

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

I.A.NO.46116 OF 2020

IN

CIVIL APPEAL NOs. 250-252 OF 2019

TELECOM REGULATORY
AUTHORITY OF INDIA

...APPELLANT(S)

VERSUS

M/S BHARTI AIRTEL LTD. AND ORS. ETC.

...RESPONDENT(S)

ORDER

1. Pending the appeals against the final order passed by Telecom Disputes Settlement and Appellate Tribunal (hereinafter referred to as 'TDSAT'), the Telecom Regulatory Authority of India (hereinafter referred to as 'TRAI'), which is the appellant in the appeals, has come up with this application for an interim direction to the respondents to disclose information/details sought by the appellant regarding segmented offers.

2. We have heard Mr. Tushar Mehta, learned Solicitor General for the applicant/appellant namely TRAI, Mr. Aspi Chinoy, learned senior counsel for respondent.

3. Sans unnecessary details, the circumstances leading to the present application can be summarised as follows:-

- a) In exercise of powers conferred by Section 11(1)(b)(i) read with Section 11(2) of the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as the 'Act'), TRAI issued an order namely the Telecommunication Tariff (63rdAmendment) Order, 2018 dated 16.02.2018;
- b) Challenging the said Tariff Order, Bharti Airtel Limited, Idea Cellular Limited and Vodafone Mobile Services Limited, filed appeals in Telecom Appeal Nos. 1, 2 and 3 of 2018 before the TDSAT;
- c) Primarily, the challenge was to the "Reporting Requirements" and "Significant Market Power" (for short SMP). Yet another grievance was about the insistence of TRAI about the disclosure of segmented discounts/concessions;
- d) Pending appeals before TDSAT, the Telecom Service Providers sought interim stay of the Tariff Order. TDSAT issued an interim arrangement on 24.04.2018 staying the relevant clauses relating to the Reporting Requirements and the definition of SMP. However, the Tribunal permitted TRAI

- to ask for details of segmented discounts/concessions for analysis. At the same time the service providers were exempted from disclosing the names of their customers and other sensitive information;
- e) Challenging the interim arrangement so issued by TDSAT on 24.04.2018, TRAI filed writ petitions before the High Court of Delhi. By a judgment dated 04.05.2018, the writ petitions were dismissed, however with a request to the Tribunal to dispose of the appeals as expeditiously as possible;
- f) Thereafter, TDSAT heard the appeals finally and allowed them partially by a final order dated 13.12.2018. By this order, TDSAT set aside the Telecom Tariff 63rd Amendment Order in so far as it changes the concepts of SMP, Non-predation and the related provisions;
- g) It is against the said final order of TDSAT that TRAI has come up with the above Civil Appeals;
- h) On 21.01.2019 the Appeals were admitted. However, on the prayer for stay, this Court recorded:-
- “There will be no stay of the impugned judgment except to the extent of remand”.
- i) Thereafter the appellant namely TRAI has come up with this application in I.A.No.46116 of 2020 seeking an interim direction to the service providers to disclose information/details sought by the appellant regarding the segmented offers.

4) On the basis of a chart filed as Annexure A-5 indicating the number of segmented offers provided by Telecom Service Providers (for short TSPs) during a period of 12 calendar months from January, 2019 to December, 2019 in various states, it is contended by the applicant – TRAI, that the details of these offers are not even disclosed to TRAI and that therefore, despite being a regulator, TRAI is not in a position to analyse whether the plans are transparent and non-discriminatory and whether predatory pricing is resorted to by TSPs in the garb of segmented offers or not. According to the applicant, they requested the TSPs to provide information relating to these offers, but the TSPs failed to disclose the information. It is the contention of the applicant that the TSPs are under a statutory obligation to offer tariffs in a transparent and non-discriminatory manner and to report all tariffs to the authority.

5) In response, it is contended by the TSPs that segmented offers, as found by TDSAT in the impugned order, constitute “confidentially designed trade practices”. Therefore, the TDSAT held that there is no need for reporting. But at the same time TDSAT allowed the applicant to seek from the TSPs, the number of segmented offers made available to their existing customers, along

with a declaration that the principles of non-discrimination were being followed. According to the respondents, they are complying with the directions so issued in the impugned order.

6) It is also contended by the respondents that whenever the applicant-TRAI wanted to call for details of segmented offers about which TRAI received complaints, the respondents are ready and willing to furnish the same. However, so far TRAI has not received any complaint. Therefore, it is contended by the respondents that TRAI cannot seek such interim directions, especially after having failed to secure a stay of the operation of the impugned order. The respondents also contend that the grant of interim directions as prayed for, would tantamount to allowing the appeal itself.

