by a specific legislation 'turning people away from the court door'. The headnote of this decision uses this term common law constitutional right.

- 32.** In an article Dr. Cyrus Dass, a member of Faculty of Law University of Malaya published in 'World of All Human Rights' Soli J. Sorabji a Festschrift, opined that the same may safely be taken as an accurate compendious description of the right.
- 33.** We need not dilate the matter any further being not necessary for this case. What we intend to emphasise is that such a valuable right of any person can be curtailed only by a legislation and not by an administrative action whatever be its status.
- 34.** To say the least this Tribunal is also on its administrative side must be held to be bound by law and, thus, we have no hesitation in holding that on its administrative side this Tribunal has no jurisdiction to lay down the ad-valorem rate of court fee.

- 35.** This Tribunal has no rule making power. It cannot regulate and/or implement the provisions of the Act. It can only regulate its procedure.

Its jurisdiction, therefore, is confined only to the procedural aspect of the matter and not the substantive aspect of the matter which interferes with the right of a litigant to approach this Tribunal. Once it is held that levy of court fee on ad-valorem basis is exclusively within the domain of the legislature, in our considered opinion, the Tribunal could not have levied any court fee, in absence of any provision for levying fee on the original petitions, although, such a provision exists in regard to filing of an appeal in the light of Section 35(ii)(bd) of the Act.

- 36.** We are of the opinion, although there exists a casus-omissus, the same as is well known, cannot be supplied by a Court of Law.

- 37.** We are not oblivious of the fact that the parties come before us in commercial matters where the stakes are very high and justifiably court fee must be levied.

We are also aware that in fact the present Chief Justice of India and also the Law Minister of India have publicly stated

that higher court fees should be levied in the commercial matters. It requires an amendment of the Act, which process we cannot undertake either on the administrative side or on the judicial side, although we see no reason as to why a counter claim for more than Rs. 2000 crores should be adjudicated without payment of any court fee but we find ourselves in a helpless situation.

- 38.** We may notice that even the Ministry of Finance recently has opined that court fee should be levied and thus, it should take-up the matter with the Ministry of Law. We strongly recommend for the same.
- 39.** We, however, are not sure as to who would take the initiative. The Ministry of Communication & IT has taken a stand which is inconsistent with the stand of Ministry of Finance.
- 40.** Be that as it may, we hope that early steps would be taken by the concerned Ministry to amend the provisions of the Act.
- 41.** There was some delay in pronouncing the judgment, the reason being that we thought pending amendment of the Act as was advised by the Ministry of Finance, the Department of Telecommunication, which is the applicant before us, may itself take steps to get the Act amended and/or withdraw and/or not press this petition.

42. After all the court fees which have been realised by this Tribunal have been deposited in the Central Government's Treasury.

43. Mr. Vaidyanathan would urge that court fee should be levied for upholding the independence of this Tribunal. Independence and/or impartiality of this Tribunal cannot be judged as to whether the litigants before us pay court fee or not.

For dealing with a dispute on its judicial side, this Tribunal is not dependent on the Ministry. The Ministry is in a matter of this nature only a disputant. The dispute by and between the parties hereto shall be adjudicated upon on its own merits.

44. The very fact that this Tribunal does not show any hesitation in holding that it had no jurisdiction on its administrative side to levy any court fee is itself a pointer to show that it is an independent Tribunal. If this Tribunal has no jurisdiction, the rules framed by it levying ad-valorem court fee is quorum non judis.

45. The consequence of our judgment is indisputably far reaching. In fact we have given sufficient indication to the applicant and/or its representatives in that behalf.

- 46.** We even made all attempts to know the view points of all concerned Ministries.
- 47.** If the Department of Telecom has taken a conscious decision upon being legally advised, it was entitled to do so.
- 48.** In view of our findings aforementioned, the other contentions raised by Mr. Vaidyanathan need not be addressed.
- 49.** For the reasons aforementioned this application is allowed.
- 50.** It is declared that respondent is not required to pay any court fees on the amount of set off or counter claim raised before us.
- 51.** Keeping in view that it is one of the oldest matter, the hearing is expedited.

.....**J**
(S.B. Sinha)
Chairperson

.....
(G.D. Gaiha)
Member

.....
(P.K. Rastogi)
Member

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