

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

Dated 18th October, 2019

Telecommunication Petition No.169 of 2014

Internet Service Providers Association of India & Ors. ... Petitioners

Vs.

Union of India ... Respondent

Telecommunication Petition No.108 of 2017
(MA Nos.264 and 265 of 2018)

Anjani Broadband Solutions Pvt. Ltd. ... Petitioner

Vs.

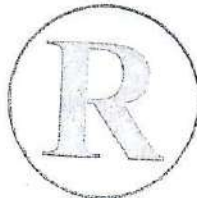
Union of India ... Respondent

Telecommunication Petition No.87 of 2017

Krauss Communication Pvt. Ltd. & Ors. ... Petitioners

Vs.

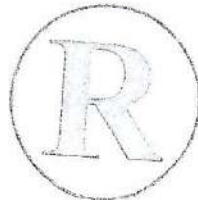
Union of India ... Respondent



BEFORE:

HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON
HON'BLE MR. A.K. BHARGAVA, MEMBER

- For Petitioner Nos.1 in T.P. : Mr. Tarun Gulati, Senior Advocate
 No.169 of 2014 Mr.Aditya Vaibhav Singh, Advocate
- For Petitioner No.2 in T.P. : Mr. Aditya Vaibhav Singh, Advocate
 No.169 of 2014
- Petitioner No.3 in T.P. : Mr. Meet Malhotra, Senior Advocate
 No.169 of 2014 Mr. Ravi S.S. Chauhan, Advocate
 Ms. Pallak Singh, Advocate
- For Petitioners in T.P. : Mr. Vineet Bhagat, Advocate
 Nos.108 of 2017 Mr. Himanshu Dhawan, Advocate
- For Petitioner in T.P. No.87 : Ms. Archana Saxena, Advocate for
 of 2017 Mr.Asutosh Lohia, Advocate
- For Petitioner in T.P. No.195 : Mr.Neeraj Kumar, Advocate
 of 2018
- For Petitioner in T.P. No.119 : Mr.Aditya Vaibhav Singh, Advocate
 of 2017
- For Respondent – Union of : Mr.Abhay Prakash Sahay, Advocate
 India Mr.Dhruv Tamta, Advocate
 Mr.Apoorv Kurup
 Ms. Nidhi Mittal, Advocate
 Mr.Rahul Kulhare, Advocate



Telecommunication Petition No.195 of 2018

W15 Internet Services Pvt. Ltd. ... Petitioner

Vs.

Union of India ... Respondent

Telecommunication Petition No.94 of 2017

Perfect Internet Pvt. Ltd. ... Petitioner

Vs.

Union of India ... Respondent

Telecommunication Petition No.119 of 2017

Gloriosa Infotel IT Services India Pvt. Ltd. ... Petitioner

Vs.

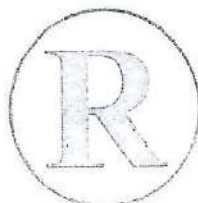
Union of India ... Respondent

Telecommunication Petition No.200 of 2018

Excell Media Pvt. Ltd. ... Petitioner

Vs.

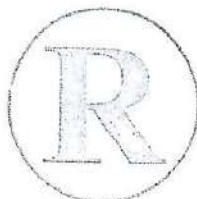
Union of India ... Respondent



ORDER

By S.K. Singh, Chairperson –These petitions have been filed by or on behalf of Internet Service Providers who hold licences granted by the respondent. They have challenged the imposition of the licence fee on internet services mainly on two grounds. Firstly on the plea that the respondent has permitted some old ISP licensees to enjoy under the old regime of no licence fee on revenue from pure internet services whereas petitioners are required to pay licence fee for similar internet services by bringing them under the provisions of Unified Licence(UL) regime, thus violating the principle of providing a level playing field for all the internet service providers. Secondly, it is the case of the petitioners that the statutory procedure laid down under Section 11 of the Telecom Regulatory Authority of India Act (the TRAI Act) has not been followed by the respondent while laying down terms relating to Gross Revenue(GR)/Adjusted Gross Revenue(AGR) for UL-ISP licence.

2. For the sake of convenience, the relevant facts will be referred from the records of Petition No.169/2014 and also from a Convenience Compilation submitted on behalf of the petitioners. It is clarified that the facts and the issues of law are common for all these petitions and they have been heard together.



