REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5253 OF 2010

Bharat Sanchar Nigam Limited ... Appellant

versus

Telecom Regulatory Authority of India and others ... Respondents

With

Civil Appeal Nos. 951-952 of 2005

Civil Appeal No. 3298 of 2005

Civil Appeal No. 3299 of 2005

Civil Appeal No. 4529 of 2005

Civil Appeal Nos. 5834-5836 of 2005

Civil Appeal No. 5837 of 2005

Civil Appeal No. 6049 of 2005

Civil Appeal No. 802 of 2006

Civil Appeal No. 2731 of 2006

Civil Appeal No. 2794 of 2006

Civil Appeal No. 3504 of 2006

Civil Appeal Nos. 4965-4966 of 2007

Civil Appeal No. 177 of 2008

Civil Appeal Nos. 598-599 of 2008

Civil Appeal No. 5184 of 2010

Civil Appeal No. 5873 of 2010

Civil Appeal No. 6068 of 2010

Civil Appeal No. 6255 of 2010

Civil Appeal No. D28298 of 2010

T.C. (C) No. 39 of 2010

Civil Appeal Nos. 271-281 of 2011

JUDGMENT

G.S. SINGHVI, J.

1. By an order dated 6.2.2007 passed in Civil Appeal No. 3298 of 2005 – Telecom Regulatory Authority of India (Authority) v. Bharat Sanchar Nigam Limited (BSNL) and connected matters, a two Judge Bench made a reference to the larger Bench for determination of the following substantial questions of law of public importance:

1. Whether in the event of any inconsistency between the terms and conditions of the licenses issued under Section 4 of the Indian Telegraph Act, 1885 and the provisions of the Telecom Regulatory Authority of India Act, 1997 (for short, 'the Act'), the provisions of the Act would prevail in view of the purpose and object for which the Act has been passed, i.e., for ensuring rapid development of telecommunications in the country incorporating the most modern technology and, at the same time, protecting the interests of the consumers and the service providers?

2. Whether Authority has powers to fix the terms and conditions of inter connectivity between service providers, in respect of all the licenses, irrespective of the fact whether licenses issued before or after 24.1.2000 - especially in view of the non-obstante clause in sub-section (1) of Section 11 and sub-clause (ii) of Clause (b) of sub-section (l) of Section 11 of the TRAI (Amendment) Act of 2000?

3. Whether Authority has no power to fix terms and conditions of interconnectivity between service providers in respect of licenses issued

after 24.01.2000 including terms and conditions of interconnection agreements - in view of, inter-alia, the scheme laid down in the provisos to Section 11(1) of the TRAI Act, 1997 as amended on 24.01.2000 and if it does not have any such power what would be the harmonious construction of the amended clause 11(1)(b)(ii) and the new scheme more specifically embodied in the provisos?

4. Whether under the amended provisions of the TRAI Act, 1997 introduced w.e.f 24.01.2000 - the harmonious construction of Section 11(1)(b)(ii) and the scheme of the provisos to Section 11(1) would allow the Authority to have the power to fix the terms and conditions of interconnectivity with respect to licenses issued before 24.1.2000, only to the extent the licensor (Govt. of India) accepts the recommendations of the Authority for incorporation in the new licenses, so as to achieve level playing field between the service providers granted licenses before and after the amendment of the TRAI Act?

5. Whether the appeals are maintainable in the present form?

2. The larger Bench heard the arguments on various dates but released the cases vide order dated 19.10.2011. Thereafter, by mistake the Registry listed all the matters before a two Judge Bench. During the course of hearing, Shri A.S. Chandhiok, learned senior advocate appearing for BSNL invited the Court's attention to orders dated 6.2.2007 and 21.10.2010 and pointed out that the cases were earlier heard by the larger Bench. Thereupon, the two Judge Bench directed that the cases be posted before the larger Bench.

3. When the cases were listed before this Bench, learned counsel for the parties agreed that a preliminary issue relating to jurisdiction of the Telecom Disputes Settlement Appellate Tribunal (TDSAT) to entertain challenge to the regulations framed by the Authority may be decided before the questions framed vide order dated 6.2.2007 are taken up for consideration. Thereupon, the Court decided to hear the arguments on the following question:

> "Whether in exercise of the power vested in it under Section 14(b) of the Act, TDSAT has the jurisdiction to entertain challenge to the regulations framed by the Authority under Section 36 of the Act.

4. For better appreciation of the arguments advanced by learned counsel for the parties, we may notice the facts borne out from the records of different appeals.

Civil Appeal Nos. 5253, 5184, 5873, 6068, 6255 of 2010 and Civil Appeal No. D28298 of 2010

5.1 The delay in filing and re-filing C.A. No. D28298 of 2010 is condoned.

5.2 These appeals have been filed by Bharat Sanchar Nigam Limited (BSNL), Cellular Operators Association of India (COAI), Association of Unified Telecom Service Providers of India (AUSPI), the Authority, M/s. Sistema Shyam TeleServices Limited and Mahanagar Telephone Nigam Limited (MTNL), respectively, against order dated 28.5.2010 passed by TDSAT whereby the appeal preferred by BSNL against the Telecommunication Interconnection (Port Charges) Amendment Regulation (1 of 2007) was allowed and the Authority was directed to give fresh look at the regulations and BSNL was directed not to claim any amount from any operator during the interregnum, i.e., from the date of coming into force of the regulations and the date of the order.

5.3 A perusal of the record shows that port charges came to be prescribed in Schedule 3 of the Telecommunication Interconnection (Charges and Revenue Sharing) Regulations, 1999, which came into force on 28.5.1999. By virtue of Clause 8, the regulations were given overriding effect qua the interconnection agreements. MTNL challenged the 1999 regulations before the Delhi High Court in Civil Writ Petition No. 6543/1999, which was allowed by the Division Bench of the High Court vide order dated 17.1.2000 [MTNL v. TRAI, AIR 2000 (Delhi) 208] and it was held that the Regulations framed under Section 36 of the Act could not be given overriding effect. Thereafter, the Authority framed the Telecommunication Interconnection (Port Charges) Amendment Regulations (6/2001). The port charges were specified in the schedule to the amended regulations. The amended regulations were challenged in Appeal Nos.11/2002 and 31/2003, which were allowed by TDSAT vide orders dated 27.4.2005 and 3.5.2005 respectively.

5.4 In view of the aforesaid orders of TDSAT, the Authority sought response of various service providers for review of port charges. In that process, BSNL raised objection to the jurisdiction of the Authority

to vary the terms and conditions of interconnection agreements or the contractual rates. On 2.2.2007, the Authority issued Telecommunication Interconnection (Port Charges) Amendment Regulation (1 of 2007) reducing the port charges required to be paid by private telecom operators to BSNL by about 23-29%. BSNL challenged Notification dated 2.2.2007 in Appeal No. 4/2007. By an order dated 28.5.2010, TDSAT allowed the appeal of BSNL and issued directions to which reference has been made hereinabove.

Civil Appeal Nos. 951-952/2005

6.1 Civil Appeal No. 951/2005 has been filed by the Authority against order dated 21.4.2004 by which TDSAT allowed Appeal No.2/2004 filed by BSNL questioning direction dated 31.12.2003 issued under Section 13 read with Section 11(1)(b) of the Act. Civil Appeal No. 952/2005 has been filed by the Authority against order dated 10.8.2004 by which TDSAT dismissed Petition No.2/2004 for review of order dated 21.4.2004.

6.2 On receiving information that some operators were disconnecting Points of Interconnection (PoI) for the reason of non payment of

Interconnection Usage Charges and other such reasons, the Authority issued direction dated 31.12.2003 under Section 13 read with Section 11(1)(b) conveying to all service providers that disconnection of PoIs was not desirable because the subscribers would be inconvenienced and all disputes should be resolved through mutual negotiations. It was also provided that if the dispute could not be resolved, then 10 days' notice of disconnection should be given to the erring party with a copy to the Authority. In the event of non-intervention by the Authority, the aggrieved party could disconnect the PoI or approach the Authority for determination of the matter.

6.3 BSNL filed Appeal No.2/2004 for striking down the aforesaid direction on the ground that only TDSAT was vested with the jurisdiction to decide the disputes and the Authority had no jurisdiction in the matter. TDSAT allowed the appeal and held that the Authority did not have the jurisdiction to entertain dispute between the service providers. TDSAT noted that the words "dispute" and "determination" have been used in the direction issued by the Authority, referred to the judgment of this Court in Cellular Operators Association of India v. Union of India (2003) 3 SCC 186 and held that the jurisdiction of

TDSAT is quite wide and is circumscribed only by the three instances, i.e., disputes before the MRTP Commission, Consumer Forums and those under Section 7B of the Telegraph Act.

6.4 The Authority filed Review Petition No. 2/2004 and argued that while the Authority can be faulted for the use of words "dispute" and "determination", its power to intervene cannot be questioned. Another plea taken by the Authority was that the regulations framed under Section 36 are in the nature of subordinate legislation and validity thereof cannot be questioned before TDSAT. The review petition was dismissed by TDSAT vide order dated 10.8.2004 reiterating that it had jurisdiction to entertain dispute relating to validity of regulations.

Civil Appeal Nos. 3298 and 4529 of 2005

7.1 These appeals are directed against order dated 27.4.2005 passed by TDSAT in Appeal Nos. 11 and 12 of 2002 filed by BSNL and MTNL respectively, challenging Clause 3.1 of the Telecommunication Interconnection (Reference Interconnect Offer) Regulation, 2002 (2 of 2002).

7.2 In exercise of its powers under Section 36 read with Section 11(1)(c) and (d) of the unamended Act, the Authority prescribed revenue sharing for service providers under the Calling Party Pays regime on 17.9.1999. This was challenged before the Delhi High Court. In its judgement [MTNL v. TRAI (supra)], the High Court observed that the Authority has no power to change or vary rights of parties under contracts or licenses.

7.3 After the judgment of the High Court, the Act was amended by Ordinance dated 24.1.2000 and Section 11(1)(b)(ii) was inserted to enable the Authority to fix the terms and conditions of interconnectivity between the service providers.

7.4 In exercise of the power vested in it under Section 36 read with Section 11(1)(b)(ii), (iii) and (iv), the Authority framed the 2002 Regulations. Under Clause 3.1 of these regulations, the service providers with significant market share were required to publish their Reference Interconnect Offer (RIO) within 90 days of the issue of the Regulations with prior approval of the Authority. The 2002 Regulations stipulate the broad framework, structure and provisions on which the service provider is to make an offer of interconnection with

other service providers. BSNL submitted the proposed RIO on 12.7.2002. MTNL also submitted proposed RIO sometime in 2002. The RIOs of BSNL and MTNL were approved with certain changes effected vide identically worded letters dated 9.10.2002.

7.5 BSNL and MTNL filed Appeal Nos. 11 and 12/2002 challenging letters dated 9.10.2002 issued by the Authority. It was contended *inter alia* that the Authority did not have the power to frame such a regulation. They argued that the changes suggested in the RIO were non transparent and under the garb of the regulations, the Authority cannot be conferred power to fix the terms and conditions of interconnectivity which BSNL and MTNL can offer to other service providers. Clause 3.1 was challenged insofar as it had been interpreted to take away the statutory right to appeal as granted under the Act.

7.6 TDSAT disposed of both the appeals vide order dated 27.4.2005. TDSAT extensively referred to the orders passed in Review Petition No.2/2004 in Appeal No.2/2004 (BSNL v. TRAI) and Appeal No.3/2005 as also the order passed by the Delhi High Court wherein it was held that TDSAT is empowered to hear appeals involving challenge to the validity of the regulations framed under Section 36.

TDSAT then held that even after amendment of the Act, the Authority does not have the power to amend or override the terms and conditions of the interconnect agreements executed by the service providers.

Civil Appeal Nos. 3299, 6049 of 2005 and 802 of 2006

8.1 These appeals have been filed against order dated 3.5.2005 of TDSAT whereby it allowed Appeal No.31/2003 and partly allowed Petition No.20/2004 and quashed direction dated 22.7.2003 issued by the Authority on the premise that it did not have the power to override and make direct interconnectivity mandatory.

8.2 Direct connectivity between different service providers was introduced in light of NTP 1999 and the same was provided for in the license agreements of existing licensees through an amendment on 29.1.2001 as per DoT letter dated 9.8.2000 which stated that direct connectivity was permitted for the purpose of terminating traffic on the basis of mutual agreements. In the meanwhile, on 29.9.2000 BSNL was granted license to provide cellular mobile services and it commenced its Cellone Cellular Services in October 2002.

8.3 The Act was amended vide Ordinance dated 24.1.2000 to include the power to fix the terms and conditions of interconnectivity between service providers (Section 11(1)(b)(ii) of the amended Act).

8.4 The Authority issued Telecommunication Interconnection (Reference Interconnect Offer) Regulation, 2002 on 12.7.2002 and mooted the idea of an Interconnect Gateway Switch. On 15.5.2003, the Authority issued a consultation paper stating that if one of the parties demands direct connectivity it needs to be made mandatory through regulations. On 30.6.2003, the Authority called upon stakeholders to discuss the issue of direct connectivity. Thereafter, the Authority issued direction dated 22.7.2003 under Section 13 of the Act to all service providers directing that direct connectivity be made between service providers at the earliest and not later than three months from the issue of the direction so as to promote network efficiency and consumer interest.

8.5 BSNL filed Appeal No. 31/2003 challenging direction dated 22.7.2003 on the ground that the same was contrary to the terms and conditions of the license agreements of basic and cellular operators.

8.6. The Authority issued IUC Regulations dated 29.10.2003 mandating direct connectivity between service providers. As per clause (b) of Schedule II, charges could be levied through mutual negotiations but they were to be lower than Rs.0.20. BSNL issued Circular dated 28.1.2004 levying charge of Rs.0.4 per minute for a call from cellular mobile network to another cellular network transited by BSNL. This charge included Rs.0.30 towards call termination and Rs.0.19 towards transit.

8.7 The Authority released Consultation Paper on Interconnect Exchange cum Inter-Carrier Billing Clearance House for Multi-Operator Multi-Service Scenario on 13.4.2004 mooting Interconnect Exchange as an alternative to direct connectivity.

8.8 COAI filed Petition No. 20/2004 seeking a direction against BSNL CellOne to directly connect to the Cellular Service Providers and to strike down the BSNL Circular requiring payment of Rs 0.19 transit charges which BSNL Basic Services Division was demanding and collecting.

8.9 TDSAT allowed Appeal No.31/2003 and partly allowed petition No.20/2004 and quashed direction dated 22.7.2003 on the ground that

the Authority cannot issue direction resulting in modification of the licence issued after 2000 amendment. TDSAT held that fixation of the terms and conditions of interconnectivity and ensuring effective interconnectivity is part of the legislative mandate of the Authority under Section 11(1)(b)(ii) and (iii). TDSAT referred to its earlier order dated 27.4.2005 passed in Appeal Nos. 11 and 12/2002 and held that the amendment of the Act does not override the law laid down by the Delhi High Court in MTNL v. TRAI (supra). TDSAT further held that the power vested in the Authority could be exercised in harmony with the terms of interconnectivity of licenses issued after the 2000 amendment and the principles laid down in the High Court judgment. With regard to the claim of COAI, TDSAT held that though BSNL was justified in collecting Rs.0.19 transit charges from Level I TAX to termination of calls in PSTN network or for providing interconnectivity to networks of other service providers, it was not justified in charging transit charges to the extent of Rs.0.19 for transit calls from, Level I TAX to Cellone's Gateway MSC. TDSAT held that it cannot direct BSNL to implement direct connectivity as the Authority did not have the power to override license terms and

conditions for making the same mandatory either by direction under Section 13 or by regulation under Section 36.

Civil Appeal Nos.5834-5836 and 5837 of 2005

9.1 These appeals are directed against order dated 27.4.2005 passed by TDSAT whereby it allowed Petition No. 9 of 2001 filed by Association of Basic Telecom Operators and others and Petition No. 3/2001 filed by Cellular Operators Association of India, dismissed Petition No. 12/2003 filed by private BSOs as withdrawn and dismissed Appeal No. 5/2002 filed by BSNL.

9.2 Access charges to be paid by the Basic Licensees to the DoT (now BSNL) were provided for in tender document issued on 16.1.1995 at the rate of Rs 0.64 per MCU for STD calls and Rs 0.87 per MCU for ISD calls. Clarification was issued on 27.5.1996 reducing the charges to Rs 0.50 per MCU for STD calls and Rs 0.70 per MCU for ISD calls.

