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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment decided on: 04.05.2018

\+ W.P.(C) 4763/2018

TELECOM REGULATORY AUTHORITY OF INDIA ..... Petitioner
Through: Mr. Sandeep Sethi, ASG with Ms. Maneesha Dhir, Mr. Abhishek Kumar, Mr. Savansh Gupta and Mr. Mahipal Singh, Advocates.

versus

IDEA CELLULAR LTD. & ANR. .....Respondents
Through: Mr. Darius Khambatta with Mr. Soli Cooper, Sr. Advocates with Ms. Alka Bharucha, Mr. Angad Singh Dugal and Ms. Sneha Singh, Advocates for R-1.
Mr. N. Venkatraman, Mr. Ramji Srinivasan, Sr. Advocates with Mr. Ritin Rai, K.R. Sasiprabhu, Mr. Hiten Sampat, Mr. Vishnu Sharma, Mr. Abhipshit Mishra, Mr. Abhas Kshetrapal and Ms. Kritika Bharadwaj, Advocates for R-2.

\+ W.P.(C) 4782/2018

TELECOM REGULATORY AUTHORITY OF INDIA ..... Petitioner
Through: Mr. Tushar Mehta, ASG with Ms. Maneesha Dhir, Mr. Abhishek Kumar, Mr. Savansh Gupta and Mr. Mahipal Singh, Advocates.

versus

BHARTI AIRTEL LTD. & ORS. .....Respondents
Through: Mr. P. Chidambaram with Mr. Gopal Jain, Sr. Advocates with Mr.

Harsh Kaushik and Mr. Abhay Chattopadhyay, Advocates for R-1 & R-2.
Mr. N. Venkatraman, Mr. Ramji Srinivasan, Sr. Advocates with Mr. Ritin Rai, K.R. Sasiprabhu, Mr. Hiten Sampat, Mr. Vishnu Sharma, Mr. Abhipshit Mishra, Mr. Abhas Kshetrapal and Ms. Kritika Bharadwaj, Advocates for R-3.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

CAVEAT No.417/2018

1) Since, there is an appearance on behalf of caveator, the caveat stands discharged.

C.M. APPL. No.18358/2018 in W.P.(C) No.4763/2018
C.M. APPL. No.18439/2018 in W.P.(C) No.4782/2018

2) Allowed, subject to all just exceptions.

W.P.(C) No.4763/2018 & 4782/2018

3) These are two writ petitions which have been filed by the Telecom Regulatory Authority of India (in short 'TRAI') to impugn the common order dated 24.04.2018, passed by the Telecom Disputes Settlement and Appellate Tribunal (in short 'Tribunal'), in Appeal No.1 and 2 of 2018.

4) The appeals before the Tribunal were preferred by Idea Cellular Ltd. which is arrayed as respondent no.1 in W.P.(C) No.4763/2018 and by Bharti Airtel Ltd. which is arrayed as respondent no.1 in W.P.(C) No.4782/2018.

5) These appeals preferred by Bharti and Idea lay a challenge to the Telecommunication Tariff (63rd Amendment) Order, 2018 (in short '2018 TTO'). To be noted, 2018 TTO was notified on 16.02.2018.

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6) It is important to note that the 2018 TTO was issued by TRAI in exercise of its powers conferred upon it by Section 11(2) read with provisions of sub-section (1) clause (b) sub-clause (i) of the very same section.

7) In effect, by virtue of 2018 TTO the petitioner has brought about amendments in the Telecommunication Tariff Order, 1999 (in short '1999 TTO'). It appears that apart from anything else both Bharti and Idea were aggrieved by the amendment brought about in the definition of 'reporting requirements' and 'Significant Market Power' (in short 'SMP'). Furthermore, a grievance was also articulated by the said entities with regard to TRAI's insistence on disclosure of segmented discounts/ concessions. It appears that the non-disclosure of the information would lead to imposition of penalties.

8) The Tribunal after hearing parties by way of an interim arrangement had issued the following operative directions in paragraph 7 of the impugned order:

> "7. *In view of the above, the clauses in the impugned order related to the reporting requirement and definition of SMP are stayed. However, respondent will be entitled to ask for details of segmented discounts/ concessions for analysis but no penalty shall be imposed on that basis until further orders in these pending appeals. The appellants have expressed deep apprehension that if the reporting requires disclosure of names etc. of their customers, or other sensitive commercial information, disclosure of the same may adversely impact their business interests and the rival service providers may gain if they have access to such information. In our view, it would not be necessary for the appellants to disclose names of their customers and if there is any other sensitive information which they feel would affect their business interests, they would be at liberty to withhold such information but offer a written explanation for such withholding, to the respondent. If the respondent feels that relevant and necessary information is being withheld without just and good reasons, the matter may be*

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brought to the notice of this Tribunal for appropriate directions."