Therefore, this judgment shall govern all these petitions. The main prayers made in Petition No.169/2014 are:-

- “(a) Restrain the Respondent from imposing a condition of payment of licence fee on the Adjusted Gross Revenue(AGR) which shall include revenue from Internet Service;
- (b) Set-aside and Quash the impugned Letters No.820-01/12-DS III dated 23.12.2013 and Letter bearing No.820-01/12-DS III dated 20.02.2014 to the extent they demand payment of License Fee @ 8% of Adjusted Gross Revenue as per the AGR applicable under Unified Licence i.e. revenue from Internet Service;”

3. Petitioner No.1 of Petition No.169/2014 is a Society registered under the Indian Societies Act. It claims that most of the ISPs including the other two petitioners – Sifi Technologies Ltd. And M/s Tata Communications Ltd. are its members who are incorporated as companies and hold licences for providing internet service including internet telephony, granted by the respondent.

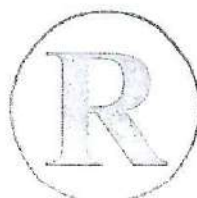
4. Fortunately, no issue of fact is involved in this petition but it will be useful to take note of certain important relevant facts for understanding the legal issues and arriving at proper conclusions. The Internet Services in India were launched on 15.08.1995 through Videsh Sanchar Nigam Ltd. (VSNL), an erstwhile Public



Sector Undertaking of Department of Telecommunications(DoT), Government of India. In order to achieve better development and greater expansion and penetration of such services, the Government of India announced its ISP Policy in November, 1998. Licences began to be issued on non-exclusive basis from 06.11.1998 with waiver of licence fee upto 31.10.2003 and thereafter with a token fee of Re.1/- per annum for licences issued prior to 01.11.2003. Limited Internet Telephony Services were also allowed w.e.f. 01.04.2002 by issuing amended ISP licence.

5. DoT amended the licence agreement for Internet Service (including Internet Telephony) on 03.03.2006. A licence fee of 6% of AGR was imposed w.e.f. 01.01.2006. AGR included revenue from Internet Telephony but excluded revenue from Internet Access (pure Internet Services) and internet content.

6. Vide its letter dated 17.11.2006, DoT sought recommendations of TRAI in terms of Section 11(1)(a) of the Act for review of the Policy relating to Internet Services. TRAI issued a Consultation Paper for various issues including licence fee, on 27.12.2006. That Consultation Paper in Para 4.8.3.1. records that licence fee was waived till 31.10.2003 and thereafter a nominal licence fee of Re.1/- became payable but the relevant clause pertaining to licence fee provided that "the Telecom Authority reserves the right to review licence fee including Universal Service Obligation(USO) levy any time during the validity of the licence, which

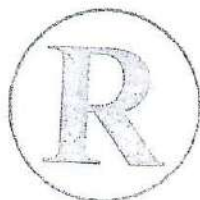


shall be binding on the licensee". TRAI mentioned that rationalisation of ISP licence fee is urgently required. The stakeholders were requested to give their suggestions.

7. On 10.05.2007, TRAI made its recommendations on "Review of Internet Services". It recommended a uniform annual licence fee equivalent to 6% of AGR on all ISPs including revenues earned from pure internet services. Soon thereafter, the respondent issued Guidelines and General Information for grant of licence for operating internet services on 24.08.2007. Annual licence fees at the rate of 6% of AGR subject to a minimum for Category A and B service areas were fixed. But importantly, the revenues from pure internet services were excluded from the definition of AGR for the purpose of computing licence fee. TRAI's recommendation on this point was clearly not accepted by the Government/respondent.

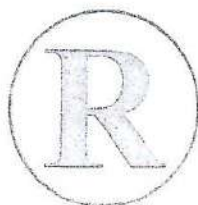
8. On 05.12.2007, TRAI reiterated its stand through a letter to DoT seeking inclusion of revenue from pure internet service in the AGR for computation of licence fee. DoT issued a reply on 25.02.2008 and informed TRAI that the matter has been reconsidered but there was no need to review the earlier decision.

9. The Government on 25.01.2010 issued amendment to the Guidelines of 24.08.2007. Clause 23(b) of the said amendment required the ISPs having licences



prior to 24.08.2007 to migrate under the provisions of Guidelines of 24.08.2007 otherwise their licences shall not be renewed. The migration could be allowed at least one year prior to the expiry of their licence period of 15 years so that they could migrate to either Category A or Category B ISP licence under the Guidelines of 24.08.2007. The definition of AGR remained unchanged in these amended Guidelines.