9.3 In 1997-98 interconnect agreements were signed between Basic Operators and the then DoT providing for payment of interconnect charges including port charges at a minimum of Rs 54,000/- per PCM termination per annum for a period of 3 years and then actual/full cost

based rates, and access charges at Rs 0.50 per MCU for STD calls and Rs 0.70 per MCU for ISD calls. By 1.8.1999 all BSOs migrated to the revenue sharing regime instead of the fixed license fee regime. Port charges in respect of Cellular Mobile Service Providers were prescribed by the DoT vide Circulars dated 27.9.1996 and 5.6.1998 which extended that arrangement for computation of port charges which was incorporated in interconnection agreements signed with private BSOs to CMSPs.

9.4 The Authority issued Telecommunication Interconnection (Charges and Revenue Sharing) Regulation, 1999 (hereinafter 'Interconnection Regulations 1999') vide notification dated 28.5.1999 by which the port charges as also the access charges were reduced. Clause 8 of the Regulations provided that the Regulations would have an over-riding effect on the interconnect agreements entered into between the operators and DoT/BSNL. Consequent to the issuing of Interconnect Regulations 1999, DoT issued circulars dated 1.10.1999, 12.10.1999 and 25.10.1999 altering the post charges and access charges. That clause was struck down by Delhi High Court in MTNL v. TRAI (supra).

9.5 After its creation on 1.10.2000, BSNL issued communications dated 28.4.2001 and 31.5.2001 requesting an increase in the access charges, making the regime of payment dependent on actual work done by the concerned operator. The BSOs made a representation to the Authority objecting to this increase.

9.6 AUSPI filed Petition No. 9/2001 before TDSAT challenging communications dated 28.4.2001 and 31.5.2001. Vide interim order dated 10.7.2001, AUSPI was directed to continue paying the admitted amounts. AUSPI paid the port charges and access charges under Interconnect Regulations, 1999 and hence BSNL issued circulars dated 2.11.2001 and 21.11.2001 for recovery of the amounts calculated on the basis of the interconnect agreements stating that in light of the Delhi High Court judgement, letter dated 12.10.1999 issued by DoT on the basis of Interconnection Regulations 1999 had become null and void. As per this circular, BSNL revised retrospectively w.e.f. 1.5.1999 port charges to be levied from CMSPs at rates prevailing prior to 1.5.1999. Thereupon, AUSPI amended Petition No. 9/2001 and challenged circular dated 2.11.2001 apart from the applicable rates

of port charges. COAI separately filed Petition No.3/2002 for quashing circular dated 2.11.2001.

9.7 During the pendency of those petitions, the Authority issued Telecommunication Interconnection (Charges and Revenue Sharing) Regulation, 2001 on 14.12.2001 which dealt only with access charges. These regulations were challenged by BSNL in Appeal No. 5/2002. the Authority thereafter issued Telecommunication Interconnection (Port Charges) Regulation, 2001 fixing rates of port charges w.e.f. 28.12.2001. These regulations were accepted and adopted by all the parties.

9.8 Private BSOs filed Petition No. 12/2003 challenging the applicable rate of port charges for period till issuance of Port Charges Regulation dated 28.12.2001. By an order dated 27.4.2005, TDSAT allowed Petition Nos. 9/2001 and 3/2002 and quashed circular dated 2.11.2001 by observing that the demands raised therein are without basis. It held that the BSOs and CMSPs were liable to pay charges as per the DoT letter dated 12.10.1999 till the coming into effect of the Authority Port Charges Regulations, 2001. TDSAT dismissed Petition No.12/2003 filed by private BSOs as withdrawn. It also dismissed

Appeal No.5/2002 filed by BSNL and upheld the validity of the Interconnection Regulations, 2001 on the ground that they had become necessary to bring about certainty in the access charges regime and it could not be said that the Authority acted unfairly or arbitrarily to enrich private operators.

Civil Appeal Nos. 2731, 2794 and 3504 of 2006.

10.1 The Authority issued direction dated 22.7.2003 under Section 13 of the Act to all service providers directing that direct connectivity be made between service providers at the earliest and not later than three months from the issue of the direction so as to promote network efficiency and consumer interest.

10.2 BSNL filed Appeal No. 31/2003 challenging direction dated 22.7.2003 on the ground that the same was contrary to the terms and conditions of the license agreements of basic and cellular operators.

10.3 In October 2003, the Authority issued Telecom Interconnection Usages Charges Regulations (IUC Regulations) mandating direct connectivity between service providers. As per

clause (b) of Schedule II, charges could be levied through mutual negotiations subject to the condition that they shall not exceed Rs.0.20 per minute. BSNL issued Circular dated 28.1.2004 levying charge of Rs 0.4 per minute for a call from cellular mobile network to another cellular network transited by BSNL. This charge includes Rs 0.30 towards call termination and Rs 0.19 towards transit.

10.4 BSNL issued Circular dated 2.7.2004 to its telecom circles informing them of its decision to permit direct connectivity with the BSNL Cellular Network. Reliance Infocom was one of the UASL operators who had sought such connectivity. NLD and ILD operators were permitted to establish direct connectivity with CellOne network vide BSNL Circular dated 4.8.2004. Vide Circular dated 23.8.2004, Reliance was given direct interconnect as NLDO/ILDO on the same terms and conditions as Bharti Televentures Ltd.

10.5 COAI filed Petition No. 20/2004 seeking a direction against BSNL CellOne to directly connect to the Cellular Service Providers and to strike down the BSNL Circular requiring payment of Rs 0.19 as transit charges which BSNL Basic Services Division was demanding and collecting.

10.6 Vide order dated 3.5.2005, TDSAT allowed Appeal No. 31/2003 and quashed direction dated 22.7.2003 holding that the direction mandating direct connectivity resulted in modification of license conditions of licenses issued after the 2000 amendment and as such this was not in accordance with the provision of the Act. TDSAT partly allowed Petition No. 20/2004 and held that BSNL was not justified in charging transit charges to the extent of Rs 0.19 for transit calls from, Level I TAX to Cellone's Gateway MSC. Relief of refund of amounts already collected was not granted.

10.7 In compliance of TDSAT's order, the Authority issued Telecom Regulatory Authority of India (Transit Charges for Bharat Sanchar Nigam Limited's CellOne Terminating Traffic) Regulation, 2005 (10 of 2005) dated 8.6.2005 under Section 36 read with section 11(1)(b)(ii), (iii) and (iv) clarifying that no transit charges shall be levied by BSNL on cellular operators for accessing CellOne subscribers wherever MSCs of both CellOne and private CMSPs are connected to the same BSNL switch.

10.8 Bharti Televentures Ltd. made representation dated 18.5.2005 to BNL to extend the benefit of Tribunal's order dated

3.5.2005. It also submitted representation dated 13.6.2005 to the Authority to amend regulations dated 8.6.2005 extending the waiver to fixed line service providers. Thereupon, fresh Addenda II was inserted into the Interconnect Agreement between Bharti and BSNL on 5.7.2005 which deals with the issue of direct connectivity and payment of transit charges.

10.9 BSNL extended benefit of the judgment dated 3.5.2005 to Tata Teleservices Limited in May 2005 on the ground that it was similarly situated as the cellular operators. However, in October 2005 it withdrew the benefit and demanded that Tata pay transit charges at Rs 0.19 on the ground that Tata could not avail of the benefit of the judgment as it was a UAS licensee and not a CMSP.

10.10 BSNL forwarded a draft Addenda to the Interconnect Agreement to Reliance Infocom Limited on 14.3.2005. The same was signed by the parties on 17.11.2005 for NLD services and on 6.1.2006 as UASL operator. Reliance filed representation before the Authority dated 30.8.2005 to extend regulation date 8.6.2005 to UAS licensees also. This request was declined by the Authority on 6.9.2005. In light of decision dated 11.11.2005 passed by TDSAT mandating level

playing filed and reciprocity between service providers and the subsequent the Authority directive dated 16.11.2005 applying this judgment to all service providers although the petitioners had been only cellular operators, Reliance filed another representation dated 12.12.2005 but did not get any response from the Authority.

10.11 Bharti Televentures Limited filed Appeal No. 8/2005 seeking extension of the benefit of order dated 3.5.2005 and also for modification of the regulations and for extension of the benefit to similarly situated UAS Licensees.

10.12 By an order dated 10.2.2006, TDSAT dismissed the appeal and held that the transit charges would be determined by the interconnect agreement voluntarily entered into between Bharti and BSNL post judgment dated 3.5.2005. However, TDSAT did not go into the issue of whether basic service providers can be construed as similarly situated to cellular operators.

10.13 Bharti Televentures Limited challenged the aforesaid order in Review Application No. 1/2006, which was dismissed vide order dated 3.5.2006.

10.14 Tata Teleservices Limited filed Petition No. 132/2005 praying for extending the benefit of order dated 3.5.2005, setting aside the demands of BSNL for Rs 0.19 as transit charges and modification of the regulations. That petition was dismissed by TDSAT vide order dated 3.5.2006 on the ground that similar appeal filed by Bharti Televentures Limited had been dismissed. Appeal No.7/2006 filed by Reliance Infocom Limited was also dismissed by TDSAT by relying upon the orders passed in the cases of Bharti Televentures Limited and Tata Teleservices Limited.

Civil Appeal Nos. 4965-66 of 2007, 177 and 598-599 of 2008

11.1 The Authority issued the 4th amendment to the IUC Regulations on 6.1.2005. Soon thereafter, BSNL issued circular dated 29.1.2005 for implementation of the Regulations stating in Annexure 2 that revenue shall be shared between BSNL and the private operator in the ratio of 50:50 for international roaming calls. COAI filed representations dated 31.1.2005, 7.2.2005, 8.2.2005 and 14.2.2005 against this circular. The Authority issued letter dated 31.1.2005 to BSNL inviting it to attend a discussion on the implementation of IUC Regulations with regard to separate trunk group for handing over

roaming calls. In light of this, BSNL issued Circular dated 1.2.2005 deferring the formation on trunk group to 14.2.2005 for national roaming calls and to 7.2.2005 for international roaming calls. The matter was deferred further to 14.2.2005 and then to 28.2.2005 vide Circulars dated 8.2.2005 and 14.2.2005.

11.2 However, by some further correspondence, the Authority sought comments from all service providers on 11.3.2005 on the issues of levy of ADC and revenue sharing on roaming subscriber traffic. It moved a consultation paper on 17.3.2005 to address the issue of revenue share arrangement between terminating network and visiting network. BSNL submitted its comments on this paper on 10.5.2005. In the meanwhile, the Authority issued 5th amendment to the IUC Regulations on 11.4.2005 making ADC applicable to national calls at Rs 0.30 per minute and international roaming calls at Rs 3.25 per minute. The amendment was implemented by BSNL vide Circular dated 9.5.2005. The amendment as it related to application of ADC was challenged by COAI in Appeal No. 7/2005 which was allowed vide order dated 21.9.2005. Thereafter, BSNL withdrew circular dated 9.5.2005 vide circular dated 13.10.2005.

11.3 On 23.6.2006, the Authority issued 6th amendment to IUC Regulations. BSNL issued Circular dated 28.2.2006 for implementation of the 6th amendment and provided for higher termination charges for roaming calls. Thereupon, COAI filed complaints before BSNL and also before the Authority regarding higher termination charges for roaming calls. The Authority issued letter dated 20.4.2006 to BSNL along with complaints filed by COAI and M/s BPL. Complaint of Bharti was also forwarded vide letter dated 24.4.2006. Despite agreeing to discuss the matter with the private operators, BSNL started raising bills as per the circular. COAI and others made representations dated 24.5.2006 and 12.6.2006 against thee demands. BSNL replied to the Authority's letter vide letter dated 28.4.2006 stating that the license agreements provide for revenue share and the circular was strictly in accordance with the same.

11.4 Vide decision dated 11.9.2006, the Authority rejected the claim of BSNL for revenue sharing in respect of roaming calls and directed BSNL to charge Rs 0.30 per minute for termination of

national and international roaming calls as prescribed in IUC Regulations.

11.5 BSNL filed Appeal No. 14/2006 challenging the Authority's decision dated 11.9.2006 on the ground of lack of jurisdiction. COAI also filed Appeal No.16/2006 challenging the decision of the Authority insofar as it was made prospective.

11.6 During the pendency of the appeals, the Authority notified Telecommunication Tariff (forty fourth amendment) Order, 2007 on 24.1.2007 fixing maximum permissible charges for national roaming calls.

11.7 After hearing the parties, TDSAT vide order dated 24.8.2007 dismissed Appeal Nos. 14 and 16 of 2006 and Petition No.319/2006 and held that the decision taken by the Authority was legally correct and justified.

11.8 The Authority filed MA No. 121/2007 for correction of order dated 24.8.2007 for deletion of the words "admitted" from para 6 line 12 and "and is recommendatory" from para 9 line 24. MA was allowed vide impugned order dated 12.9.2007 and the words "and is recommendatory" were deleted. TDSAT held that functions

enumerated in Section 11(1)(b) cannot be said to be part of the recommendatory power which is contained in Section 11(1)(a).

11.9 COAI and others filed EA No. 21/2007 seeking implementation of TDSAT's order dated 24.8.2007 and claiming benefit of the Authority order from 11.9.2006 when it was issued and refund of the amounts collected contrary to the same. EA was allowed vide impugned order dated 28.11.2007 and BSNL was directed to refund the amounts collected in excess of the Authority decision dated 11.9.206. Tribunal held that by virtue of its order, the Authority decision would be operative prospectively from the date on which it was issued and especially in light of the absence of stay, BSNL was not entitled to collect any sum contrary to the Authority decision and cannot now take advantage of its wrong.

Civil Appeal Nos. 271-281 of 2011

12.1 These appeals have been filed for setting aside final judgment and order dated 29.9.2010 passed by TDSAT whereby it disposed off Appeal Nos. 4/2006; 6/2006; 5/2007; 5/2008; 2-8/2009 and remanded the matter to the Authority with a direction to consider the matter relating to IUC Regulations afresh.

12.2 The Authority issued Telecommunication Interconnection (Charges and Revenue Sharing) Regulation (No. 5 of 2001) – basic framework for regulating access charges on 14.12.2001. Separate Regulation for regulating port charges was issued by the Authority in Dec 2001. On 24.1.2003, the Authority issued Telecom Interconnection Usage Charges Regulation, 2003 according to which termination charges were fixed at Rs 0.30 per minute (metro) and Rs 0.40 (circle). The concept of Access Deficit Charge (ADC) was also introduced at 30% of the total sectoral revenue - fee paid by private operators to cross subsidise BSNL for deploying its fixed network in non-lucrative areas.

12.3 On receipt of representation dated 4.2.2003 by COAI about the anomalies in the 2003 IUC Regulations, the Authority undertook a review on 29.10.2003 and reduced the termination charges to a uniform rate, i.e., Rs. 0.30 per minute for all types of calls and the ADC was made 10%. The representation made by COAI for further reduction in the amount of termination charges was, however, rejected by the Authority.

12.4 Between 2005 and 2008, 5 amendments were made and in the matter of payment of ADC on 9.3.2009, the Authority notified IUC (Amendment Regulations, 2009) fixing termination charge at Rs 0.20 per minute for local and national long distance calls and mobile telephone services. These regulations were challenged by BSNL and various private operators by filing separate appeals, the details of which are given below:

Appeal No.	Appellant	Details of Appeal
Appeal No. 6/2006	BSNL	Challenged the IUC Regulations, 2006 alleging denial of payment of ADC by TRAI and prescription of uniform termination charges when cost of calls terminating in wireless network is almost 1/3rd of calls on the wireline network.
Appeal No. 5/2007	BSNL	Challenged the 8th Amendment dt. 21.3.2007 to the extent of reduction of ADC payable to BSNL and fixation of uniform termination charges (Mobile Termination Charge and Fixed Termination Charge).
Appeal No. 5/2008	BSNL	Challenged the 9th Amendment dt. 27.3.2008 to the extent of reduction of ADC payable to BSNL and fixation of uniform termination charges.
Appeal No. 4/2006	COAI	Challenging the Regulations, 2006 to the extent that Mobile Termination Charge at Rs. 0.30 per minute has been maintained which is not cost based as stated by TRAI.
Appeal	BSNL	Seeking setting aside of the Regulation dt.