9) A perusal of the aforesaid extract would show that the Tribunal has issued the following directions: -

i) It has stayed the operation of 2018 TTO insofar as it relates to the reporting requirements qua the amended definition of SMP.

ii) While TRAI has been empowered to ask for segmented discounts/ concessions for the purposes of analysis, it has been restrained from imposing penalties until further orders.

iii) Bharti and Idea have been, for the moment, exempted from disclosing the names of their customers and other sensitive information which according to them could effect their business interests. However, the exemption qua withholding of sensitive information comes with the caveat that if they were to do so, then, they would have to furnish an explanation to TRAI in respect of the same. Furthermore, in case TRAI were to come to a conclusion that relevant and necessary information is being withheld, without reason, it would be free to approach the Tribunal for obtaining appropriate directions.

10) TRAI, however is aggrieved by the aforesaid operative directions contained in the impugned order and, has thus, approached this Court by way of the captioned petition under Article 226 of the Constitution.

11) Mr. Tushar Mehta and Mr. Sandeep Sethi, learned ASGs, who, appeared on behalf of TRAI, assailed the order of Tribunal, broadly, on the following grounds: -

i) That the impugned order did not contain any reasons and is thus, liable to be vacated.

ii) 2018 TTO is a statutory order issued in exercise of powers contained under Section 11 of the Telecom Regulatory Authority

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of India Act, 1997 (in short '1997 Act') after deep deliberation and, therefore, it ought to have been allowed its full play.

iii) TRAI, was entitled to collect and collate information in the best interest of the customers. The purpose of 2018 TTO was to provide a level playing field for all stakeholders based on the principles of transparency, non-discrimination and non-predation in respect of imposition of tariff.

iv) 2018 TTO was passed bearing in mind the provisions of sub-section (4) of Section 11 of the 1997 Act which requires TRAI to ensure that transparency is maintained in exercise of powers conferred upon it under the provisions of the said Act.

v) 2018 TTO was issued after discussions were held with various stakeholders pursuant to the issuance of the consultation paper titled: Regulatory Principles of Tariff Assessment. This paper was prepared as far back as on 17.2.2017.

vi) TRAI, is well within its powers to fix tariffs and that, in the best interest of all stakeholders, it has instead adopted a regime of forbearance subject to the Telecom Service Providers (TSP) adhering to the principles of transparency, non-discrimination and non-predation. To ensure that these principles are adhered to by TSPs, collection of information and its analysis by TRAI is critical.

vii) The Tribunal by passing the impugned order has completely overlooked the rationale given in the explanatory memorandum appended to 2018 TTO. The Tribunal in the impugned order does not advert to any of these aspects set out in the explanatory memorandum.

12) TRAI has issued 2018 TTO pursuant to the judgment of the Tribunal dated 01.02.2018, passed in a batch of appeals which were preferred by Bharti and Idea. In this behalf, particular emphasis was laid

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on pagaraph 31 and 32 of the said order.

13) Mr. Ramji Srinivasan and Mr. Venkatraman, Senior Advocates who appeared on behalf of Reliance Jio Infocomm Limited (RJIL) which is arrayed as respondent no.2 in W.P.(C) No.4763/2018 and as respondent no.3 in W.P.(C) No.4782/2018, supported the contention made on behalf of TRAI. Emphasis was laid by learned counsels on the fact that RJIL was following the mandate of 2018 TTO to its last detail. It was their contention that under the extant Regulatory Regime, TSPs cannot have more than 25 tariff plans. It was their say that Bharti and Idea were trying to circumvent the same by adopting a methodology of segmented discounts. By this device, according to learned counsels, discounts were offered to preferred customers which violated the principles of non-discrimination. It was submitted that the disclosure of information was vital in order to maintain a level playing field.

14) Mr. Chidambaram, Mr. Gopal Jain and Mr. Darius Khambatta, learned senior counsels, who appeared for Idea and Bharti in the captioned writ petitions, opposed the submissions advanced on behalf of TRAI and RJIL, broadly, on the following grounds: -

i) First, the order was reasoned, and that, it had been passed after hearing all the parties.

ii) The impugned order put in place only an "interim arrangement" pending disposal of the appeal and therefore, this Court, at this stage, ought not disturb the arrangement put in place by the Tribunal by interfering with the impugned order.

iii) The 2018 TTO has, significantly, changed the regulatory regime which had been in place for the past 16 years.