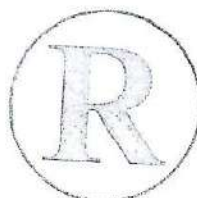
10. On 11.05.2010 TRAI issue its recommendations on “Spectrum Management and Licencing Framework”. *Inter alia*, it recommended that all future licences should be unified licences and that spectrum be delinked from the licence; there should be uniform licence fee across all telecom licences and service areas. It also recommended that w.e.f. 01.04.2010 the licence fee and Spectrum Usage Charges by each licensee shall be on actual AGR subject to a minimum 6%. On 10.10.2011, DoT requested TRAI to make recommendations on the Uniform Licence Guidelines and for modalities and guidelines to enable existing licensees to migrate to uniform licence regime. TRAI gave its recommendations on 16.04.2012 and 12.05.2012. Petitioners have highlighted that these recommendations did not deal with AGR issue in respect of any of the licences including ISP licence. It was also pointed out that even the preceding Consultation Paper issued by TRAI on 16.01.2012 did not deal with terms and conditions related



to GR/AGR. In the recommendations of 16.04.2012, TRAI stated on the AGR issue thus:

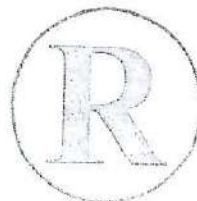
“2.49.....Regarding the revenue which shall be taken into account for calculating GR/AGR for levying of licence fee, the Authority is of the opinion that at this stage, it does not propose any change in the definition of GR/AGR as the issue required deeper study.”

11. A circular dated 29.06.2012 was issued by the respondent to all ISPs on the amendment in respect of licence fee. In the light of the right reserved by the Licensor to modify at any time, the terms and conditions of the licence agreement for provision of internet services, it sought to prescribe a uniform licence fee rate of 8% of AGR for all ISP and ISP-IT licences, in two steps starting from 01.07.2012. For ISP-IT, the rate was 7% till 31.03.2013 and thereafter at the same uniform rate of 8%. However, in Para 2 of the said circular DoT made a statement that revenue for the purpose of licence fee shall provisionally include all types of revenue from internet services, allowing only those deductions available for pass-through charges and taxes/levies as in the case of Access Services, without any set-off for expenses. It further provided that revenues from internet services will also be included in the definition of applicable AGR provisionally for ISP-IT category till Government takes the final decision after obtaining TRAI recommendations in that regard. On a challenge to that circular through Petition No.429/2012 filed by



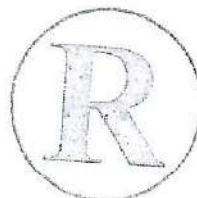
Internet Service Providers Association of India, by a judgment dated 12.10.2012 this Tribunal held that the TRAI had not made any recommendations in respect of change in the concept of AGR and that explains the statement in Para 2 that revenues from internet services were included in the definition of applicable AGR only provisionally till Government takes final decision after obtaining recommendations in that regard from TRAI. The Tribunal further held in clear terms that the Internet Service Providers could not be asked provisionally to pay on the basis of a concept of AGR in respect whereof the final decision was to be taken at a later stage. On this ground alone the decision in Para 2 of the circular dated 29.06.2012 was set aside to the advantage of the pure Internet Service Providers. However, no interference were made with the decision in Para 1 raising the annual licence fee rate to 8% for the year 2013-14 and onwards.

12. In view of the lacunae pointed out by this Tribunal through its judgment, respondent issued a letter on 22.10.2012 seeking recommendations of TRAI in respect of definition of AGR in the ISP Licence Agreements for provision of internet services, and amendment in the licences such as ISP licence granted under 1998 Guidelines, ISP licence granted under 2002 Guidelines and subsequently under 2007 Guidelines (ISP-IT category Licence). In the light of above letter, TRAI issued a Consultation Paper on 28.12.2012.