No. 2/2009		9.3.2009 to the extent of fixation of termination charges and carriage charge.
Appeal No. 3/2009	AUSPI	Seeking setting aside of Regulation dt. 9.3.2009. Review of termination charge, transit charge and port charge.
Appeal No. 4/2009	Vodafone	Seeking setting aside of Regulation dt. 9.3.2009. Reduce termination charge to 35 paise or remand for fresh consideration by TRAI. Determine MTC using Forward looking long range increment cost (FL-LRIC). Take in to account CAPEX, OPEX, common cost and cost of capital mark up listed under the heading "International Practice in Cost Modelling" which is very well established. Not to offset this cost by applying amount attributable to revenue earned from provision of telecom services including VAS in determining MTC.
Appeal No. 5/2009	M/s Bharati Airtel	Similar to Vodafone. Additionally, increase termination charges on international roaming. Determination of transit charge/carriage charge from level II TAX to SDCC and Intra SDCA and TAX transit charge on basis of cost principles.
Appeal No. 6/2009	M/s Idea Cellular Ltd. & Ors.	Similar to M/s Bharati Airtel
Appeal No. 7/2009	M/s Aircel Ltd. & Ors.	Similar to Vodafone.
Appeal No. 8/2009	Etisalat D.B. Telecom (P) Ltd.	Seeking setting aside of Regulation dt. 9.3.2009. Direction to TRAI to: re-introduce termination charges based on whether operator is a new entrant and had fulfilled roll out obligation; determine MTC at not

		more then 09 paise per minute and FTC at not more than 10 paise per minute; fix TAX transit charge at not more than 02 paise; reduce long distance carriage charge to not more than 11 paise per minute; fix 'nil' charge for receipt of interconnect SMS traffic on the receiving telecom network.

12.5 By an order dated 12.5.2009, TDSAT dismissed Appeal Nos. 6/2006, 5/2007 and 5/2008. However, by the impugned order some of the appeals were disposed of and the matter was remanded to the Authority with a direction to consider the matter afresh and complete the consultation process in a time bound manner so that the new IUC charges could be made effective/implemented by 1.1.2011.

Transferred Case No.39 of 2010

13.1 The transferred case is Letters Patent Appeal No.337/2007 titled TRAI v. Telecom Dispute Settlement Appellate Tribunal and another, which was filed before the Division Bench of the Delhi High Court against order dated 23.12.2005 passed by the learned Single Judge in Writ Petition No.2838/2005.

13.2 The Authority enacted the Telecommunication Interconnection Usage Charges Regulation 2003 (4 of 2003) on

29.10.2003 under Section 36 read with Section 11(1)(b)(ii), (iii) and (iv). These regulations were amended vide notifications dated 25.11.2003, 12.12.2003 and 31.12.2003 and 6.1.2005. By the last amendment, provision was made for modification of the method and manner of charging Access Deficit Charges

13.3 MTNL filed Appeal No. 3/2006 for quashing the amendment made in 2005 on the premise that its entitlement to Access Deficit Charges had been arbitrarily reduced. On notice by TDSAT, the Authority raised a preliminary objection to the former's jurisdiction. TDSAT relied upon various provisions of the Act, the judgments of this Court in Clariant International Limited v. Security Exchange Board (2004) 8 SCC 524, Cellular Operators Association of India v. Union of India (2003) 3 SCC 186 and West Bengal Electivity Regulatory Commission v. CESC Ltd (2002) 8 SCC 715 and held that the Authority is empowered to frame regulations circumscribed by the statutory provisions and that it has no authority to frame regulations in respect of matters not specifically provided for and in such matters only TDSAT had the jurisdiction to issue directions.

14. Before proceeding further, we may notice the background in which the Act was enacted. In India, the first telegraph link was established in 1939 between Calcutta and Diamond Harbour. In 1851, the telegraph line was opened for traffic but it was largely confined to the work of East India Company. The Indian Telegraph Act was enacted in 1885. It gave exclusive privilege of establishing, maintaining and working of telegraphs to the Central Government, which was also empowered to grant licence to private persons to establish telegraph network in any part of India.

15. After Independence, the Government of India took complete control of the telecom sector and brought it under the Post and Telegraph Department. One major step taken for improving telecommunication services in the country was the establishment of a modern telecommunication manufacturing facility at Bangalore under the public sector, in the name of "Indian Telephone Industries Ltd". 1984 represents an important milestone in the development of telecommunication sector. In that year, the Centre for Development of Telematics ("C-DoT") was set up for developing indigenous technologies and licences were given to the private sector to

manufacture subscriber-equipment. In 1986, Mahanagar Telephone Nigam Ltd. and Videsh Sanchar Nigam Ltd. ("VSNL") were set up. In July 1992 a decision was taken to allow private investment for the services like electronic mail, voicemail, data services, audio text services, video text services, video conferencing, radio paging and cellular mobile telephone.

16. In February 1993, the Finance Minister in his Budget speech announced Government's intention to encourage private sector involvement and participation in Telecom to supplement efforts of Department of Telecommunications especially in creation of internationally competitive industry. On 13.5.1994, National Telecom policy was announced which was placed in Parliament saying that the aim of the policy was to supplement the effort of the Department of Telecommunications in providing telecommunications services. The main objectives of that policy were:

> "(i) affording telecommunication for all and ensuring the availability of telephone on demand;
>
> (ii) providing certain basic telecom services at affordable and reasonable prices to all people and covering all villages;

(iii) giving world standard telecom services; addressing consumer complaints, dispute resolution and public interface to receive special attention and providing the widest permissible range of services to meet the customers' demand and at the same time at a reasonable price;

(iv) creating a major manufacturing base and major export of telecom equipment having regard to the country's size and development; and

(v) protecting the defence and security interests of the country."

17. With the entry of private operators into telecom sector, proper regulation of the sector was considered appropriate. An important step in the institutional reform of Indian telecom sector was setting up of an independent regulatory authority, i.e., Telecom Regulatory Authority. Initially, it was proposed to set up the Authority as a non-statutory body and for that purpose, the Indian Telegraph (Amendment) Bill, 1995 was introduced and was passed by Lok Sabha. However, when the matter was taken up in Rajya Sabha, the members expressed the view that the Authority should be set up as a statutory body. Keeping that in view as also the 22nd Report of the Standing Committee on Communications, the Telecom Authority of India Ordinance, 1996

was promulgated. In Delhi Science Forum v. Union of India (1996) 2 SCC 405, this Court took cognizance of some of the provisions contained in the Ordinance and observed:

> "The existence of a Telecom Regulatory Authority with the appropriate powers is essential for introduction of plurality in the Telecom sector. The National Telecom Policy is a historic departure from the practice followed during the past century. Since the private sector will have to contribute more to the development of the telecom network than DoT/MTNL in the next few years, the role of an independent Telecom Regulatory Authority with appropriate powers need not be impressed, which can harness the individual appetite for private gains, for social ends. The Central Government and the Telecom Regulatory Authority have not to behave like sleeping trustees, but have to function as active trustees for the public good."
>
> (emphasis supplied)

18. The 1996 Ordinance was replaced by the Act. The main purpose of establishing the Authority as a statutory body was to ensure that the interest of consumers are protected and, at the same time, to create a climate for growth of telecommunications, broadcasting and cable services in such a manner which could enable India to play leading role in the emerging global information society. The goals and objectives of the Authority are as follows:

i. Increasing tele-density and access to telecommunication services in the country at affordable prices.

ii. Making available telecommunication services which in terms of range, price and quality are comparable to the best in the world.

iii. Providing a fair and transparent policy environment which promotes a level playing field and facilitates fair competition.

iv. Establishing an interconnection regime that allows fair, transparent, prompt and equitable interconnection.

v. Re-balancing tariffs so that the objectives of affordability and operator viability are met in a consistent manner.

vi. Protecting the interest of consumers and addressing general consumer concerns relating to availability, pricing and quality of service and other matters.

vii. Monitoring the quality of service provided by the various operators.

viii. Providing a mechanism for funding of net cost areas/ public telephones so that Universal Service Obligations are discharged by telecom operators for spread of telecom facilities in remote and rural areas.

ix. Preparing the grounds for smooth transition to an era of convergence of services and technologies.

x. Promoting the growth of coverage of radio in India through commercial and noncommercial channels.

xi. Increasing consumer choice in reception of TV channels and choosing the operator who would provide television and other related services.

19. The Preamble and Sections 3, 11 to 14, 18, 33, 35, 36 and 37 of the Act (unamended) read as under:

> "**Preamble**
> An Act to provide for the establishment of the Telecom Regulatory Authority of India to regulate the telecommunication, and services, and for matters connected therewith or incidental thereto.
>
> **Section 3 - Establishment and incorporation of Authority-**(1) With effect from such date as the Central Government may, by notification appoint, there shall be established, for the purposes of this Act, an Authority to be called the Telecom Regulatory Authority of India.

(2) The Authority shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contact, and shall, by the said name, sue or be sued.

(3) The authority shall consist of a Chairperson, and not less than two, but not exceeding six members, to be appointed by the Central Government.

(4) The head office of the Authority shall be at New Delhi.

Section 11. Functions of Authority

(1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 the functions of the Authority shall be to-

a. recommend the need and timing for introduction of new service provider;

b. recommend the terms and conditions of licence to a service provider;

c. ensure technical compatibility and effective inter-connection between different service providers;

d. regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;

e. ensure compliance of terms and conditions of licence;

f. recommend revocation of licence for non-compliance of terms and conditions of licence;

g. laydown and ensure the time period for providing local

and long distance circuits of telecommunication between different service providers;

h. facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;

i. protect the interest of the consumers of telecommunication service;

j. monitor the quality of service and conduct the periodical survey of such provided by the service providers;

k. inspect the equipment used in the network and recommend the type of equipment to be used by the service providers;

l. maintain register of interconnect agreements and of all such other matters as may be provided in the regulations;

m. keep register maintained under clause (I) open for inspection to any member of public on payment of such fee and compliance of such other requirements as may be provided in the regulations;

n. settle disputes between service providers;

o. render advice to the Central Government in the matters relating to the development of telecommunication technology and any other matter reliable to telecommunication industry in general;

p. levy fees and other charges at such rates and in respect of such services as may be determined by regulations;

q. ensure effective compliance of universal service obligations;

r. perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act.

(2) Notwithstanding anything contained in the Indian Telegraph Act, 1885, the Authority may, from time to time, by order, notify in the Official Gazette the rates at which the telecommunication services within India and outside India shall be provided under this Act including the rates at which messages shall be transmitted to any country outside India;

Provided that the Authority may notify different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid the Authority shall record the reasons therefor.

(3) While discharging its functions under sub-section (1), the Authority shall not act against the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.

(4) The Authority shall ensure transparency while exercising its powers and discharging its functions.

12. Powers of Authority to call for information, conduct investigations, etc.-(1) Where the Authority considers it expedient so to do, it may, by order in writing,-

(a) call upon any service provider at any time to furnish in writing such information or explanation relating to its affairs as the Authority may require; or
(b) appoint one or more persons to make an inquiry in relation to the affairs of any service provider; and
(c) direct any of its officers or employees to inspect the books of account or other documents of any service provider.

(2) Where any inquiry in relation to the affairs of a service provider has been undertaken under sub-section (1),-

(a) every officer of the Government Department, if such service provider is a department of the Government;
(b) every director, manager, secretary or other officer, if such service provider is a company; or
(c) every partner, manager, secretary or other officer, if such service provider is a firm; or
(d) every other person or body of persons who has had dealings in the course of business with any of the persons mentioned in clauses (b) and (c),
shall be bound to produce before the Authority making the inquiry, all such books of account or other documents in his custody or power relating to, or having a bearing on the subject-matter of such inquiry and also to furnish to the Authority with any such statement or information relating thereto, as the case may be, required of him, within such time as may be specified.

(3) Every service provider shall maintain such books of account or other documents as may be prescribed.

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

13. Powers of Authority to issue directions- The Authority may, for the discharge of its functions under sub-section (1) of section 11, issue such directions from time to time to the service providers, as it may consider necessary.

14. Authority to settle disputes-(1) If a dispute arises, in respect of matters referred to in sub-section (2), among service providers or between service providers and a group of consumers, such disputes shall be adjudicated by a bench constituted by the Chairperson and such bench shall consist of two members;

Provided that if the members of the bench differ on any point or points they shall state the point or points on which they differ and refer the same to a third member for hearing on such point or points and such point or points shall be decided according to the opinion of that member.

(2) The bench constituted under sub-section (1) shall exercise, on and from the appointed day all such jurisdiction, powers and authority as were exerciseable immediately before that date by any
civil court on any matter relating to-

(i) technical compatibility and inter-connections between service providers;
(ii) revenue sharing arrangements between different service providers;
(iii) quality of telecommunication services and interest of consumers;

Provided that nothing in sub-section shall apply in respect of matters relating to-
(a) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade

Practices Commission established under sub-section (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969;
(b) the complaint of an individual consumer maintainable before a Consumer Disputes Redressal Forum or a Consumer Disputes Redressal Commission or the National Consumer Redressal Commission established under section 9 of the Consumer Protection Act, 1986;
(c) dispute between telegraph authority and any other person referred to in sub-section (1) of section 7B of the Indian Telegraph Act, 1885.

18. Appeal to High Court - Any person aggrieved by any decision or order of the Authority may file an appeal to the High Court within thirty days from the date of communication of the decision or order of the Authority to him;

Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

33. Delegation. - The Authority may, by general or special order in writing, delegate to any member, officer of the Authority or any other person subject to such conditions, if any, as may be specified in the order, such of its powers and functions under this Act (except the power to settle dispute under Chapter IV and to make regulation under section 36) as it may deem necessary.

35.Power to make rules.- (1) The Central government may, by notification, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely;-

(a) the salary and allowances payable to and the other conditions of service of the Chairperson and members under sub-section (5) of section 5;

(b) the powers and functions of the Chairperson under subsection (1) of section 6;

(c) the procedure for conducting an inquiry made under subsection (2) of section 7;

(d) the category of books of accounts or other documents which are required to be maintained under sub-section (3) of section 12;

(e) the period within which an application is to be made under sub-section (1) of section 15;

(f) the manner in which the accounts of the Authority shall be maintained under sub-section (1) of section 23;

(g) the time within which and the form and manner in which returns and report are to be made to the Central Government under sub-section (1) and (2) of section 24;

(h) any other matter which is to be, or may be, prescribed, or in respect of which provision is to be made, by rules;

36. Power to make regulations.-(1) The Authority may, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the purposes of Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:-

(a) the times and places of meetings of the Authority and the procedure to be followed at such meetings under subsection (1) of section 8, including quorum necessary for the transaction of business;

(b) the transaction of business at the meetings of the Authority under sub-section (4) of section 8;

(c) the salaries and allowances payable to and the other conditions of service of officers and other employees of the Authority under sub-section (2) of section 10;

(d) matters in respect of which register is to be maintained by the Authority under clause (l) of sub-section (l) of section 11;

(e) levy of fee and lay down such other requirements on fulfilment of which a copy of register may be obtained under clause (m) of sub-section (l) of section 11;

(f) levy of fees and other charges under clause (p) of subsection (1) of Section 11.

37. Rules and regulations to laid before Parliament. - Every rule and every regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulations or both Houses agree that the rule or regulation should not

be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation."

20. With a view to overcome the difficulties experienced in the implementation of the Act, the Central Government constituted a Group on Telecom and IT Convergence under the Chairmanship of the Finance Minister. The recommendations made by the Group led to the issuance of the Telecom Regulatory Authority of India (Amendment) Ordinance, 2000, which was replaced by the Telecom Regulatory Authority of India (Amendment) Act, 2000. One of the important features of the Amendment Act was the establishment of a Tribunal known as the Telecom Disputes Settlement and Appellate Tribunal for adjudicating disputes between a licensor and a licencee, between two or more service providers, between a service provider and a group of consumers, and also to hear and dispose of any appeals from the direction, decision or order of the Authority.

21. The provisions of the amended Act, which have bearing on the decision of the question framed in the opening paragraph of this judgment are as under:

> "**2. Definitions**. –(1) xxx xxx xxx
>
> (aa) "Appellate Tribunal" means the Telecom Disputes Settlement and Appellate Tribunal established under section 14;
>
> (b) "Authority" means the Telecom Regulatory Authority of India established under sub- section (1) of section 3;
>
> (e) "Licensee" means any person licensed under sub- section (1) of section 4 of the Indian Telegraph Act, 1885 (13 of 1885) for providing specified public telecommunication services;
>
> (ea) "licensor" means the Central Government or the telegraph authority who grants a license under section 4 of the Indian Telegraph Act, 1885;
>
> (i) "regulations" means regulations made by the Authority under this Act;
>
> (j) "service provider" means the Government as a service provider and includes a licensee;
>
> (k) "telecommunication service" means service of any description (including electronic mail, voice mail, data services, audio tax services, video tax services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electro-magnetic means but shall not include broadcasting services:

Provided that the Central Government may notify other service to be telecommunication service including broadcasting services.