7) We have carefully considered the rival contentions and also perused the pleadings and documents.

8) At the outset it should be pointed out that the jurisdiction and power of TRAI to issue the Telecommunication Tariff Order dated 16.02.2018 was not seriously disputed at least in the appeal filed by one of the TSPs. This is recorded in Para-4 of the impugned order.

9) Though the jurisdiction and power of TRAI appears to have been questioned in one of the appeals before TRAI, the TDSAT has not recorded any categorical finding that TRAI had no jurisdiction and power to demand details of segmented offers. All that TDSAT found in Para-18 of the impugned order is that segmented offers and discounts offered in the ordinary course of business to existing customers without any discrimination within the target segment, do not amount to a tariff plan and that therefore there is no need for reporting. The TDSAT held in this regard that the issue of confidentiality has also to be taken note of.

10) After holding so, TDSAT recorded an important finding in Para-18 of the impugned order which reads as follows:-

“...But the issue of non-discrimination between the same “segment” is too important to be ignored and that would require reporting in any particular case when the Authority has reasons to call for reporting any so called segmented offers/discounts during a particular period. Such power is ancillary and essential for effective implementation of the principle of non-discrimination in the matter of all tariff plans...”

11) In the light of the aforesaid finding, TDSAT eventually ordered the remand of the matter back to TRAI, for settling the issue of segmented offers through open consultation process. If TRAI did not

have any power to call for details regarding segmented offers and if it was a case of complete lack of jurisdiction, the question of remanding the matter back to the Authority would not have arisen.

12) The TSPs do not appear to be aggrieved by the order of remand passed in respect of segmented offers. At least we are not informed of the filing of any appeals by the TSPs against the impugned order. Therefore, this is not a case of exercise by TRAI, of a power not at all vested in them in law.

13) As far as confidentiality is concerned, the learned Solicitor General agreed that the same should be preserved. By issuing appropriate directions, confidentiality can be ensured.

14) The argument of the respondents that the prayer for stay of operation of the impugned order was granted only to a limited extent, at the time when the appeals were admitted, does not take the respondents anywhere. In fact, the impugned order dealt with several issues such as segmented offers, SMP, non-predation etc. The prayer for stay related to all the issues and the order of remand. Therefore, the limited interim order passed on 21.01.2019, at the time of admission of the appeals, does not operate as a fetter

for the applicant to seek interim directions, limited to the extent of disclosure of details relating to only one of the several issues.

15) For the very same reason as aforesaid, the argument of the respondents that the grant of interim directions as prayed for would tantamount to allowing the appeals, does not hold water. There are several issues involved in the appeal. The interim directions now sought are confined to only one of the several issues and what is sought in respect of that issue is also only a limited direction.

16) As we have pointed out in the beginning, the Telecommunication Tariff Orders are issued by TRAI in exercise of the power conferred by Section 11(1)(b)(i) read with Section 11(2) of the Act. The first Telecommunication Tariff Order was issued on 09.03.1999. Even the said Order contained provisions for Reporting Requirement under Clause 7 and the definition of the expression “Reporting Requirement”.

17) The Telecommunication Tariff (17th Amendment) Order issued on 22.01.2002 brought about some changes in “Reporting Requirement” and amended the definition of the said expression. The Telecommunication Tariff (21st Amendment) Order issued on

13.06.2002 made further changes to Clause 7 which dealt with Reporting Requirement.

18) By the Telecommunication Tariff (30th Amendment) Order dated 16.01.2004, the definition of “Reporting Requirement” was substantially modified, so as to include the principles of non-discrimination and non-predation. This was amended by the 42nd Amendment Order dated 07.03.2006. The 52nd Amendment Order dated 19.09.2012, introduced a penalty clause to the Reporting Requirement. Eventually the impugned order namely the 63rd amendment Order dated 16.02.2018 was issued. The amended definition of Reporting Requirement makes it clear that the Reporting Requirement is for the information and record of the TRAI.

19) In the light of the above historical background, what is now sought by TRAI to ensure adherence to the regulatory principles of transparency, non-discrimination and non-predation, cannot be said, at least prima facie to be either illegal or wholly unjustified. Hence the I.A. is allowed and a direction is issued to the respondents to disclose information/details sought by the applicant/appellant regarding segmented offers. But it is the duty

and responsibility of TRAI to ensure that such information is kept confidential and is not made available to the competitors or to any other person.

20. I.A.No 46116 of 2020 is disposed of accordingly.

.....CJI
(S.A. BOBDE)

.....J.
(A.S. BOPANNA)

.....J.
(V. RAMASUBRAMANIAN)

New Delhi
November 06, 2020