13. DoT introduced Unified Licence(UL) Regime w.e.f. 19.08.2013, thus requiring licence fee even on pure internet service in respect of new UL ISP Licence. This was done without a recommendation from TRAI on the AGR/Licence Fee issue. Through letters dated 27.08.2013 and 07.01.2014, TRAI suggested DoT to make a reference on the subject of AGR pertaining to services other than ISPs also but as appears from reply of DoT dated 10.02.2014, TRAI was requested to finalise the issue of AGR/Licence Fee for ISPs because it was causing delay in migration of existing ISPs to Unified Licence regime and also in issue of new ISP Licences under UL.

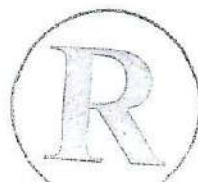
14. The Petitioner Association had also drawn the attention of DoT towards difficulties in migration of ISPs to the new UL regime, through letter dated 20.09.2013. It also met the Secretary, DoT on 24.12.2013. The Petitioner Association wrote to the Secretary, DoT on 20.12.2013 that in the meeting of 24.12.2013 the Secretary had assured that till TRAI comes out with recommendations on AGR for ISPs including on pure internet services and DoT takes a decision on the same, the ISPs whose licences have expired or are expiring shortly may be allowed to continue in the old licence regime with licence fee as per that regime. TRAI recommendations would be made applicable to old ISP Licence and new UL ISP Licence simultaneously so as not to disturb the level playing field.



15. It is not in dispute, as noted already, that before introducing the Unified Licence regime on 19.08.2013, although the recommendation of TRAI for UL regime was made long back on 11.05.2010, and also in 2012 licences under old regime i.e. old ISP licences were issued or renewed till June, 2013. These licences do not include pure internet service in the AGR and hence, there is no licence fee on the revenue from pure internet services for this class of licensees/ISPs.

16. Petitioner No.3, M/s Tata Communications Ltd.(TCL) was also an old ISP licensee. Its licence was to expire after 24.01.2014. Hence, in terms of clause 8.2 of the Unified Licence Guidelines dated 19.08.2013, it made an application to DoT on 23.01.2014 for migration to UL-ISP licence but raised an objection to payment of licence fee at the rate of 8% even on pure internet service revenues which was not being paid by similar ISP licensees holding licence under the old regime. On that basis it requested to be treated on par with ISPs under the old regime so that level playing field could be maintained till AGR is made applicable as per TRAI recommendations, uniformly to all categories of ISP licensees.

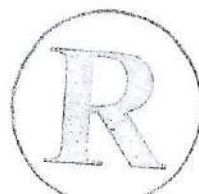
17. A legal notice dated 04.02.2014 was also issued by Petitioner Association to DoT seeking expeditious action on the level playing field issue. On 10.02.2014, DoT wrote to TRAI for expediting recommendations without linking AGR/licence fee issue of ISPs with other issues. On 20.02.2014, DoT permitted Petitioner No.3 to provide internet services as per other terms and conditions of the old ISP



licences but subject to payment of licence fee at the rate of 8% of AGR as applicable under Unified Licence even for the extended period of three months which was granted for completing all the formalities to obtain Unified Licence. In May 2015, Petitioner No.3 sought two months' extension for compliance of Letter of Intent but since it was denied Petitioner No.3 submitted an undertaking for compliance on 10.06.2014. The Petition No.169/2014 appears to have been filed on 21.03.2014. On 25.03.2014, an interim order was passed requiring the petitioner to file undertaking that if the petition fails, it would pay the full amount demanded by the respondent along with interest as may be directed by this Tribunal and on such undertaking its licence will be provisionally extended till the disposal of the petition. As a result the petitioners are enjoying the benefit of provisional extension of their old licence and not paying the licence fee in terms of Unified Licence Guidelines.

18. In respect of application of Petitioner No.3 for migration to UL, a Letter of Intent conveying the approval of competent authority for award of UL-ISP Category 'A' Authorisation for all-India Service Area was issued by DoT on 30.04.2014. The letter mentions various terms and conditions requiring compliance within a fixed time.

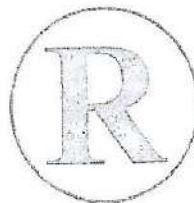
19. On 01.05.2014, TRAI submitted its recommendations on definition of AGR in Licence Agreement for provision of Internet Service and minimum presumptive



AGR. TRAI has recommended for a uniform licence fee of 8% of the AGR application for all ISP and ISP-IT licences. Revenue for the purpose of licence fee for both these categories shall include all types of revenue from internet services allowing only those deductions available through pass-through charges and taxes/levies as in the case of Access Services, without any set-off for expenses. Revenue from internet services shall also be included in the definition of AGR. It is the common case of the parties that the Government has so far not taken any decision on the above recommendation of TRAI.