11. Functions of Authority.—(1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to—

(a) make recommendations, either suo motu or on a request from the licensor, on the following matters, namely—

(i) need and timing for introduction of new service provider;

(ii) terms and conditions of licence to a service provider;

(iii) revocation of licence for non-compliance of terms and conditions of licence;

(iv) measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;

(v) technological improvements in the services provided by the service providers;

(vi) type of equipment to be used by the service providers after inspection of equipment used in the network;

(vii) measures for the development of telecommunication technology and any other matter relatable to telecommunication industry in general;

(viii) efficient management of available spectrum;

(b) discharge the following functions, namely—

(i) ensure compliance of terms and conditions of licence;

(ii) notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the Telecom Regulatory Authority of India (Amendment)

Act, 2000, fix the terms and conditions of interconnectivity between the service providers;

(iii) ensure technical compatibility and effective inter-connection between different service providers;

(iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;

(v) lay down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service;

(vi) lay down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;

(vii) maintain register of interconnect agreements and of all such other matters as may be provided in the regulations;

(viii) keep register maintained under clause (vii) open for inspection to any member of public on payment of such fee and compliance of such other requirement as may be provided in the regulations;

(ix) ensure effective compliance of universal service obligations;

(c) levy fees and other charges at such rates and in respect of such services as may be determined by regulations;

(d) perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act:

Provided that the recommendations of the Authority specified in clause (a) of this sub-section shall not be binding upon the Central Government:

Provided further that the Central Government shall seek the recommendations of the Authority in respect of matters specified in sub-clauses (i) and (ii) of clause (a) of this sub-section in respect of new licence to be issued to a service provider and the Authority shall forward its recommendations within a period of sixty days from the date on which that Government sought the recommendations:

Provided also that the Authority may request the Central Government to furnish such information or documents as may be necessary for the purpose of making recommendations under sub-clauses (i) and (ii) of clause (a) of this sub-section and that Government shall supply such information within a period of seven days from receipt of such request:

Provided also that the Central Government may issue a licence to a service provider if no recommendations are received from the Authority within the period specified in the second proviso or within such period as may be mutually agreed upon between the Central Government and the Authority:

Provided also that if the Central Government having considered that recommendation of the Authority, comes to a prima facie conclusion that such recommendation cannot be accepted or needs modifications, it shall refer the recommendation back to the Authority for its reconsideration, and the Authority may, within fifteen days from the date of receipt of such reference, forward to the Central Government its recommendation after considering the reference made by that Government. After receipt of further recommendation if any, the Central Government shall take a final decision.

(2) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the Authority may, from time to time, by order, notify in the Official Gazette the rates at which the telecommunication services within India and outside India shall be provided under this Act including the rates at which messages shall be transmitted to any country outside India:

Provided that the Authority may notify different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid the Authority shall record the reasons therefor.

(3) While discharging its functions under sub-section (1), or sub-section (2) the Authority shall not act against the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.

(4) The Authority shall ensure transparency while exercising its powers and discharging its functions.

12. Powers of Authority to call for information, conduct investigations, etc. - (1) Where the Authority considers it expedient so to do, it may, by order in writing,-

(a) call upon any service provider at any time to furnish in writing such information or explanation relating to its affairs as the authority may require; or

(b) appoint one or more persons to make an inquiry in relation to the affairs of any service provider; and

(c) direct any of its officers or employees to inspect the books of account or other documents of any service provider.

(2) Where any inquiry in relation to the affairs of a service provider has been undertaken under sub-section (1),-

(a) every officer of the Government Department, if such service provider is a department of the Government;

(b) every director, manager, secretary or other officer, if such service provider is a company; or

(c) every partner, manager, secretary or other officer, if such service provider is a firm; or

(d) every other person or body of persons who has had dealings in the course of business with any of the persons mentioned in clauses (b) and (c),

shall be bound to produce before the Authority making the inquiry, all such books of account or other documents in his custody or power relating to, or having a bearing on the subject-matter of such inquiry and also to furnish to the Authority with any such statement or information relating thereto, as the case may be, required of him, within such time as may be specified.

(3) Every service provider shall maintain such books of account or other documents as may be prescribed.

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

13. Power of Authority to issue directions.—The Authority may, for the discharge of its functions under sub-section (1) of section 11, issue such directions from time to time to the service providers, as it may consider necessary:

Provided that no direction under sub-section (4) of Section 12 or under this section shall be issued except on the matters specified in clause (b) of sub-section (1) of Section 11."

14. Establishment of Appellate Tribunal.—The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to–

(a) adjudicate any dispute–

(i) between a licensor and a licensee;

(ii) between two or more service providers;

(iii) between a service provider and a group of consumers;

Provided that nothing in this clause shall apply in respect of matters relating to–

(A) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969);

(B) the complaint of an individual consumer maintainable before a consumer Disputes Redressal forum or a Consumer Disputes Redressal Commission or the National Consumer Redressal commission established under section 9 of the Consumer Protection Act, 1986 (68 of 1986);

(C) dispute between telegraph authority and any other person referred to in sub-section (1) of section 7B of the Indian Telegraph Act 1885 (13 of 1885);

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

14A. Application for settlement of disputes and appeals to Appellate Tribunal.-

(7) The Appellate Tribunal may, for the purpose of examining the legality or propriety or correctness of any dispute made in any application under sub-section (1), or of any direction or order or decision of the Authority referred to in the appeal preferred under sub-section (2), on its own motion or otherwise, call for the records relevant to

disposing of such applications or appeal and make such orders as it thinks fit.

14M. Transfer of pending cases.--All applications, pending for adjudication of disputes before the Authority immediately before the date of establishment of the Appellate Tribunal under this Act, shall stand transferred on that date to such Tribunal:

Provided that all disputes being adjudicated under the provisions of Chapter IV as it stood immediately before the commencement of the Telecom Regulatory Authority (Amendment) Act, 2000, shall continue to be adjudicated by the Authority in accordance with the provisions, contained in that Chapter, till the establishment of the Appellate Tribunal under the said Act:

Provided further that all cases referred to in the first provision shall be transferred by the Authority to the Appellate Tribunal immediately on its establishment under section 14.

14N. Transfer of appeals.--(1) All appeals pending before the High Court immediately before the commencement of the Telecom Regulatory Authority (Amendment) Act, 2000, shall stand transferred to the Appellate Tribunal on its establishment under section 14.

(2) Where any appeal stands transferred from the High Court to the Appellate Tribunal under sub-section (1),-

(a) the High Court shall, as soon as may be after such transfer, forward the records of such appeal to the Appellate Tribunal; and

(b) the Appellate Tribunal may, on receipt of such records, proceed to deal with such appeal, so far as may be from the stage which was reached before such transfer or from any earlier stage or de novo as the Appellate Tribunal may deem fit.

18. Appeal to Supreme Court—(1) Notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in any other law, an appeal shall lie against any order, not being an interlocutory order, of the Appellate Tribunal to the Supreme Court on one or more of the grounds specified in section 100 of that Code.

(2) No appeal shall lie against any decision or order made by the Appellate Tribunal with the consent of the parties.

(3) Every appeal under this section shall be preferred within a period of ninety days from the date of the decision or order appealed against:

Provided that the Supreme Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

33. Delegation. - The Authority may, by general or special order in writing, delegate to any member, officer of the Authority or any other person subject to such conditions, if any, as may be specified in the order, such of its powers and functions under this Act (except the power to settle dispute under Chapter IV and to make regulation under section 36) as it may deem necessary.

35. Power to make rules.-(1) The Central Government may, by notification, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters namely:-

(a) the salary and allowances payable to and the other conditions of service of the Chairperson and members under sub-section (5) of section 5;

(aa) the allowance payable to the part-time members under sub-section (6A) of section 5;

(b) the powers and functions of the Chairperson under sub-section (1) of section 6;

(c) the procedure for conducting an inquiry made under sub-section (2) of section 7;

(ca) the salary and allowances and other conditions of service of officers and other employees of the Authority under sub-section (2) of section 10;

(d) the category of books of account or other documents which are required to be maintained under sub-section (3) of section 12;

(da) the form, the manner of its verification and the fee under sub-section (3) of section 14A;

(db) the salary and allowances payable to and other terms and conditions of service of the Chairperson and other Members of the Appellate Tribunal under section 14E;

(dc) the salary and allowances and other conditions of service of the officers and employees of the Appellate Tribunal under sub-section (3) of section 14H;

(dd) any other power of a civil court required to be prescribed under clause (i) of sub-section (2) of section 16;

(e) the period within which an application is to be made under sub-section (1) of section 15;

(f) the manner in which the accounts of the Authority shall be maintained under sub-section (1) of section 23;

(g) the time within which and the form and manner in which returns and report are to be made to the Central Government under sub-sections (1) and (2) of section 24;

(h) any other matter which is to be, or may be, prescribed, or in respect of which provision is to be made, by rules.

36. Power to make regulations.-(1) The Authority may, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the purpose of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:-

(a) the times and places of meetings of the Authority and the procedure to be followed at such meetings under sub-section (1) of section 8, including quorum necessary for the transaction of business;

(b) the transaction of business at the meetings of the Authority under sub-section (4) of section 8;

(c) omitted by Act 2 of 2000

(d) matters in respect of which register is to be maintained by the Authority under clause (l) of sub-section (1) of section 11;

(e) levy of fee and lay down such other requirements on fulfilment of which a copy of register may be obtained under sub clause (b) of sub- section (1) of section 11;

(f) levy of fees and other charges under clause (c) of sub-section (1) of section 11.

37. Rules and regulations to laid before Parliament. - Every rule and every regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulations or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified

form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation."

22. A comparative statement of the relevant provisions of the unamended and amended Acts is given below:

UNAMENDED ACT	AMENDED ACT
PREAMBLE An Act to provide for the establishment of the Telecom Regulatory Authority of India to regulate the telecommunication services, and for matters connected therewith or incidental thereto.	**PREAMBLE** An Act to provide for the establishment of the Telecom Regulatory Authority of India and the Telecom Disputes Settlement and Appellate 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, to promote and ensure orderly growth of the telecom sector and for matters connected therewith or incidental thereto.
Section 3. **Establishment and incorporation of Authority.-**(1) With effect from such date as the Central Government may, by notification appoint, there shall be established, for the purposes of this Act, an	**Section 3** **Establishment and incorporation of Authority.-**(1) With effect from such date as the Central Government may, by notification appoint, there shall be established, for the purposes of this Act, an

Authority to be called the Telecom Regulatory Authority of India. (2) The Authority shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued. (3) The Authority shall consist of a Chairperson, and not less than two, but not exceeding six members, to be appointed by the Central Government. (4) The head office of the Authority shall be at New Delhi.	Authority to be called the Telecom Regulatory Authority of India. (2) The Authority shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued. (3) The Authority shall consist of a Chairperson, and not more than two whole-time members and not more than two part-time members, to be appointed by the Central Government. (4) The head office of the Authority shall be at New Delhi.
Section 11. **Functions of Authority.-**(1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 the functions of the Authority shall be to- (a) recommend the need and timing for introduction of new service provider; (b) recommend the terms and conditions of licence to a service provider;	**Section 11.** **Functions of Authority.-**(1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to- (a) make recommendations, either suo motu or on a request from the licensor, on the following matters, namely:- (i) need and timing for

(c) ensure technical compatibility and effective inter-connection between different service providers;	introduction of new service provider;
(d) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;	(ii) terms and conditions of licence to a service provider;
(e) ensure compliance of terms and conditions of licence;	(iii) revocation of licence for non-compliance of terms and conditions of licence;
(f) recommend revocation of licence for non-compliance of terms and conditions of licence;	(iv) measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;
(g) lay down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;	(v) technological improvements in the services provided by the service providers;
(h) facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;	(vi) type of equipment to be used by the service providers after inspection of equipment used in the network;
(i) protect the interest of the consumers of	(vii) measures for the development of telecommunication technology and any other matter relatable to telecommunication industry in general;
	(viii) efficient management of available spectrum;
	(b) discharge the following functions, namely:-

	telecommunication service;	(i)	ensure compliance of terms and conditions of licence;
(j)	monitor the quality of service and conduct the periodical survey of such provided by the service providers;	(ii)	notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, fix the terms and conditions of inter-connectivity between the service providers;
(k)	inspect the equipment used in the network and recommend the type of equipment to be used by the service providers;		
(l)	maintain register of interconnect agreements and of all such other matters as may be provided in the regulations;	(iii)	ensure technical compatibility and effective inter-connection between different service providers;
		(iv)	regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;
(m)	keep register maintained under clause (l) open for inspection to any member of public on payment of such fee and compliance of such other requirements as may be provided in the regulations;	(v)	lay-down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service;
(n)	settle disputes between service providers;		
(o)	render advice to the Central Government in the matters relating to the development of	(vi)	lay-down and ensure the time

telecommunication technology and any other matter relatable to telecommunication industry in general; (p) levy fees and other charges at such rates and in respect of such services as may be determined by regulations; (q) ensure effective compliance of universal service obligations; (r) perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act. (2) Notwithstanding anything contained in the Indian Telegraph Act, 1885, the Authority may, from time to time, by order, notify in the Official Gazette the rates at which the telecommunication services within India and outside India shall be provided under this Act including the rates at which messages shall be transmitted to any country outside India; Provided that the Authority may	period for providing local and long distance circuits of telecommunication between different service providers; (vii) maintain register of interconnect agreements and of all such other matters as may be provided in the regulations; (viii) keep register maintained under clause (vii) open for inspection to any member of public on payment of such fee and compliance of such other requirement as may be provided in the regulations; (ix) ensure effective compliance of universal service obligations; (c) levy fees and other charges at such rates and in respect of such services as may be determined by regulations; (d) perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act:

notify different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid the Authority shall record the reasons therefor. (3) While discharging its functions under sub-section (1), the Authority shall not act against the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality. (4) The Authority shall ensure transparency while exercising its powers and discharging its functions.	Provided that the recommendations of the Authority specified in clause (a) of this sub-section shall not be binding upon the Central Government: Provided further that the Central Government shall seek the recommendations of the Authority in respect of matters specified in sub-clauses (i) and (ii) of clause (a) of this sub-section in respect of new licence to be issued to a service provider and the Authority shall forward its recommendations within a period of sixty days from the date on which that Government sought the recommendations: Provided also that the Authority may request the Central Government to furnish such information or documents as may be necessary for the purpose of making recommendations under sub-clauses (i) and (ii) of clause (a) of this sub-section and that Government shall supply such information within a period of seven days from receipt of such request: Provided also that the Central Government may issue a licence to a service provider if no recommendations are received from the Authority within the period specified in the second proviso or

	within such period as may be mutually agreed upon between the Central Government and the Authority: Provided also that if the Central Government having considered that recommendation of the Authority, comes to a prima facie conclusion that such recommendation cannot be accepted or needs modifications, it shall, refer the recommendation back to the Authority for its reconsideration, and the Authority may within fifteen days from the date of receipt of such reference, forward to the Central Government its recommendation after considering the reference made by that Government. After receipt of further recommendation if any, the Central Government shall take a final decision. (2) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the Authority may, from time to time, by order, notify in the Official Gazette the rates at which the telecommunication services within India and outside India shall be provided under this Act including the rates at which messages shall be transmitted to any country outside India: Provided that the Authority may

	notify different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid the Authority shall record the reasons therefor. (3) While discharging its functions under sub-section (1) or sub-section (2) the Authority shall not act against the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality. (4) The Authority shall ensure transparency while exercising its powers and discharging its functions.
Section 13 **Powers of Authority to issue directions.-** The Authority may, for the discharge of its functions under sub-section (1) of section 11, issue such directions from time to time to the service providers, as it may consider necessary.	**Section 13** **Power of Authority to issue directions.-** The Authority may, for the discharge of its functions under sub-section (1) of section 11, issue such directions from time to time to the service providers, as it may consider necessary: Provided that no direction under subsection (4) of section 12 or under this section shall be issued except on the matters specified in clause (b) of sub-section. (1) of section 11.
CHAPTER IV	**CHAPTER IV**