15) By way of an example, Mr. Chidambaram drew my attention to the definition of SMP given in the Telecommunication Interconnection Usage Charges (IUC) Regulation, 2003 (in short '2003 IUC'), dated

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29.10.2003. For the sake of convenience, the said definition is extracted hereafter: -

> *"Significant Markt Power (SMP) means "A Serivice Provider holding a share of at least 30% of total activity in a licensed telecommunication service area. These Services are categorised as Basic Service, Cellular Mobile Service, National Long Distance Service and International Long Distance Service." Where "Activity" would mean and include any one or more of the following:*
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> *(a) Subscriber Base*
> *(b) Turnover*
> *(c) Switching Capacity*
> *(d) Volume of Traffic "*

15.1) Mr. Chidambaram contrasted the definition of SMP given in 2003 IUC with the amended definition of SMP given in 2018 TTO; the said definition reads as follows: -

> *"If "significant market power (SMP)" means a service provider holding a share of at least thirty per cent. of total activity in a relevant market;*
>
> *Explanation – Total activity shall be determined on the basis of either subscriber base or gross revenue. "*

15.2) Contrasting the amendment made in the definition, Mr. Chidambaram submitted that if the amended definition is adhered to by TRAI, then, RJIL will not fall within the ambit of the definition of SMP as it is a new entrant in the field who would not have a large enough subscriber base. In sum, the thrust of Mr. Chidambaram's argument was as to whether the private respondents, that is, Bharti and Idea were right or not was a matter which had to be tested before the Tribunal based on materials put before it by then. The argument was that, while the reasons in the impugned order were brief they were certainly not bereft of rationale and, therefore, no interference was required.

16) I have heard the learned counsel for the parties and perused the record. According to me, the Tribunal has, as a matter of fact, given reasons, though brief in paragraph 6 of the impugned order. Those reasons for the sake of convenience, in the said part of the order are extracted hereafter: -

> "*6. Having considered the stand of both the parties as well as the relevant materials, it is apparent that the norms of Regulation prevailing since quite some time and notified in 2003 as the "The Telecommunication (Interconnection Usage Charges) Regulation 2003" have been altered in a significant manner in respect of predatory pricing as well as in respect of reporting requirement. Related to the latter requirement is the change which now requires reporting of all concessions/ discounts given to any category of consumer for any reason whatsoever. The issues will have significant impact and ramifications.*"
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> (emphasis is mine)

17) As would be evident, what has prevailed with the Tribunal is the manner in which changes have been brought about in the regulatory regime. As indicated above, while noting the submissions advanced on behalf of Bharti and Idea, what has come to light is that the fact that the definition for SMP has been changed, to my mind, would require examination to ascertain as to whether or not it would disturb the level playing field as amongst the TSPs.

17.1) Insofar as the petitioners are concerned, in my view, the interim arrangement sufficiently protects their interests while it allows for Bharti and Idea to retain sensitive information which could affect their business interests, TRAI has been given leeway to approach the Tribunal for necessary directions in case it is of the view that the information sought for is being withheld for reasons which are neither just nor good. I am of the view that since what has been put in place by the Tribunal is an interim arrangement which is obviously *pro tem* in nature, it could, if the situation so demands withdraw or even modify the interim arrangement.

17.2) At this juncture, I must also point out that I had put to the counsels for Bharti, Idea and RJIL as to whether in the given circumstances, expedition of pending appeals would help. Counsels for parties unanimously indicated that if the hearing of the pending appeals is expedited, then, it would bring about a definitive closure of the matter insofar as the Tribunal is concerned.

18) Thus, for the foregoing reasons, I am not inclined to interfere with the impugned order passed by the Tribunal. Since, I was informed that TRAI has already filed its reply in the appeals pending before the Tribunal, RJIL is given time till 10.05.2018 to file its reply. Bharti and Idea will file their rejoinder on or before 16.05.2018. The matter will be placed for directions before the Tribunal on 17.5.2018. The Tribunal is requested to hear and dispose of the appeals as expeditiously as possible.

19) *Dasti* under the signatures of Court Master.

RAJIV SHAKDHER
(JUDGE)

MAY 04, 2018
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