20. It is not in dispute that later in July, 2014, TRAI issued a Consultation Paper on definition of Revenue Base (AGR) for different types of service licences including for UL ISP Licence and has submitted its recommendations on 06.01.2015 which is also pending. But these developments are not directly relevant for deciding the issues arising in the petitions as noted already.

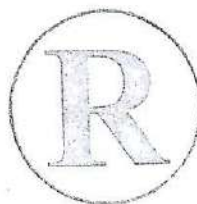
21. T.P. No.94/2017 has been filed by a company which acquired a Licence Agreement on 22.05.2014 for Unified Access Services under ISP-B Category from DoT. It has raised a grievance against demand of annual licence fee on the basis of 8% of AGR on the same ground that by including revenue from pure internet service in the AGR, the respondent have created a non-level playing field between ISP operators providing same services. The reliance is on same facts and law in



support of same issues which have been raised in the earlier Petition No.169/2015. Similar is the case of petitioners in other matters.

22. In the background of facts noticed there is no difficulty in appreciating the submission advanced on behalf of the petitioners that some ISP licensees under the old ISP licence are continuing to provide same services and they are not required to pay licence fee on the revenue from pure internet service since it is not included as a component of the AGR. On the other hand, old ISP licensee like Tata Communications Ltd. (Petitioner No.3 in T.P. No.169/2014) whose licence expired in 2014 and also those who have signed UL-ISP licence but were not having old ISP licence are required to pay licence fee even on revenues from pure internet service because of change in the definition of AGR in the UL regime. The issues are – (i) whether such a situation amounts to unreasonable classification and creation of non-level playing field; and (ii) whether the new condition imposed by DoT requiring payment of licence fee on pure internet services revenues has been introduced without complying with the requirement of Section 11 of the TRAI Act.

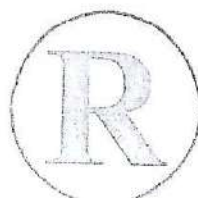
23. In our considered view, both the issues have to be answered in favour of the petitioners for the reasons indicated hereinafter.



Non-level playing field

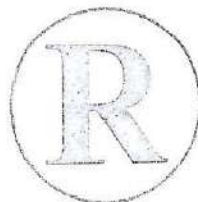
24. Law is clearly enunciated in the case of Reliance Energy Limited Vs. Maharashtra State Road Development Corporation Limited and others; (2007) 8 SCC 1. Mr. Meet Malhotra, learned Senior Advocate has highlighted Paras 36 to 39 of this judgment. The significance of constitutional principles like those in Article 14, 19(1)(g) and 21 of the Constitution in so far as they govern the exercise of public power in a democracy has been articulated in no uncertain terms. Level playing field has been held as an important concept invocable on the basis of Article 19(1)(g) of the Constitution because this Article confers fundamental right to carry on business to a company. Denial of level playing field will definitely hamper such a right. However, it has been clarified that this doctrine is subject to public interest. The concept requires that equally placed competitors should be treated alike by ensuring that they have a “level playing field” to carry out their business. It has also been highlighted that rule of law requires legal certainty. Article 14 applies to government policies and even in contractual matters if the policy or act of the Government fails to satisfy the test of reasonableness, then such act or decision would be unconstitutional.

25. Article 14 of the Constitution requires that actions and decisions of Government shall be fair and it forbids different treatment within the same class. It is also well-settled that reasonable classification is permissible provided the



classification meets the twin conditions of (i) it is founded on an intelligible differential which distinguishes persons grouped together from those left-out of the group and (ii) the differential has a rational relation to the object sought to be achieved by such an action or decision. On applying this principle to the facts of this case, there appears no intelligible differential for exempting one class of ISPs from licence fee on revenues from pure internet services while imposing such licence fee for same services on another group. Even if some differential be imagined although none has been argued, it is nearly impossible to link such imaginary differential with the decision to levy licence fee on the basis of a changed definition of AGR which includes revenues from pure internet service also.