SETTLEMENT OF DISPUTES	APPELLATE TRIBUNAL
Section 14.	**Section 14.**
Authority to settle disputes.- (1) If a dispute arises, in respect of matters referred to in sub-section (2), among service providers or between service providers and a group of consumers, such disputes shall be adjudicated by a bench constituted by the Chairperson and such bench shall consist of two members: Provided that if the members of the bench differ on any point or points they shall state the point or points on which they differ and refer the same to a third member for hearing on such point or points and such point or points shall be decided according to the opinion of that member. (2) The bench constituted under sub-section (1) shall exercise, on and from the appointed day all such jurisdiction , powers and authority as were exercisable immediately before that date by any civil court on any matter relating to- (i) technical compatibility and interconnections between service providers; (ii) revenue sharing arrangements	**Establishment of Appellate Tribunal.–** The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to— (a) adjudicate any dispute— (i) between a licensor and a licensee; (ii) between two or more service providers; (iii) between a service provider and a group of consumers: Provided that nothing in this clause shall apply in respect of matters relating to— (A) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under subsection (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969); (B) the complaint of an individual consumer

between different service providers; (iii) quality of telecommunication services and interest of consumers: Provided that nothing in this sub-section shall apply in respect of matters relating to- (a) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under subsection (1) of Section 5 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969); (b) the complaint of an individual consumer maintainable before a Consumer Disputes Redressal Forum or a Consumer Disputes Redressal Commission or the National Consumer **Disputes?** Redressal Commission established under section 9 of the Consumer Protection Act, 1986 (68 of 1986); (c) dispute between telegraph authority and any other person referred to in sub-section (1) of section 7-B of the Indian Telegraph Act, 1885 (13 of 1885).	maintainable before a Consumer Disputes Redressal Forum or a Consumer Disputes Redressal Commission or the National Consumer **Disputes?** Redressal Commission established under section 9 of the Consumer Protection Act, 1986 (68 of 1986); (C) dispute between telegraph authority and any other person referred to in sub-section (1) of section 7B of the Indian Telegraph Act, 1885 (13 of 1885); (b) hear and dispose of appeal against any direction, decision or order of the Authority under this Act. **Section 14A - 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 it within that period. (4) On receipt of an application under sub-section (1) or an appeal under sub-section (2), the Appellate Tribunal may, after giving the parties to the dispute or the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. (5) The Appellate Tribunal shall send a copy of every order made by it to the parties to the dispute or the appeal and to the Authority, as the case may be. (6) The application made under subsection (1) or the appeal preferred under sub-section (2)

	shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the application or appeal finally within ninety days from the date of receipt of application or appeal, as the case may be: Provided that where any such application or appeal could not be disposed of within the said period of ninety days, the Appellate Tribunal shall record its reasons in writing for not disposing of the application or appeal within that period. (7) The Appellate Tribunal may, for the purpose of examining the legality or propriety or correctness, of any dispute made in any application under sub-section (1), or of any direction or order or decision of the Authority referred to in the appeal preferred under sub-section (2), on its own motion or otherwise, call for the records relevant to **deposing** of such application or appeal and make such orders as it thinks fit. **Section 14M - Transfer of pending cases** All applications, pending for adjudication of disputes before the Authority immediately before the date of establishment of the Appellate Tribunal under this Act,

	shall stand transferred on that date to such Tribunal: Provided that all disputes being adjudicated under the provisions of Chapter IV as it stood immediately before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, shall continue to be adjudicated by the Authority in accordance with the provisions, contained in that Chapter, till the establishment of the Appellate Tribunal under the said Act: Provided further that all cases referred to in the first proviso shall be transferred by the Authority to the Appellate Tribunal immediately on its establishment under section 14. **Section 14N - Transfer of appeals** (1) All appeals pending before the High Court immediately before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, shall stand transferred to the Appellate Tribunal on its establishment under section 14. (2) Where any appeal stands

	transferred from the High Court to the Appellate Tribunal under sub-section (1),— (a) the High Court shall, as soon as may be after such transfer, forward the records of such appeal to the Appellate Tribunal; and (b) the Appellate Tribunal may, on receipt of such records, proceed to deal with such appeal, so far as may be from the stage which was reached before such transfer or from any earlier stage or de novo as the Appellate Tribunal may deem fit.
Section 16 **Procedures and powers of Authority.-** (1) The Authority shall be guided by the principles of natural justice. (2) The Authority shall have, for the purpose of discharging their functions under this Chapter, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) in respect of the following matters, namely (a) summoning and	**Section 16** **Procedure and powers of Appellate Tribunal.-** (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. (2) The Appellate Tribunal shall have, for the purposes of

enforcing the attendance of any person and examining him on oath; (b) requiring the discovery and production of documents; (c) receiving evidence on affidavits; (d) issuing commissions for the examination of witnesses or documents; (e) reviewing its decisions; (f) dismissing an application for default or deciding it ex parte; (g) setting aside any order of dismissal of any application for default or any order passed by it ex parte; (h) any other matter which may be prescribed. (3) Every proceeding before the Authority shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228, and for the purpose of Section 196 of the Indian Penal Code, 1860 (45 of 1860) and the Authority shall be deemed to be a civil court for all the purposes of Section 195 and Chapter XXVI of the Code of	discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:— (a) summoning and enforcing the attendance of any person and examining him on oath; (b) requiring the discovery and production of documents; (c) receiving evidence on affidavits; (d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act,1872 (1 of 1872), requisitioning any public record or document or a copy of such record or document, from any office; (e) issuing commissions for the examination of witnesses or documents; (f) reviewing its decisions; (g) dismissing an application for default or deciding it, ex parte; (h) setting aside any order of dismissal of any application for default or

Criminal Procedure 1973 (2 of 1974).	any order passed by it, ex parte; and (i) any other matter which may be prescribed. (3) Every proceeding before the Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code (45 of 1860) and the Appellate Tribunal shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).
Section 19 **Orders passed by Authority or High Court to be executable as a decree.-** Every order made by the Authority under this Act or the order made by the High Court in any appeal against any order of the Authority shall, on a certificate issued by any officer of the Authority or the Registrar of the High Court, as the case may be, be deemed to be decree of the civil court and shall be executable in the same manner as a decree of that court.	**Section 19.** **Orders passed by Appellate Tribunal to be executable as a decree.-**(1) An order passed by the Appellate Tribunal under this Act shall be executable by the Appellate Tribunal as a decree of civil court, and for this purpose, the Appellate Tribunal shall have all the powers of a civil court. (2) Notwithstanding anything contained in sub-section (1), the Appellate Tribunal may transmit any order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were

	a decree made by that court.
Section 20 **Penalty for wilful failure to comply with orders of Authority or High Court.-** If any person wilfully fails to comply with the orders of the Authority or any order of the High Court, as the case may be, he shall be punishable with fine which may extend to one lakh rupees and in case of a second or subsequent offence with fine which may extend to two lakh rupees and in the case of continuing contravention with additional fine which may extend to two lakh rupees for every day during which the default continues.	**Section 20** **Penalty for wilful failure to comply with orders of Appellate Tribunal.-**If any person wilfully fails to comply with the order of the Appellate Tribunal, he shall be punishable with fine which may extend to one lakh rupees and in case of a second or subsequent offence with fine which may extend to two lakh rupees and in the case of continuing contravention with additional fine which may extend to two lakh rupees for every day during which such default continues.]
Section 36 **Power to make regulations.-**(1) The Authority may, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the purposes of this Act. (2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:- (a) the times and places of meetings of the Authority and the procedure to be followed at such meetings under sub-section	**Section 36** **Power to make regulations.-** (1)The Authority may, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the purposes of this Act. (2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:- (a) the times and places of meetings of the Authority and the procedure to be followed at such meetings

(1) of Section 8, including quorum necessary for the transaction of business; (b) the transaction of business at the meetings of the Authority under sub-section (4) of Section 8; (c) the salaries and allowances payable to and the other conditions of service of officers and other employees of the Authority under sub-section (2) of Section 10; (d) matters in respect of which register is to be maintained by the Authority under clause (l) of sub-section (1) of Section 11; (e) levy of fee and lay down such other requirements on fulfilment of which a copy of register may be obtained under clause (m) of sub-section (1) of Section 11; (f) levy of fees and other charges under clause (p) of sub-section (1) of section 11.	under sub-section (1) of section 8, including quorum necessary for the transaction of business; (b) the transaction of business at the meetings of the Authority under sub-section (4) of section 8; xxx (d) matters in respect of which register is to be maintained by the authority under sub-clause (vii) of clause (b) of sub-section (1) of section 11; (e) levy of fee and lay down such other requirements on fulfilment of which a copy of register may be obtained under sub-clause (viii) of clause (b) of sub-section (1) of section 11; (f) levy of fees and other changes under clause (c) of sub-section (1) of section 11;

23. We shall now deal with the question formulated by this Court, the first facet of which relates to the scope of Section 36 of the Act.

24. Shri R.F. Nariman, learned Solicitor General argued that the power vested in the Authority to make regulations for carrying out the purposes of the Act is very wide and is not controlled by Section 36(2), which provides for framing of regulations on specified matters. He submitted that if power is conferred upon a statutory authority to make subordinate legislation in general terms, the particularization of the topics is merely illustrative and does not limit the scope of the general power. Learned Solicitor General further argued that for carrying out the purposes of the Act, the Authority can make regulations on various matters specified in other sections including Sections 8(1), 8(4), 11(1)(b), 12(4) and 13. He submitted that the regulations made under Section 36(1) and (2) are in the nature of subordinate legislation and are required to be laid before each House of Parliament in terms of Section 37 and Parliament can approve, modify or annul the same. He further submitted that a restrictive interpretation of Section 36(1) with reference to Clauses (a), (b) and (d) of Section 36(2) will make the provision otiose and the Court should not adopt that course.

25. Shri A.S. Chandhiok, learned senior counsel appearing for BSNL argued that sub-section (1) of Section 36 should not be construed as conferring unbridled power upon the Authority to make regulations, else other provisions like Sections 12(4) and 13, which empower the Authority to issue directions on certain matters would become redundant. Shri C.S. Vaidyanathan, learned senior counsel appearing for the appellants in C.A. Nos.6049/2005, 802/2006, 4523/2006 and 5184/2010 argued that Section 36(1) should be construed consistent with other provisions of the Act and regulations cannot be made on the matters covered by other provisions. He referred to Section 11(2) and argued that the power conferred upon the Authority to issue an order fixing the rates at which the telecommunication services are to be provided within and outside India including the rates at which messages are required to be transmitted to any country outside India and the power vested in the authority under Section 12(4) and 13 to issue directions to the service providers cannot be controlled by making regulations under Section 36(1). Shri Vaidyanathan emphasized that if Parliament has conferred power upon the Authority under Section 11(2) to notify the rates by a transparent method, the

power under Section 36(1) cannot be used for framing regulation on that topic. Learned senior counsel referred to Section 62 of the Electricity Act, 2003, which, according to him, is pari materia to Section 11(2) and argued that in view of paragraph 15 of the judgment in PTC India Limited v. Central Electricity Regulatory Commission (2010) 4 SCC 603, regulations cannot be framed on the subject specified in that section. Dr. A.M. Singhvi, learned senior counsel appearing for the appellants in C.A. Nos.271-281/2011 argued that the operation of Section 36(1) of the Act is controlled by Section 36(2), which provide for framing of regulation in respect of some ministerial acts required to be performed under the Act and argued that the Authority cannot make regulations on the subjects specifically covered by other provisions. Dr. Singhvi submitted that the Court should not give an interpretation to Section 36(1) which will make the Authority an unruly horse and enable it to style every instrument as a regulation and thereby exclude the same from challenge before TDSAT. An ancillary argument made by Dr. Singhvi is that if regulations are framed on the topics covered by other provisions of the Act, then TDSAT will be denuded much of its jurisdiction and the purpose of

creating an independent adjudicatory body will be defeated. Shri Mukul Rohatgi, learned senior counsel argued that the scope of Section 36(1) should be confined to the topics specified in sub-section (2) thereof, else the same will become inconsistent with other provisions of the Act including Sections 11(2), (4), 12(4) and 13. Shri Ramji Srinivasan, learned counsel appearing in some of the appeals, argued that the regulation making power under Section 36(1) cannot be used for nullifying the power of the Authority to issue directions on the topics specified in Sections 11(1)(b), 11(2), 12(4) and 13.

26. We have considered the respective arguments. Under the unamended Act, the Authority had the following three types of functions:

RECOMMENDATORY FUNCTIONS

> Under Section 11 (1) (a) of the TRAI Act 1997, the Authority is required to make recommendations either suo moto or on a request from the licensor, i.e., Department of Telecommunications or Ministry of Information & Broadcasting in the case of Broadcasting and Cable Services.
>
> TRAI has powers to make recommendations either suo motu or on request from the licensor on the following matters as per **Section 11(1)(a)**:

(i) need and timing for introduction of new service provider;

(ii) terms and conditions of licence to a service provider;

(iii) revocation of licence for non-compliance of terms and conditions of licence;

(iv) measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;

(v) technological improvements in the services provided by the service providers;

(vi) type of equipment to be used by the service providers after inspection of equipment used in the network;

(vii) measures for the development of telecommunication technology and any other matter relatable to telecommunication industry in general;

(viii) efficient management of available spectrum.

REGULATORY FUNCTIONS

The Authority also had regulatory and tariff setting functions, like ensuring compliance of terms and conditions of licence, laying standard of Quality of Service (QoS) to be provided by service providers and notifying the rates at which telecommunication has to be provided and ensuring effective compliance of USOs. It also had the power to call upon any service provider at any time to furnish in formation or explanation, in writing, relating to its affairs. It was required to ensure transparency while exercising its powers and discharging its functions. It was given powers to punish for violation of its directions.

Another approach was through feedback / representations received from consumers / consumer organizations, experts etc.

These functions could be discharged by the Authority through a multipronged approach. One of these approaches was by analyzing the reports received from the service providers. In certain cases, the Authority could on its own initiative take action for ensuring compliance of terms and conditions of license.

ADJUDICATORY FUNCTIONS

Originally, TRAI was also empowered to adjudicate upon disputes among Service Providers or between the Service Providers and a group of Consumers on matters relating to technical compatibility and interconnection between the Service Providers, revenue sharing arrangement between Service Providers, quality of telecommunication services and interests of consumers.

27. After the amendment of 2000, the Authority can either suo motu or on a request from the licensor make recommendations on the subjects enumerated in Section 11(1)(a)(i) to (viii). Under Section 11 (1)(b), the authority is required to perform nine functions enumerated in clauses (i) to (ix) thereof. In these clauses, different terms like 'ensure', 'fix', 'regulate' and 'lay down' have been used. The use of the term 'ensure' implies that the Authority can issue directions on the particular subject. For effective discharge of functions under various

clauses of Section 11(1) (b), the authority can frame appropriate regulations. The term 'regulate' contained in sub-clause (iv) shows that for facilitating arrangement amongst service providers for sharing their revenue derived from providing telecommunication services, the Authority can either issue directions or make regulations.

28. The terms 'regulate' and 'regulation' have been interpreted in large number of judgments. We may notice few of them. In V.S. Rice & Oil Mills v. State of A.P. AIR 1964 SC 1781, agreements for a period of ten years had been executed for supply of electricity and the same did not contain any provision authorising the Government to increase the rates during their operation. However, in exercise of power under Section 3(1) of the Madras Essential Articles Control and Requisitioning (Temporary Powers) Act, 1949, the State Government issued order enhancing the agreed rates. The same was challenged on the ground that any increase in agreed tariff was out of the purview of Section 3(1). Chief Justice Gajendragadkar, speaking for the Constitution Bench, observed as under:

> "The word regulate is wide enough to confer power on the State to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is

necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and its availability at fair prices. The concept of fair prices to which Section 3(1) expressly refers does not mean that the price once fixed must either remain stationary, or must be reduced in order to attract the power to regulate. The power to regulate can be exercised for ensuring the payment of a fair price, and the fixation of a fair price would inevitably depend upon a consideration of all relevant and economic factors which contribute to the determination of such a fair price. If the fair price indicated on a dispassionate consideration of all relevant factors turns out to be higher than the price fixed and prevailing, then the power to regulate the price must necessarily include the power to increase so as to make it fair. Hence the challenge to the validity of orders increasing the agreed tariff rate on the ground that they are outside the purview of Section 3(1) cannot be sustained."

29. In State of Tamil Nadu v. Hind Stone (1981) 2 SCC 205, this Court held that the word 'regulate' must be interpreted to include 'prohibition' within its fold. Some of the observations made in that judgment (paragraph 10) are extracted below:

"We do not think that 'regulation' has that rigidity of meaning as never to take in 'prohibition'. Much depends on the context in which the expression is used in the statute and the object sought to be achieved by the contemplated regulation. It was observed by Mathew, J. in G.K. Krishnan v. State of T.N. (1975) 1 SCC 375: 'The word "regulation" has no fixed connotation. Its meaning differs according to the nature of the thing to which it is applied.' In modern statutes concerned as they are with

economic and social activities, 'regulation' must, of necessity, receive so wide an interpretation that in certain situations, it must exclude competition to the public sector from the private sector. More so in a welfare State. It was pointed out by the Privy Council in Commonwealth of Australia v. Bank of New South Wales (1949) 2 All ER — and we agree with what was stated therein — that the problem whether an enactment was regulatory or something more or whether a restriction was direct or only remote or only incidental involved, not so much legal as political, social or economic consideration and that it could not be laid down that in no circumstances could the exclusion of competition so as to create a monopoly, either in a State or Commonwealth agency, be justified. Each case, it was said, must be judged on its own facts and in its own setting of time and circumstances and it might be that in regard to some economic activities and at some stage of social development, prohibition with a view to State monopoly was the only practical and reasonable manner of regulation. The statute with which we are concerned, the Mines and Minerals (Regulation and Development) Act, is aimed, as we have already said more than once, at the conservation and the prudent and discriminating exploitation of minerals. Surely, in the case of a scarce mineral, to permit exploitation by the State or its agency and to prohibit exploitation by private agencies is the most effective method of conservation and prudent exploitation. If you want to conserve for the future, you must prohibit in the present. We have no doubt that the prohibiting of leases in certain cases is part of the regulation contemplated by Section 15 of the Act."

30. In K. Ramanathan v. State of Tamil Nadu (1985) 2 SCC 116, this Court interpreted the word 'regulation' appearing in Section 3(2)(d) of the Essential Commodities Act, 1955 and observed:

"The word "regulation" cannot have any rigid or inflexible meaning as to exclude "prohibition". The word "regulate" is difficult to define as having any precise meaning. It is a word of broad import, having a broad meaning, and is very comprehensive in scope. There is a diversity of opinion as to its meaning and its application to a particular state of facts, some courts giving to the term a somewhat restricted, and others giving to it a liberal, construction. The different shades of meaning are brought out in Corpus Juris Secundum, Vol. 76 at p. 611:

> "'Regulate' is variously defined as meaning to adjust; to adjust, order, or govern by rule, method, or established mode; to adjust or control by rule, method, or established mode, or governing principles or laws; to govern; to govern by rule; to govern by, or subject to, certain rules or restrictions; to govern or direct according to rule; to control, govern, or direct by rule or regulations.
>
> 'Regulate' is also defined as meaning to direct; to direct by rule or restriction; to direct or manage according to certain standards, laws, or rules; to rule; to conduct; to fix or establish; to restrain; to restrict."

See also: Webster's Third New International Dictionary, Vol. II, p. 1913 and Shorter Oxford Dictionary, Vol. II, 3rd Edn., p. 1784.

It has often been said that the power to regulate does not necessarily include the power to prohibit, and ordinarily the word "regulate" is not synonymous with the word "prohibit". This is true in a general sense and in the sense that mere regulation is not the same as absolute prohibition. At the same time, the power to regulate carries with it full power over the thing subject to regulation and in absence of restrictive words, the power must be

regarded as plenary over the entire subject. It implies the power to rule, direct and control, and involves the adoption of a rule or guiding principle to be followed, or the making of a rule with respect to the subject to be regulated. The power to regulate implies the power to check and may imply the power to prohibit under certain circumstances, as where the best or only efficacious regulation consists of suppression. It would therefore appear that the word "regulation" cannot have any inflexible meaning as to exclude "prohibition". It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation, and the Court must necessarily keep in view the mischief which the legislature seeks to remedy.

The question essentially is one of degree and it is impossible to fix any definite point at which "regulation" ends and "prohibition" begins. We may illustrate how different minds have differently reacted as to the meaning of the word "regulate" depending on the context in which it is used and the purpose and object of the legislation. In Slattery v. Nalyor LR (1888) 13 AC 446 the question arose before the Judicial Committee of the Privy Council whether a Bye-law by reason of its prohibiting internment altogether in a particular cemetery, was ultra vires because the Municipal Council had only power of regulating internments whereas the Bye-law totally prohibited them in the cemetery in question, and it was said by Lord Hobhouse, delivering the judgment of the Privy Council:

> "A rule or Bye-law cannot be Held as ultra vires merely because it prohibits where empowered to regulate, as regulation often involved prohibition."

31. In Jiyajeerao Cotton Mills Ltd. v. M.P. Electricity Board 1989 Supp (2) SCC 52, the validity of the orders providing for higher charges/tariff for electricity consumed beyond legally fixed limit was upheld in view of Section 22(b) of the Electricity Act, which permits the State Government to issue an appropriate order for regulating the supply, distribution and consumption of electricity. It was held that the Court while interpreting the expression "regulate" must necessarily keep in view the object to be achieved and the mischief sought to be remedied. The necessity for issuing the orders arose out of the scarcity of electricity available to the Board for supplying to its customers and, therefore, in this background the demand for higher charges/tariff was held to be a part of a regulatory measure.

32. In Deepak Theatre v. State of Punjab 1992 Supp (1) SCC 684, this Court upheld classification of seats and fixation of rates of admission according to the paying capacity of a cinegoer by observing that the same is an integral part of the power to make regulation and fixation of rates of admission became a legitimate ancillary or incidental power in furtherance of the regulation under the Act.

33. The term 'regulation' was also interpreted in Quarry Owners' Association v. State of Bihar (2000) 8 SCC 655 in the context of the provisions contained in the Mines and Minerals (Regulation Development) Act, 1957 and it was held:

> "Returning to the present case we find that the words "regulation of mines and mineral development" are incorporated both in the Preamble and the Statement of Objects and Reasons of this Act. Before that we find that the Preamble of our Constitution in unequivocal words expresses to secure for our citizens social, economic and political justice. It is in this background and in the context of the provisions of the Act, we have to give the meaning of the word "regulation". The word "regulation" may have a different meaning in a different context but considering it in relation to the economic and social activities including the development and excavation of mines, ecological and environmental factors including States' contribution in developing, manning and controlling such activities, including parting with its wealth, viz., the minerals, the fixation of the rate of royalties would also be included within its meaning."

34. Reference in this connection can also be made to the judgment in U.P. Coop. Cane Unions Federation v. West U.P. Sugar Mills Association (2004) 5 SCC 430. In that case, the Court interpreted the word 'regulation' appearing in U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 and observed:

> " "Regulate" means to control or to adjust by rule or to subject to governing principles. It is a word of broad impact having wide meaning comprehending all facets not only specifically enumerated in the Act, but also embraces within its fold the powers incidental to the regulation envisaged in good faith and its meaning has to be ascertained in the context in which it has been used and the purpose of the statute."

35. It is thus evident that the term 'regulate' is elastic enough to include the power to issue directions or to make regulations and the mere fact that the expression "as may be provided in the regulations" appearing in clauses (vii) and (viii) of Section 11(1)(b) has not been used in other clauses of that sub-section does not mean that the regulations cannot be framed under Section 36(1) on the subjects specified in clauses (i) to (vi) of Section 11(1)(b). In fact, by framing regulations under Section 36, the Authority can facilitate the exercise of functions under various clauses of Section 11(1)(b) including clauses (i) to (vi).

36. We may now advert to Section 36. Under sub-Section (1) thereof the Authority can make regulations to carry out the purposes of the Act specified in various provisions of the Act including Sections 11, 12 and 13. The exercise of power under Section 36(1) is hedged with the

condition that the regulations must be consistent with the Act and the Rules made thereunder. There is no other restriction on the power of the Authority to make regulations. In terms of Section 37, the regulations are required to be laid before Parliament which can either approve, modify or annul the same. Section 36(2), which begins with the words "without prejudice to the generality of the power under sub-section (1)" specifies various topics on which regulations can be made by the Authority. Three of these topics relate to meetings of the Authority, the procedure to be followed at such meetings, the transaction of business at the meetings and the register to be maintained by the Authority. The remaining two topics specified in Clauses (e) and (f) of Section 36(2) are directly referable to Section 11(1)(b)(viii) and 11(1)(c). These are substantive functions of the Authority. However, there is nothing in the language of Section 36(2) from which it can be inferred that the provisions contained therein control the exercise of power by the Authority under Section 36(1) or that Section 36(2) restricts the scope of Section 36(1).

37. It is settled law that if power is conferred upon an authority/body to make subordinate legislation in general terms, the particularization

of topics is merely illustrative and does not limit the scope of general power. In Emperor v. Sibnath Banerji AIR 1942 PC 156, the Privy Council considered the correctness of the judgment of the Federal Court, which held that Rule 26 of the Defence of India Rules framed under clause (j) of Section 3(2) of the Defence of India Act, 1939 was ultra vires the provisions of the Act. While reversing the judgment of the Federal Court, the Privy Council observed:

> "In the opinion of their Lordships, the function of sub-section (2) is merely an illustrative one; the rule-making power is conferred by sub-section (1), and "the rules" which are referred to in the opening sentence of Sub-section (2) are the . Rules which are authorized by, and made under, sub-section (1); the provisions of sub-section (2) are not restrictive of Sub-section (1), as, indeed is expressly stated by the words "without prejudice to the generality of the powers conferred by sub-section (l)."

38. The proposition laid down in Sibnath Banerji's case was followed by this Court in large number of cases. In Afzal Ullah v. State of Uttar Pradesh 1964 (4) SCR 991, the Constitution Bench considered challenge to the validity of bye-law No.3 framed by Municipal Board, Tanda. The appellant had questioned the bye-law on the ground that the same was ultra vires the provisions of Section 241

of the United Provinces Municipalities Act, 1916. The facts of that case were that the appellant had established a market for selling food-grains, vegetables, fruits, fish etc. The Chairman of the Municipal Board issued a notice to the appellant requiring him to obtain a licence for running the market with an indication that if he fails to do so, criminal proceedings will be initiated against him. On account of his failure to take the required licence, the appellant was tried by Tahsildar, Tanda in Criminal Case No.141 of 1960. The Tahsildar acquitted the appellant on the ground that the prosecution had failed to prove the fact that in the market established on the land belonging to the appellant, vegetables, fruits and fish were sold. The order of acquittal was set aside by the High Court and the appellant was convicted under Section 299(1) of the 1916 Act read with clause (3) of the relevant bye-laws. In the appeal filed before this Court, it was argued that bye-law 3(a) and other bye-laws passed by the Board are ultra vires the provisions of Section 241 of the Act. The Constitution Bench referred to the provisions of Sections 241 and 298 of the Act and various clauses of Section 298(2) which specify the topics on which bye-laws can be framed and observed:

"Even if the said clauses did not justify the impugned Bye-law, there can be little doubt that the said Bye-laws would be justified by the general power conferred on the Boards by Section 298(1). It is now well-settled that the specific provisions such as are contained in the several clauses of Section 298(2) are merely illustrative and they cannot be read as restrictive of the generality of powers prescribed by Section 298(1) (vide Emperor v. Sibnath Banerji). If the powers specified by Section 298(1) are very wide and they take in within their scope Bye-laws like the ones with which we are concerned in the present appeal, it cannot be said that the powers enumerated under Section 298(2) control the general words used by Section 298(1). These latter clauses merely illustrate and do not exhaust all the powers conferred on the Board, so that any cases not falling within the powers specified by Section 298(2) may well be protected by Section 298(1), provided, of course, the impugned Bye-law can be justified by-reference to the requirements of Section 298(1). There can be no doubt that the impugned Bye-laws in regard to the markets framed by Respondent 2 are for the furtherance of municipal administrate ion under the Act, and so, would attract the provisions of Section 298(1). Therefore, we are satisfied that the High Court was right in coming to the conclusion that the impugned Bye-laws are valid."

(emphasis supplied)

39. In Rohtak Hissar District Electricity Supply Company Ltd. v. State of Uttar Pradesh and others AIR 1966 SC 1471, this Court dealt with the rule making power of the State Government under the Uttar Pradesh Industrial Disputes Act, 1947 and observed:

"Section 15(1) confers wide powers on the appropriate Government to make rules to carry out the purposes of the Act; and Section 15(2) specifies some of the matters enumerated by clauses (a) to (e), in respect of which rules may be framed. It is well-settled that the enumeration of the particular matters by sub-section (2) will not control or limit the width of the power conferred on the appropriate Government by sub-section (1) of Section 15; and so, if it appears that the item added by the appropriate Government has relation to conditions of employment, its addition cannot be challenged as being invalid in law."

(emphasis supplied)

40. In K. Ramanathan v. State of Tamil Nadu (supra), a three-Judge Bench of this Court considered the scope of Section 3(1), (2) and Section 5 of the Essential Commodities Act, 1955. The appellant and other agriculturists of Tanjavur District had challenged the constitutional validity of clause 3(1-a) of the Order issued by the Central Government under Section 5 read with Section 3 of the Essential Commodities Act, 1955 placing complete ban on the transport, movement or otherwise carrying of paddy outside the districts. The High Court rejected their challenge and dismissed the writ petitions. Before this Court, it was argued that the delegation of power under Section 5 of the Act must necessarily be given a restricted interpretation. While rejecting the argument, this Court referred to the

judgment in Sibnath Banerji's case, Santosh Kumar Jain v. State AIR 1951 SC 201 and observed:

> "Learned Counsel for the appellant however strenuously contends that the delegation of powers by the Central Government under Section 5 of the Act must necessarily be in relation to 'such matters' and subject to 'such conditions' as may be specified in the notification. The whole attempt on the part of the learned Counsel is to confine the scope and ambit of the impugned order to CL (d) of Sub-section (2) of Section 3 of the Act which uses the word 'regulating' and take it out of-the purview of Sub-section (1) of Section 3 which uses the words 'regulating or prohibiting'. That is not proper way of construction of Sub-section (1) and (2) of Section 3 of the Act in their normal setting. The restricted construction of Section 3 contended for by learned Counsel for the appellant would render the scheme of the Act wholly unworkable as already indicated, the source of power to make an order of this description is Sub-section (1) of Section 3 of the Act and sub's. (2) merely provides illustration for the general powers conferred by Sub-section (1). Sub-section (2) of Section 3 of the Act commences with the words 'Without prejudice to the generality of the powers conferred by Sub-section (1)'. It is manifest that Sub-section (2) of Section 3 of the Act confers no fresh powers but is merely illustrative of the general powers conferred by Sub-section (1) of Section 3 without exhausting the subjects in relation to which such powers can be exercised."

41. The question was again considered in D.K. Trivedi and Sons v. State of Gujarat 1986 (Supp) SCC 20. This Court was called upon to examine the challenge to the constitutionality of Section 15 of the

Mines and Minerals (Regulation and Development) Act, 1957, the power of the State Governments to make rules under Section 15 to enable them to charge dead rent and royalty in respect of leases of mines and minerals granted to them and to enhance the rates of dead rent and royalty. While repelling the argument that the 1957 Act does not contain guidelines for exercise of power by the State Government under Section 15(1), this Court observed:

> "32. There is no substance in the contention that no guidelines are provided in the 1957 Act for the exercise of the rule-making power of the State Governments under Section 15(1). As mentioned earlier, Section 15(1) is in pari materia with Section 13(1). Section 13, however, contains sub-section (2) which sets out the particular matters with respect to which the Central Government may make rules "In particular, and without prejudice to the generality of the foregoing power", that is, the rule-making power conferred by sub-section (1). It is well settled that where a statute confers particular powers without prejudice to the generality of a general power already conferred, the particular powers are only illustrative of the general power and do not in any way restrict the general power. Section 2 of the Defence of India Act, 1939, as amended by Section 2 of the Defence of India (Amendment) Act, 1940, conferred upon the Central Government the power to make such rules as appeared to it "to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to

the life of the community". Sub-section (2) of Section 2 conferred upon the Central Government the power to provide by rules or to empower any authority to make orders providing for various matters set out in the said sub-section. This power was expressed by the opening words of the said sub-section (2) to be "Without prejudice to the generality of the powers conferred by sub-section (1)". In King Emperor v. Sibnath Banerji the Judicial Committee of the Privy Council held:

> "In the opinion of Their Lordships, the function of sub-section (2) is merely an illustrative one; the rule-making power is conferred by subsection (1), and 'the rules' which are referred to in the opening sentence of sub-section (2) are the rules which are authorized by, and made under, sub-section (1); the provisions of sub-section (2) are not restrictive of sub-section (1), as, indeed, is expressly stated by the words 'without prejudice to the generality of the powers conferred by sub-section (1)."

The above proposition of law has been approved and accepted by this Court in Om Prakash v. Union of India (1970) 3 SCC 942 and Shiv Kirpal Singh v. V.V. Giri (1970) 2 SCC 567.