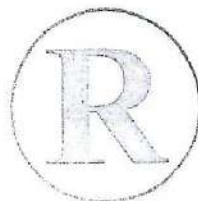
26. It is satisfying to note that it is not the pleadings of the respondent that the two groups should be treated unequally. During arguments it has been submitted that old regime granted exemption of licence fee in respect of revenue from pure internet service and therefore, so long as the old licences are existing and operational, they will constitute a different class. Non-levy of licence fee on that class can not/should not entitle the licensees under the new regime or those who have migrated due to the expiry of old licences to claim exemption. On its face, the arguments appear attractive but on scratching the surface, it is found that the recommendation of TRAI as far back as in 2010 required all ISP licensees to



migrate to UL regime for renewal also. There was no disagreement with such recommendation but the matter remained pending and in spite of obvious implications, renewal was granted even till June, 2013 including new licences under the old regime. This can only show that the respondents were in favour of no licence fee over revenues from pure internet service. This required that such policy be observed uniformly in respect of future ISP licences also both on account of Article 14 and Article 19(1)(g) of the Constitution so as to ensure level playing field till adoption of any common new policy. Without ensuring this, impugned decision has rightly been assailed on the ground of violating the principle of level playing field.

27. The differential of “old regime” and “new regime” only for creating two classes is not sufficient. As already observed, the differential must have a rational relation to the object. No object for classification is visible or discernible nor there is any relation between the differential and the object, if it is to enhance the collections from the licence fee. Not creating two classes will contribute more for enhancing the collections from licence fee.

28. The first contention advanced on behalf of the petitioners that the impugned decision is in violation of principle of providing a “level playing field” is thus found to have merits. The petitions must succeed on this ground alone. However,

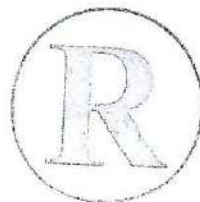


since the parties have been heard on the other issue also, the same is also discussed hereinafter.

Whether the impugned decision of the respondent is in violation of Section 11 of TRAI Act.

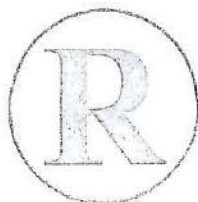
29. Section 11(1) of the Act lays down the functions of the Authority under two heads; the first is covered under (a) requiring the Authority to make recommendations either *suo moto* or on a request from the licensor on 8 matters enumerated thereunder. Under (b), the Authority is given functions which require action and are different from recommendatory functions. It is made clear by the first proviso to Section 11(1) that the recommendations of the Authority specified in Clause (a) shall not be binding upon the Central Government. However, this proviso is not absolute and is clearly conditioned by other provisos. The second proviso mandates, without option, that the Central Government shall seek Authority's recommendation in matters covered by sub-clauses (i) and (ii) of Clause (a) of sub-section(1) in respect of a new licence to be issued to a service provider. The Authority is also mandated to forward its recommendations within a period of 60 days from the receipt of request from the Government.

30. The third proviso is not relevant for the present purpose but it shows that if the Authority requires further information or documents than the Government has



to supply the same in a time bound manner, within a period of 7 days. The fourth proviso entitled the Central Government to issue a licence to a service provider if no recommendations are received from the Authority within the period of 60 days or within such extended period as may be mutually agreed between the Government and the Authority. The last and the fifth proviso lays down a clear procedure when the Central Government is of a *prima facie* conclusion that the recommendation of the Authority cannot be accepted or that it needs modification. In such a situation it is required to refer the recommendation back to the Authority for reconsideration. The Authority may make further recommendation to the Central Government within 15 days and on receipt of such further recommendation, if any, the Central Government shall take final decision.

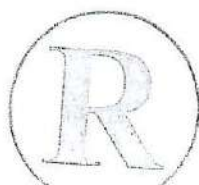
31. The provisos noticed above clearly show that Central Government although free not to accept the recommendations of the Authority, has to mandatorily seek recommendations when the matter involves terms and conditions of licence to a service provider, particularly, in respect of new licence, as is the case in the present matter. Though a time limit of 60 days is prescribed for the Authority to forward its recommendations but the fourth proviso enables the parties to mutually agree to extend such period. There is no good reason to read into this proviso that such mutual agreement must be through a written instrument. It may be inferred even by conduct because although Central Government can proceed to issue a licence



without waiting beyond 60 days, the purpose of waiting for recommendations and having a effective consultation is to derive benefits from an expert and independent body such as the Authority and hence when the Central Government does not issue a further time limit and waits for the recommendation as in the present case, it has to be construed that the period of 60 days has been extended by mutual agreement.