33. A provision similar to sub-section (2) of Section 13, however, does not find place in Section 15. In our opinion, this makes no difference. What sub-section (2) of Section 13 does is to give illustrations of the matters in respect of which the Central Government can make rules for "regulating the grant of prospecting licences and mining leases in respect of minerals and for purposes connected therewith". The opening clause of sub-section (2) of Section 13, namely, "In particular, and without prejudice to the generality of the foregoing power", makes it clear that the topics set out in that sub-section are already

included in the general power conferred by sub-section (1) but are being listed to particularize them and to focus attention on them. The particular matters in respect of which the Central Government can make rules under sub-section (2) of Section 13 are, therefore, also matters with respect to which under sub-section (1) of Section 15 the State Governments can make rules for "regulating the grant of quarry leases, mining leases or other mineral concessions in respect of minor minerals and for purposes connected therewith". When Section 14 directs that "The provisions of Sections 4 to 13 (inclusive) shall not apply to quarry leases, mining leases or other mineral concessions in respect of minor minerals", what is intended is that the matters contained in those sections, so far as they concern minor minerals, will not be controlled by the Central Government but by the concerned State Government by exercising its rule-making power as a delegate of the Central Government. Sections 4 to 12 form a group of sections under the heading "General restrictions on undertaking prospecting and mining operations". The exclusion of the application of these sections to minor minerals means that these restrictions will not apply to minor minerals but that it is left to the State Governments to prescribe such restrictions as they think fit by rules made under Section 15(1). The reason for treating minor minerals differently from minerals other than minor minerals is obvious. As seen from the definition of minor minerals given in clause (e) of Section 3, they are minerals which are mostly used in local areas and for local purposes while minerals other than minor minerals are those which are necessary for industrial development on a national scale and for the economy of the country. That is why matters relating to minor minerals have been left by Parliament to the State Governments while reserving matters relating to minerals other than minor minerals to the Central Government. Sections 13, 14 and 15 fall in the group of sections which is headed "Rules for regulating

the grant of prospecting licences and mining leases". These three sections have to be read together. In providing that Section 13 will not apply to quarry leases, mining leases or other mineral concessions in respect of minor minerals what was done was to take away from the Central Government the power to make rules in respect of minor minerals and to confer that power by Section 15(1) upon the State Governments. The ambit of the power under Section 13 and under Section 15 is, however, the same, the only difference being that in one case it is the Central Government which exercises the power in respect of minerals other than minor minerals while in the other case it is the State Governments which do so in respect of minor minerals. Sub-section (2) of Section 13 which is illustrative of the general power conferred by Section 13(1) contains sufficient guidelines for the State Governments to follow in framing the rules under Section 15(1), and in the same way, the State Governments have before them the restrictions and other matters provided for in Sections 4 to 12 while framing their own rules under Section 15(1)."

(emphasis supplied)

42. The same proposition has been reiterated in Academy of Nutrition Improvement v. Union of India (2011) 8 SCC 274 [Para66] . The observations contained in the last portion of that paragraph suggesting that the power conferred upon the rule making authority does not entitle it to make rules beyond the scope of the Act has no bearing on these cases because it has not been argued before us that

the regulations framed under Section 36 are ultra vires the provisions of the Act.

43. Here it will be apposite to mention that Section 11(1)(b)(iv) specifically postulates making of regulations for discharging the functions specified in those clauses. Section 11(2), which contains non-obstante clause vis-à-vis the Indian Telegraph Act, 1885, lays down that the Authority may, from time to time, by order notify the rates at which the telecommunication services within or outside India shall be provided under the Act subject to the limitation specified in Section 11(3). Under Section 12(1), the Authority is empowered to issue order and call upon any service provider to furnish such information or explanation relating to its affair or appoint one or more persons to make an inquiry in relation to the affairs of any service provider and direct inspection of the books of account or other documents of any service provider. Sections 12(4) and 13 of the Act on which reliance has been placed by the learned counsel for the respondents in support of their argument that the Authority cannot frame regulations on the subjects mentioned in these two sections are only enabling provisions. This is evinced from the expressions "shall

have the power" used in Section 12(4) and "The Authority may" used in Section 13. In terms of Section 12(4), the Authority can issue such directions to service providers, as it may consider necessary, for proper functioning by service providers. Section 13 lays down that the Authority may for discharge of its functions under Section 11(1), issue such directions to the service providers, as it may consider necessary. The scope of this provision is limited by the proviso, which lays down that no direction under Section 12(4) or Section 13 shall be issued except on matters specified in Section 11(1)(b). It is thus clear that in discharge of its functions, the Authority can issue directions to the service providers. The Act speaks of many players like the licensors and users, who do not come within the ambit of the term "service provider". If the Authority has to discharge its functions qua the licensors or users, then it will have to use powers under provisions other than Sections 12(4) and 13. Therefore, in exercise of power under Section 36(1), the Authority can make regulations which may empower it to issue directions of general character applicable to service providers and others and it cannot be said that by making

regulations under Section 36(1) the Authority has encroached upon the field occupied by Sections 12(4) and 13 of the Act.

44. Before parting with this aspect of the matter, we may notice Sections 33 and 37. A reading of the plain language of Section 33 makes it clear that the Authority can, by general or special order, delegate to any member or officer of the Authority or any other person such of its powers and functions under the Act except the power to settle disputes under Chapter IV or make regulations under Section 36. This means that the power to make regulations under Section 36 is non-delegable. The reason for excluding Section 36 from the purview of Section 33 is simple. The power under Section 36 is legislative as opposed to administrative. By virtue of Section 37, the regulations made under the Act are placed on par with the rules which can be framed by the Central Government under Section 35 and being in the nature of subordinate legislations, the rules and regulations have to be laid before both the Houses of Parliament which can annul or modify the same. Thus, the regulations framed by the Authority can be made ineffective or modified by Parliament and by no other body.

45. In view of the above discussion and the propositions laid down in the judgments referred to in the preceding paragraphs, we hold that the power vested in the Authority under Section 36(1) to make regulations is wide and pervasive. The exercise of this power is only subject to the provisions of the Act and the Rules framed under Section 35 thereof. There is no other limitation on the exercise of power by the Authority under Section 36(1). It is not controlled or limited by Section 36(2) or Sections 11, 12 and 13.

46. The second and more important facet of the question framed by the Court is whether TDSAT has the jurisdiction to entertain challenge to the regulations framed by the Authority.

47. The learned Solicitor General referred to Articles 323A and 323B of the Constitution, Section 14 of the Administrative Tribunals Act, 1985, the judgment of the larger Bench in L. Chandra Kumar v. Union of India (1997) 3 SCC 261 and argued that whenever Parliament wishes to confer power of judicial review on an adjudicatory body other than the regular Courts, it has enacted a provision like Section 14 of the 1985 Act. He submitted that the language of Section 14 of the Act, which was enacted after 12 years of

the enactment of the 1985 Act and was amended in 2000 does not empower TDSAT to undertake judicial review of subordinate legislation. Learned Solicitor General further argued that the words 'direction', 'decision' or 'order' used in Section 14(b) should not be given over-stretched meaning to empower TDSAT to entertain challenge to the regulations made under Section 36 of the Act, which are in the nature of subordinate legislation. He emphasized that if these words are interpreted to include the regulations made under Section 36, the same interpretation would hold good qua the rules framed under Section 35 because they are also in the nature of subordinate legislation. Learned Solicitor General submitted that it would be an extremely anomalous position if the rules framed under Section 35 and the regulations framed under Section 36 are challenged before TDSAT and validity thereof is examined by a Bench comprising non-judicial members. The learned Solicitor General relied upon the judgment of the Constitution Bench in PTC India Ltd. v. Central Electricity Regulatory Commission (2010) 4 SCC 603 and argued that even though in paragraph 94 of the judgment the Bench had observed that summary of findings and answer to the reference shall not be

construed as a general principle of law to be applied to Appellate Tribunals vis-à-vis Regulatory Commissions constituted under other enactments including the Act, the ratio of the judgment is clearly attracted in the present case. He submitted that Section 79 of the Electricity Act, 2003 (for short, 'the 2003 Act') does not contain Clauses like 11(1)(b)(vii) and (viii) of the Act and provision like Section 36(2) of the Act is not contained in the 2003 Act and further that Section 111 of the 2003 Act contains only the word 'order' as against the words 'direction', 'decision' or 'orders' used in Section 14 but that these differences are insignificant and there is no justification to ignore the ratio of the judgment of the Constitution Bench. Shri Nariman submitted that distinction sought to be made by the other side with reference to the language of Sections 79, 111 and 178(2)(ze) of the Electricity Act, 2003 is illusory because after noticing Section 121 which uses the words 'orders', 'instructions' or 'directions', the Constitution Bench has unequivocally held that the said section does not confer power of judicial review on the Appellate Tribunal.

48. S/Shri A.S. Chandhiok, C.S. Vaidyanathan, Dr. A.M. Singhvi, Ramji Shrinivashan and Mukul Rohatgi, learned senior counsel relied

upon the judgment of the larger Bench in L. Chandra Kumar vs. Union of India (supra) and argued that every Tribunal constituted under an Act of Parliament or State Legislature is empowered to exercise power of judicial review qua the rules and regulations. They also relied upon the judgments of this Court in Cellular Operators Assn. of India v. Union of India (2003) 3 SCC 186, Hotel & Restaurant Association v. Star India (P) Ltd. (2006) 13 SCC 753, Union of India v. TATA Teleservices (Maharashtra) Ltd. (2007) 7 SCC 517, Union of India v. Association of Unified Telecom Service Providers of India (2011) 10 SCC 543 and argued that the validity of the regulations framed under Section 36 can be examined by TDSAT and in appropriate cases the same can be struck down. They further argued that the regulations framed under Section 36 are essentially in the nature of a decision taken by the Authority and the same can always be subjected to challenge under Section 14(b). Learned senior counsel also referred to order dated 28.3.2006 passed by a three-Judge Bench in Civil Appeal No.6743/2003 – Telecom Regulatory Authority of India v. BPL Mobile Cellular Ltd. and argued that having taken the stand before this Court that a 'direction' includes 'regulation', the Authority is estopped

from adopting a different posture before this Court on the issue of maintainability of appeal under Section 14(b) involving challenge to the regulations. Dr. Singhvi and Shri Rohatgi argued that one of the objectives of the amendments made in 2000 was to create a specialised body for expeditious adjudication of disputes and appeals and that objective will be totally defeated if the regulations framed under Section 36 are excluded from the ambit of Section 14(b). They also relied upon the judgment of this Court in Madras Bar Association v. Union of India (2010) 11 SCC 1 and argued that once Parliament has conferred power of judicial review upon TDSAT, there is no valid ground to whittle down the scope thereof by giving a restrictive interpretation to Section 14(b) of the Act.

49. Before dealing with the respective arguments, we may revert back to Section 14 (unamended and amended). Under the unamended Section 14(1), the Authority could decide disputes among service providers and between service providers and a group of consumers. In terms of Section 14(2) (unamended), the bench constituted by the Chairperson of the Authority can exercise powers and authority which were exercisable earlier by the Civil Court on technical compatibility

and inter-connections between service providers, revenue sharing arrangements between different service providers, quality of telecommunication services and interest of consumers. However, the disputes specified in clauses (a), (b) and (c) of Section 14(2) could not be decided by the Bench constituted by the Chairperson.

50. Since the mechanism provided for settlement of disputes under Section 14 of the unamended Act was not satisfactory, Parliament substituted that section and facilitated establishment of an independent adjudicatory body known as TDSAT. Clause (a) of amended Section 14 confers jurisdiction upon TDSAT to adjudicate any dispute between a licensor and licensee, between two or more service providers and between a service provider and a group of consumers. Three exceptions to the adjudicatory power of TDSAT relates to the cases which are subject to the jurisdiction of Monopolies and Restrictive Trade Practices Commission, the complaint of an individual consumer which could be maintained under the consumer forums established under the Consumer Protection Act, 1986 and dispute between Telegraph Authority and any other person referred to in Section 7B(1) of the Indian Telegraph Act, 1885. In terms of clause

(b) of Section 14 (amended), TDSAT is empowered to hear and dispose of appeal against any direction, decision or order of the Authority. Section 14A(1) provides for making of an application to TDSAT for adjudication of any dispute referred to in Section 14(a). Section 14A(2) and (3) provides for filing an appeal against any direction, decision or order made by the Authority and also prescribes the period of limitation. Sub-sections (4) to (7) of Section 14 are, by and large, procedural. Section 14B relates to composition of Appellate Tribunal. Section 14C prescribes qualifications for Chairperson and Members. Section 14D speaks of tenure of the Chairperson and every other Member of TDSAT. Section 14E speaks of terms and conditions of service. Section 14F provides for filling up the vacancies. Section 14G deals with removal and resignation of Chairperson or any Member of TDSAT. Section 14H relates to staff of TDSAT. Section 14I empowers the Chairperson to make provisions of distribution of business of TDSAT amongst different Benches and their roster. Section 14J empowers the Chairperson to transfer cases from one Bench to the other. Section 14K lays down that decision of any application or appeal should be by majority. Section 14L treats the

Chairperson and Members etc. of TDSAT to be public servants. Sections 14M and 14N provide for transfer of pending cases and appeals.

51. The primary objective of the 2000 amendment was to separate adjudicatory functions of the Authority from its administrative and legislative functions and ward off the criticism that the one who is empowered to make regulations and issue directions or pass orders is clothed with the power to decide legality thereof. The word 'direction' used in Section 14(b) is referable to Sections 12(4) and 13. The word 'order' is referable to Section 11(2) and 12(1). The word 'decision' has been used in Section 14-A(2) and (7). This is because the proviso to Section 14-M postulates limited adjudicatory function of the Authority in respect of the disputes being adjudicated under Chapter IV before the 2000 amendment. This proviso was incorporated in Section 14-M to avoid a hiatus between the coming into force of the 2000 amendment and the establishment of TDSAT.

52. None of the words used in Section 14(b) have anything to do with adjudication of disputes. Before the 2000 Amendment, the applications were required to be filed under Section 15 which also

contained detailed procedure for deciding the same. While sub-Section (2) of Section 15 used the word 'orders', sub-Sections (3) and (4) thereof used the word 'decision'. In terms of sub-Section (5), the orders and directions of the Authority were treated as binding on the service providers, Government and all other persons concerned. Section 18 provided for an appeal against any decision or order of the Authority. Such an appeal could be filed before the High Court. The amendment made in 2000 is intended to vest the original jurisdiction of the Authority in TDSAT and the same is achieved by Section 14(a). The appellate jurisdiction exercisable by the High Court is also vested in TDSAT by virtue of Section 14(b) but this does not include decision made by the Authority. Section 14-N provides for transfer to all appeals pending before the High Court to TDSAT and in terms of Clause (b) of sub-Section (2), TDSAT was required to proceed to deal with the appeal from the stage which was reached before such transfer or from any earlier stage or de novo as considered appropriate by it. Since High Court while hearing appeal did not have the power of judicial review of subordinate legislation, the transferee adjudicatory forum, i.e., TDSAT cannot exercise that power under Section 14(b).

53. In Cellular Operators Assn. of India v. Union of India (supra), Pattanaik, C.J., who authored main judgment of the three Judge Bench, referred to Section 14 and observed:

> "Suffice it to say, Chapter IV containing Section 14 was inserted by an amendment of the year 2002 and the very Statement of Objects and Reasons would indicate that to increase the investors' confidence and to create a level playing field between the public and the private operators, suitable amendment in the Telecom Regulatory Authority of India Act, 1997 was brought about and under the amendment, a tribunal was constituted called the Telecom Disputes Settlement and Appellate Tribunal for adjudicating the disputes between a licensor and a licensee, between two or more service providers, between a service provider and a group of consumers and also to hear and dispose of appeal against any direction, decision or order of the Authority. The aforesaid provision was absolutely essential as the organizations of the licensor, namely, MTNL and BSNL were also service providers. That being the object for which an independent tribunal was constituted, the power of that Tribunal has to be adjudged from the language conferring that power and it would not be appropriate to restrict the same on the ground that the decision which is the subject-matter of challenge before the Tribunal was that of an expert body. It is no doubt true, to which we will advert later, that the composition of the Telecom Regulatory Authority of India as well as the constitution of GOT-IT in April 2001 consists of a large number of eminent impartial experts and it is on their advice, the Prime Minister finally took the decision, but that would not in any way restrict the power of the Appellate Tribunal under Section 14, even though in the matter of appreciation the Tribunal would

give due weight to such expert advice and recommendations. Having regard to the very purpose and object for which the Appellate Tribunal was constituted and having examined the different provisions contained in Chapter IV, more particularly, the provision dealing with ousting the jurisdiction of the civil court in relation to any matter which the Appellate Tribunal is empowered by or under the Act, as contained in Section 15, we have no hesitation in coming to the conclusion that the power of the Appellate Tribunal is quite wide, as has been indicated in the statute itself and the decisions of this Court dealing with the power of a court, exercising appellate power or original power, will have no application for limiting the jurisdiction of the Appellate Tribunal under the Act. Since the Tribunal is the original authority to adjudicate any dispute between a licensor and a licensee or between two or more service providers or between a service provider and a group of consumers and since the Tribunal has to hear and dispose of appeals against the directions, decisions or order of TRAI, it is difficult for us to import the self-contained restrictions and limitations of a court under the judge-made law to which reference has already been made and reliance was placed by the learned Attorney-General."