32. In the present case there is no exercise of power under fifth proviso and the Authority was not asked to reconsider or make further recommendation under the said proviso.

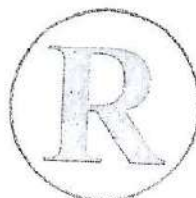
33. On facts the respondent has clearly accepted in its communications that it was waiting for recommendation in respect of issue of AGR/licence fee for ISPs even till January 2014 and thereafter the recommendations of TRAI were received on these issues on 01.05.2014. Admittedly, the recommendations are still pending for decision by the Government. These facts lead to a clear inference that the Central Government while on the one hand issued UL Guidelines on 19.08.2013, it did not communicate to the Authority that new licenses under UL be issued in January 2014 if the recommendations are not made by a particular time. The issuance of UL ISP Licence from January 2014 was an option open to the Central Government but it had to act in a transparent manner and let all concerned including the Authority know of such a course of action. That course of action was clearly not followed and hence we are of the considered view that the impugned



decision or action is not in conformity with the requirements of fairness and transparency inherent in Section 11(1) of the Act.

34. The legal requirement that the Government, even when it has the necessary powers must act fairly and in a transparent manner has been well recognized in several judicial pronouncements. This principle emanates from Articles 14, 19(1)(g) and 21 of the Constitution. There is no good reason not to seek compliance of this principle when the Government is required to act as per provisions of Section 11(1) of the Act. The aforesaid principles have been highlighted by the Apex Court in Paras 80, 86, 89 and 92 of the judgment in the case of **Cellular Operators Association of India & Ors. Vs. Telecom Regulatory Authority of India & Ors., (2016) 7 SCC 703.**

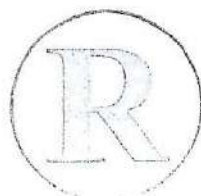
35. On behalf of petitioners reliance has rightly been placed upon observations of the Hon'ble Supreme Court in Para 68 of the judgment in the case of **Bharti Airtel Ltd. Vs. Union of India, (2015) 12 SCC 1** in support of the proposition that upon receipt of a recommendation from TRAI if the Government comes to a *prima facie* conclusion that a recommendation cannot be accepted or needs certain modification, the Government is required to refer the matter back to TRAI for reconsideration. Government of India can take a final decision on receipt of a reconsidered opinion of TRAI. Such a provision is to ensure healthy respect for the views of the Regulator which is an expert body for the concerned sector. Such



fair procedure is not affected by the provisions in the first proviso that Government is not bound by the opinion of TRAI falling under Section 11(1)(a) of the Act.

36. It has been contended on behalf of petitioners that even if they have applied for or migrated to UL ISP licenses, they cannot be deprived of their right to claim benefits of Articles 14, 19 and 19(1)(g) which are fundamental rights because agreements or contracts between State and the licensees will be void if they are found to be unreasonable and unconstitutional. In such a situation the contracts must be treated to be opposed to public policy and therefore void, being violative of Section 23 of the Contract Act. The aforesaid plea is supported by the judgment of Supreme Court in the case of **Daulat Sitaram Kodone & Ors. Vs. State of Maharashtra & Ors., (2014) 13 SCC 341.**

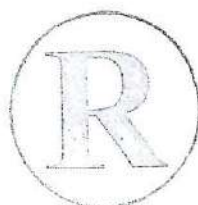
37. On behalf of respondent, the aforesaid plea has been contested by submitting that the petitioners having applied for licence under UL regime and on being granted the right to render services as ISP, cannot approbate and reprobate at the same time. For this proposition reliance has been placed upon a judgment of the Apex Court dated 05.10.2010 in the case of **Shyam Telelink Ltd. Vs. Union of India.** That judgment does not apply to the facts of the present case. In that matter the appellant unconditionally accepted a migration package offered to all the telecom operators. Thereafter the appellant challenged a demand arising out of the agreement based upon unconditional acceptance of the migration package. Such a



plea was negated by this Tribunal and also by the Apex Court on the principles embodied in English Common Law and also on equitable principle of estoppel. In that matter the constitutional principles and fundamental rights were not available to the help of the appellant and were not considered. Hence in the facts of this case the judgment in the case of **Daulat Sitaram Kodone(supra.)** is more appropriate to be followed as a precedent.

38. The submissions made on behalf of the respondent that no level playing field can be claimed when the service providers are operating under two different regimes is already considered earlier and rejected. The other plea that the Central Government has power under Section 4 of the Indian Telegraph Act 1885 to grant the licence on any conditions and for any consideration as it deems fit is not an adequate answer to the issue of level playing field and unreasonable classification urged on behalf of the petitioners and considered earlier.

39. The submission that Government has the discretion and power to fix a cut-off date between the two regimes and that issuance of UL licence on 10.01.2014 is a good explanation for the cut-off date of 10.01.2014 and not arbitrary is not relevant when the issue is not of reasonableness of cut-off date but of arbitrariness in creating two classes of ISPs without any rational for such classification and without intelligible differential. The cut-off date issue is not relevant even for meeting the pleas based on the principle of level playing field.



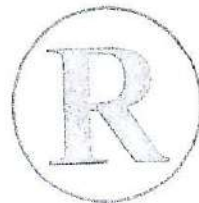
40. It has been rightly pointed out on behalf of the petitioners that the respondent in its counter affidavits has recognized the existing situation of non-level playing field and that it proposes to create a level playing field between various ISPs by taking a decision on the pending TRAI recommendations of 01.05.2014 and 06.01.2015. In fact in the pleadings, there is no justification for classification of ISPs who were admittedly providing same service and subjecting them to two different sets of conditions solely because of impugned decision to introduce new licence regime for some of the ISPs while many are continuing or are being allowed to continue under the old regime.

41. In fairness to learned counsel for the Union of India, it must be noted that he took the stand that DoT in its letter dated 10.02.2014 wrote to TRAI that non-finalisation of the definition of AGR/LF is leading to delay in migration of existing ISPs to UL and also in issuance of new ISP Licences under UL. According to him since on this issue no recommendation had been received for quite some time, hence, AGR/LF issue was resolved by DoT itself. This submission however is not supported by the contents of that letter or the other correspondences and not pleaded even in the counter affidavit. The facts disclose that DoT has taken the impugned decision and view as an interim measure awaiting the recommendations of TRAI but even after the recommendations were received in 2014 and 2015 it has been unable to unscramble the egg and hence, there is no decision so far either



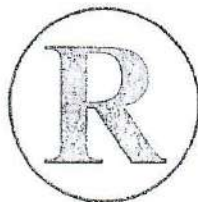
to accept or to reject the recommendations. The difficulty in taking a decision appears to have been aggravated due to issue of "level playing field". The stand of the petitioner association is that it is not opposed to the levy of licence fee as per the new concept of AGR which is to include revenue from pure internet service but such licence fee should be levied uniformly on all ISPs and hence, a prospective date needs to be selected for implementation of the proposed licence fee if the decision of DoT based upon recommendation of TRAI favours such a course of action. But the petitioners are opposed to the impugned decisions so long as the playing field is not made level. For the reasons already indicated earlier, we accept the case of the petitioners as having merit.

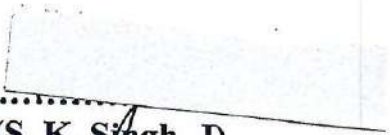
42. As a result the decision to include revenue from pure internet services in the AGR for levy of licence fee on the ISPs under Unified Licence regime is set aside on the grounds already considered and decided in favour of the petitioners. Accordingly, the impugned demands of licence fee are set aside with a direction to raise revised demands for licence fee on the basis of same concept of AGR as is being done in respect of ISPs holding licences under the old regime. In view of our interim protection granted to the petitioner on conditions, they are liable to pay such revised demands forthwith after deducting payments, if any, made in the meantime towards licence fee by way of *ad hoc* payments as per understanding. The respondent is expected to expedite the process of taking a decision keeping in




view the relevant recommendations of TRAI as well as the constitutional requirement of providing and safeguarding a "level playing field" for all the ISPs. This should be done without any delay so as to end the uncertainty for the ISPs which has continued to grip them for the last about five years.

43. The petitions are allowed to the aforesaid extent. In the facts of the case, there shall be no order as to costs.




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(S. K. Singh, J)
Chairperson


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(A.K. Bhargava)
Member