(emphasis supplied)

54. In Union of India v. TATA Teleservices (Maharashtra) Ltd. (supra), the two Judge Bench of this Court referred to the scheme of the Act and observed:

"The conspectus of the provisions of the Act clearly indicates that disputes between the licensee or licensor, between two or more service providers which takes in the

Government and includes a licensee and between a service provider and a group of consumers are within the purview of TDSAT. A plain reading of the relevant provisions of the Act in the light of the Preamble to the Act and the Objects and Reasons for enacting the Act, indicates that disputes between the parties concerned, which would involve significant technical aspects, are to be determined by a specialised tribunal constituted for that purpose. There is also an ouster of jurisdiction of the civil court to entertain any suit or proceeding in respect of any matter which TDSAT is empowered by or under the Act to determine. The civil court also has no jurisdiction to grant an injunction in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act. The constitution of TDSAT itself indicates that it is chaired by a sitting or retired Judge of the Supreme Court or sitting or a retired Chief Justice of the High Court, one of the highest judicial officers in the hierarchy and the members thereof have to be of the cadre of Secretaries to the Government, obviously well experienced in administration and administrative matters.

The Act is seen to be a self-contained code intended to deal with all disputes arising out of telecommunication services provided in this country in the light of the National Telecom Policy, 1994. This is emphasised by the Objects and Reasons also.

Normally, when a specialised tribunal is constituted for dealing with disputes coming under it of a particular nature taking in serious technical aspects, the attempt must be to construe the jurisdiction conferred on it in a manner as not to frustrate the object sought to be achieved by the Act. In this context, the ousting of the jurisdiction of the civil court contained in Section 15 and Section 27 of the Act has also to be kept in mind. The subject to be dealt with under the Act has considerable technical overtones which normally a civil court, at least as of now, is ill

equipped to handle and this aspect cannot be ignored while defining the jurisdiction of TDSAT."

55. In the aforementioned judgments, this Court has laid emphasis on the scope of the jurisdiction of TDSAT but has not dealt with the question whether the words 'direction', 'decision' or 'order' include 'regulations' framed under Section 36 of the Act and the same could be subjected to appellate jurisdiction of TDSAT. Therefore, those judgments cannot be relied upon for holding that in exercise of power under Section 14(b) of the Act TDSAT can hear an appeal against regulations framed under Section 36.

56. We may now deal with the judgment of three Judge Bench in Civil Appeal No.6743/2003 – Telecom Regulatory Authority of India v. BPL Mobile Cellular Ltd. is clearly distinguishable. The facts of that case were that in May, 2001 respondent No.1 offered a scheme as a promotional plan to its customers. Several thousand subscribers accepted the offer. In October, 2001 the scheme was dropped. A public interest litigation was filed by one subscriber challenging the unilateral dropping of the scheme by respondent No.1. The High Court passed an order and directed the appellant to submit a report in that

connection. No report having been submitted, by a subsequent order dated 24.9.2002, the High Court directed the appellant to take steps after hearing the parties and submit a report of compliance within a period of three months from the date of the order. Pursuant to this directive the appellant passed an order on 23.12.2002 holding, inter alia, that respondent No.1 had violated the provisions of the Telecommunication Tariff Order, 1999 insofar as it had failed to inform the appellant either as to the introduction of the scheme or subsequent withdrawal hereof. It was found that the action of respondent No.l had adversely affected the interest of the subscribers. Finally the appellant opined that the violation was of serious nature and to be dealt with in accordance with Section 29 read with Section 34 of the Act. Thereafter, a complaint was lodged before the jurisdictional Magistrate. Respondent No.1 filed an appeal against order dated 23.12.2002. TDSAT allowed the appeal and held that Section 29 could not be invoked for any violation of an order issued by the appellant. This Court referred to Sections 29 and 34 and formulated the following question:

"Whether the word 'directions' would include the Telecommunication Tariff Order, 1999 (hereinafter referred to as the 'Order') so that any violation thereof would be punishable under Section 29 read with Section 34."

The Court then referred to Sections 11(1)(c), 11(2), 12(4), 13 and observed:

"The order which has been passed in 1999 has in fact sought to and ensures compliance of the terms and conditions of the licence granted by the Government of India to the respondent.

It appears to us on a reading of all these provisions that the word 'directions' had been used in a wide sense to cover orders/regulations which in effect direct an action to be taken we were to limit Section 29 only to directions which were not directory orders or/directory regulations this would mean that violation of such orders/regulations would not carry any penal consequence whatsoever. Consequently, the entire scheme of the Act would become unworkable. Besides Section 11(1)(b) in respect of which directions may be issued has itself also been widely framed. Indeed the order in question pertains to the provisions of Section 11(1)(b)(i) as we have already stated. It may be that Section 29 creates an offence and therefore, must be strictly construed. However, that principle will not militate with the principle that the interpretation of a word must be made contextually. We have to ascertain the meaning of the word 'directions' in Section 29. The word 'directions' can take within its fold directory orders and regulations in the nature of directions as a matter of semantics. Besides in the context of the Act there is no reason not to include

> the orders and regulations containing directions within the word 'directions.' This would also be a logical corollary as such regulations and orders have appended to them a more serious mandate."

57. From the above extracted portion of the order it is evident that the Bench, which decided the matter, felt that the view taken by TDSAT would encourage rampant violation of the orders without any penal consequence and the entire scheme of the Act would become unworkable. The word 'directions' used in Section 29 of the Act was interpreted to include orders and regulations in the context of the factual matrix of that case and the apprehension of the Court that Section 29 would otherwise become unworkable, but the same cannot be read as laying down a proposition of law that the words 'direction', 'decision' or 'order' used in Section 14(b) would include regulation framed under Section 36, which are in the nature of subordinate legislation.

58. In PTC India Ltd. v. Central Electricity Regulatory Commission (surpa), the Constitution Bench framed the following questions:

> "(i) Whether the Appellate Tribunal constituted under the Electricity Act, 2003 (the 2003 Act) has jurisdiction under Section 111 to examine the validity of the Central Electricity Regulatory Commission (Fixation of Trading

Margin) Regulations, 2006 framed in exercise of power conferred under Section 178 of the 2003 Act?

(ii) Whether Parliament has conferred power of judicial review on the Appellate Tribunal for Electricity under Section 121 of the 2003 Act?

(iii) Whether capping of trading margins could be done by CERC (the Central Commission) by making a regulation in that regard under Section 178 of the 2003 Act?"

59. The Constitution Bench extensively referred to the provisions of the Electricity Act, 2003 including Sections 73, 75, 79, 86, 111, 177, 178, 179, 181 and 182, and observed:

"47. On the above submissions, one of the questions which arises for determination is—whether trading margin fixation (including capping) under the 2003 Act can only be done by an order under Section 79(1)(j) and not by regulations under Section 178? According to the appellant(s) it can only be done by an order under Section 79(1)(j), particularly when under Section 178(2) power to make regulations is co-relatable to the functions ascribed to each authority under the said 2003 Act.

48. In every case one needs to examine the statutory context to determine whether a court or a tribunal hearing a case has jurisdiction to rule on a defence based upon arguments of invalidity of subordinate legislation or administrative act under it. There are situations in which Parliament may legislate to preclude such challenges in the interest of promoting certainty about the legitimacy of administrative acts on which the public may have to rely.

49. On the above analysis of various sections of the 2003 Act, we find that the decision-making and regulation-

making functions are both assigned to CERC. Law comes into existence not only through legislation but also by regulation and litigation. Laws from all three sources are binding. According to Professor Wade, "between legislative and administrative functions we have regulatory functions". A statutory instrument, such as a rule or regulation, emanates from the exercise of delegated legislative power which is a part of administrative process resembling enactment of law by the legislature whereas a quasi-judicial order comes from adjudication which is also a part of administrative process resembling a judicial decision by a court of law.

50. Applying the above test, price fixation exercise is really legislative in character, unless by the terms of a particular statute it is made quasi-judicial as in the case of tariff fixation under Section 62 made appealable under Section 111 of the 2003 Act, though Section 61 is an enabling provision for the framing of regulations by CERC. If one takes "tariff" as a subject-matter, one finds that under Part VII of the 2003 Act actual determination/fixation of tariff is done by the appropriate Commission under Section 62 whereas Section 61 is the enabling provision for framing of regulations containing generic propositions in accordance with which the appropriate Commission has to fix the tariff. This basic scheme equally applies to the subject-matter "trading margin" in a different statutory context as will be demonstrated by discussion hereinbelow."

The Bench then referred to the judgments in Narinder Chand Hem Raj v. Lt. Governor, H.P. (1971) 2 SCC 747 and Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India (1985) 1 SCC 641 and held:

"53. Applying the abovementioned tests to the scheme of the 2003 Act, we find that under the Act, the Central Commission is a decision-making as well as regulation-making authority, simultaneously. Section 79 delineates the functions of the Central Commission broadly into two categories—mandatory functions and advisory functions. Tariff regulation, licensing (including inter-State trading licensing), adjudication upon disputes involving generating companies or transmission licensees fall under the head "mandatory functions" whereas advising the Central Government on formulation of National Electricity Policy and tariff policy would fall under the head "advisory functions". In this sense, the Central Commission is the decision-making authority. Such decision-making under Section 79(1) is not dependent upon making of regulations under Section 178 by the Central Commission. Therefore, functions of the Central Commission enumerated in Section 79 are separate and distinct from functions of the Central Commission under Section 178. The former are administrative/adjudicatory functions whereas the latter are legislative.

54. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide-ranging responsibilities and objectives inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76(1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Sections 76(1) and 79(1) one finds that the Central Commission is empowered to take measures/steps in discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to

determine tariff for inter-State transmission of electricity, to issue licences, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc. These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79(1), therefore, have got to be in conformity with the regulations under Section 178.

55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(*g*) the Central Commission is required to levy fees for the purpose of the 2003 Act. An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process. Making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(*g*). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(*g*) has to be in consonance with such regulation."

The Constitution Bench then considered the question whether Section 121 of the Electricity Act, 2003 can be read as conferring power of

judicial review upon the Appellate Tribunal. The Bench referred to the judgment in Raman and Raman Ltd. v. State of Madras AIR 1959 SC 694 and observed:

> "83. Applying the tests laid down in the above judgment to the present case, we are of the view that, the words "orders", "instructions" or "directions" in Section 121 do not confer power of judicial review in the Tribunal. It is not possible to lay down any exhaustive list of cases in which there is failure in performance of statutory functions by the appropriate Commission. However, by way of illustrations, we may state that, under Section 79(1)(h) CERC is required to specify the Grid Code having regard to the Grid Standards. Section 79 comes in Part X. Section 79 deals with functions of CERC. The word "grid" is defined in Section 2(32) to mean high voltage backbone system of interconnected transmission lines, sub-stations and generating plants. Basically, a grid is a network. Section 2(33) defines "Grid Code" to mean a code specified by CERC under Section 79(1)(h). Section 2(34) defines "Grid Standards" to mean standards specified under Section 73(d) by the Authority.
>
> 84. Grid Code is a set of rules which governs the maintenance of the network. This maintenance is vital. In summer months grids tend to trip. In the absence of the making of the Grid Code in accordance with the Grid Standards, it is open to the Tribunal to direct CERC to perform its statutory functions of specifying the Grid Code having regard to the Grid Standards prescribed by the Authority under Section 73. One can multiply these illustrations which exercise we do not wish to undertake. Suffice it to state that, in the light of our analysis of the 2003 Act, hereinabove, the words "orders, instructions or directions" in Section 121 of the 2003 Act cannot confer

power of judicial review under Section 121 to the Tribunal, which, therefore, cannot go into the validity of the impugned 2006 Regulations, as rightly held in the impugned judgment."

60. The summary of the findings of the Constitution Bench are contained in paragraph 92, which is reproduced below:

"92. (i) In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by orders (decisions).

(ii) A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulation.

(iii) A regulation under Section 178 is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the courts and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act.

(iv) Section 121 of the 2003 Act does not confer power of judicial review on the Appellate Tribunal. The words "orders", "instructions" or "directions" in Section 121 do not confer power of judicial review in the Appellate Tribunal for Electricity. In this judgment, we do not wish to analyse the English authorities as we find from those

authorities that in certain cases in England the power of judicial review is expressly conferred on the tribunals constituted under the Act. In the present 2003 Act, the power of judicial review of the validity of the regulations made under Section 178 is not conferred on the Appellate Tribunal for Electricity.

(v) If a dispute arises in adjudication on interpretation of a regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111, however, no appeal to the Appellate Tribunal shall lie on the validity of a regulation made under Section 178.

(vi) Applying the principle of "generality versus enumeration", it would be open to the Central Commission to make a regulation on any residuary item under Section 178(1) read with Section 178(2)(ze). Accordingly, we hold that CERC was empowered to cap the trading margin under the authority of delegated legislation under Section 178 vide the impugned Notification dated 23-1-2006.

(vii) Section 121, as amended by the Electricity (Amendment) Act 57 of 2003, came into force with effect from 27-1-2004. Consequently, there is no merit in the contention advanced that the said section has not yet been brought into force."

61. In our view, even though in paragraph 94 of the judgment the Constitution Bench clarified that the judgment will not govern the cases under the Act, the ratio of that judgment is clearly attracted in these cases.

62. The judgments of the larger Bench in L. Chandra Kumar v. Union of India (supra) and Union of India v. Madras Bar Association

(2010) 11 SCC 1 are clearly distinguishable. In L. Chandra Kumar's case, this Court considered the scope of Section 14 of the 1985 Act, which reads as under:

> "**14. Jurisdiction, powers and authority of the Central Administrative Tribunal**.- (1) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal shall exercise, on and from the appointed day, all the jurisdiction, powers and authority exercisable immediately before that day by all courts except the Supreme Court in relation to-
>
> (a) recruitment, and matters concerning recruitment, to any All-India Service or to any civil service of the Union or a civil post under the Union or to a post connected with defence or in the defence services, being, in either case, a post filled by a civilian;
>
> (b) all service matters concerning-
>
> (i) a member of any All-India Service; or
>
> (ii) a person not being a member of an All-India Service or a person referred to in clause (c) appointed to any civil service of the Union or any civil post under the Union; or
>
> (iii) a civilian not being a member of an All-India Service or a person referred to in clause (c) appointed to any defence, services or a post connected with defence,
>
> and pertaining to the service of such member, person or civilian, in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation or society owned or controlled by the Government;

(c) all service matters pertaining to service in connection with the affairs of the Union concerning a person appointed to any service or post referred to in sub-clause (ii) or sub-clause (iii) of clause (b), being a person whose services have been placed by a State Government or any local or other authority or any corporation or society or other body, at the disposal of the Central Government for such appointment.

Explanation.- For the removal of doubts, it is hereby declared that references to "Union" in this sub-section shall be construed as including references also to a Union territory.

(2) The Central Government may, by notification, apply with effect from such date as may be specified in the notification the provisions of sub-section (3) to local or other authorities within the territory of India or under the control of the Government of India and to corporations or societies owned or controlled by Government, not being a local or other authority or corporation or society controlled or owned by a State Government:

Provided that if the Central Government considers it expedient so to do for the purpose of facilitating transition to the scheme as envisaged by this Act, different dates may be so specified under this sub- section in respect of different classes of, or different categories under any class of, local or other authorities or corporations or societies.

(3) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal shall also exercise, on and from the date with effect from which the provisions of this sub- section apply to any local or other authority or corporation or society, all the jurisdiction, powers and authority exercisable immediately before that date by all courts (except the Supreme Court) in relation to--

(a) recruitment, and matters concerning recruitment, to any service or post in connection with the affairs of such local or other authority or corporation or society; and

(b) all service matters concerning a person other than a person referred to in clause (a) or clause (b) of sub- section (1) appointed to any service or post in connection with the affairs of such local or other authority or corporation or society and pertaining to the service of such person in connection with such affairs."

The larger Bench then dealt with the scope of the power of judicial review vested in the Supreme Court and the High Courts and proceeded to observe:

"Before moving on to other aspects, we may summarise our conclusions on the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set-up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the High Court

concerned may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned."

63. In Union of India v. Madras Bar Association (supra) and State of Gujarat v. Gujarat Revenue Tribunal Bar Association (2012) 10 SCC 353 : 2012 (10) SCALE 285, this Court applied the principles laid down in L. Chandra Kumar's case and reiterated the importance of Tribunals created for resolution of disputes but these judgments too have no bearing on the decision of the question formulated before us.

64. In the result, the question framed by the Court is answered in the following terms:

In exercise of the power vested in it under Section 14(b) of the Act, TDSAT does not have the jurisdiction to entertain the

challenge to the regulations framed by the Authority under Section 36 of the Act.

65. As a corollary, we hold that the contrary view taken by TDSAT and the Delhi High Court does not represent correct law. At the same time, we make it clear that the aggrieved person shall be free to challenge the validity of the regulations framed under Section 36 of the Act by filing appropriate petition before the High Court.

66. The cases may now be listed before an appropriate Bench for deciding the questions framed vide order dated 6.2.2007 passed in Civil Appeal No.3298/2005 and some of the connected matters.

.....J.
(G.S. SINGHVI)

.....J.
(B.S. CHAUHAN)

.....J.
(FAKKIR MOHAMED IBRAHIM KALIFULLA)

New Delhi
December 6, 2013.