Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5059 OF 2007

Union of India & Anr. ...
Appellants

Versus

Association of Unified Telecom Service Providers of India & Ors. ...
Respondents

WITH

CIVIL APPEAL NOs.179-180 OF 2008, 363 of 2008, 1229- 1230 of 2008, 2065 of 2008, 2479 of 2008, 1552 of 2009, 3868 of 2009, 7049 of 2010, 7062 of 2010, 7063-7064 of 2010, 7443 of 2010, 7446 of 2010, 7126 of 2010, 7444 of 2010, 7445 of 2010, 9646-9661 of 2010, 2030 of 2011, 2031 of 2011, 2270 of 2011, 3245 of 2011, 5450-5451 of 2011, 311-314 & 317-318 of 2008, CIVIL APPEAL Nos. 8627-8628 OF 2011 (Arising out of SLP (C) Nos. 1786-1787 of 2009) AND CIVIL APPEAL Nos. 8625-8626 OF 2011 (Arising out of SLP (C) Nos. 6641-6642 of 2010)

J U D G M E N T

A. K. PATNAIK, J.

Civil Appeal Nos. 5059 of 2007, 179-180 of 2008, 311-314, 317-318 of 2008, 363 of 2008, 2065 of 2008, 1229-1230 of 2008 and 3868 of 2009:

These are appeals under Section 18 of the Telecom Regulatory Authority of India Act, 1997 (for short "the TRAI Act") against the common judgment and order dated 30.08.2007 of the Telecom Disputes Settlement and Appellate Tribunal, New Delhi (for short "the Tribunal") in Petition No. 7 of 2003.

2. The relevant facts very briefly are that with the introduction of the National Telecom Policy, 1994 liberalizing the Telecom Sector, telecom licenses were issued to different service providers. The licenses granted to the service providers stipulated a fixed license fee, which was payable by the service providers every year. During the period 1994 to 1999, the licensees defaulted in payment of license fee and made a representation to the Government of India, Ministry of Telecommunications for relief against the high license fee for the survival of the telecom industry. The Government of India considered the representations and after a number of deliberations with the licensees offered a new package, known as the "National Telecom Policy

1999 - Regime" giving an option to the licensees to migrate from fixed license fee to revenue sharing fee. Accordingly, letters dated 22.07.1999 were sent to different licensees offering them a change over to NTP-99 regime, which *inter alia* stated:

"(i) The cut off date for change over to NTP-99 regime will be 01.08.1999.

(ii) The licensee will be required to pay one time Entry Fee and License Fee as a percentage share of gross revenue under the license. The Entry Fee chargeable will be the license fee dues payable by existing licensees upto 31.07.1999, calculated upto this date duly adjusted consequent upon notional extension of effective date as in para (ix) below, as per the conditions of existing license.

(iii) The license fee as percentage of gross revenue under the license shall be payable w.e.f. 01.08.1999. The Government will take a final decision about the quantum of the revenue share to be charged as license fee after obtaining recommendations of the Telecom Regulatory Authority of India (TRAI). In the meanwhile, Government have decided to fix 15% of the gross revenue of the Licensee as provisional license fee. The gross revenue for this purpose would be the total revenue of the licensee company excluding the PSTN related call charges paid to DOT/MTNL and service tax collected by the licensee on behalf of the Government from their subscribers. On receipt of TRAI's recommendation and Government's final decision, final adjustment of provisional dues will be effected depending upon the percentage of revenue share and the definition of revenue for this purpose as may be finally decided."

3. After receipt of the letter dated 22.07.1999, some of the service providers applied and took new licenses which provided that the licensee will have to pay a certain percentage of the Gross Revenue as license fee annually. After the Government of India, Ministry of Telecommunications finally took the final decision on the definition of Adjusted Gross Revenue, the license agreement was amended and signed by the licensees and the amended license agreement was effective from 01.08.1999. Clause 19 of the amended license agreement, which defines Adjusted Gross Revenue, is extracted hereinbelow:

"19. Definition of 'Adjusted Gross Revenue':

19.1 Gross Revenue:

The Gross Revenue shall be inclusive of installation charges, late fees, sale proceeds of handsets [or any other terminal equipment etc.', revenue on account of interest, dividend, value added services, supplementary services, access or interconnection charges, roaming charges, revenue from permissible sharing of infrastructure and any other miscellaneous revenue, without any setoff for related item of expense, etc.

19.2 For the purpose of arriving at the 'Adjusted Gross Revenue [AGR]' the following shall be excluded from the Gross Revenue to arrive at the AGR:

I. PSTN related call charges [Access Charges] actually paid to other eligible/

entitled telecommunication service providers within India;

II. Roaming revenues actually passed on to other eligible/ entitled telecommunication service providers and;

III. Service Tax on provision of service and Sales Tax actually paid to the Government if gross revenue had included as component of Sales Tax and Service Tax."

4. In the year 2003, some of the licensees questioned the validity of the definition of Adjusted Gross Revenue in the license agreement before the Tribunal and contended that Adjusted Gross Revenue can only relate to the revenue directly arising out of telecom operations licensed under Section 4 of the Indian Telegraph Act, 1885 (for short "the Telegraph Act") after adjustment of expenses and write offs and revenues directly not attributable to the licensed telecom activities. They also contended that miscellaneous and other items including interest income, and dividend income, value of rebates, discounts, free calls and reimbursement from USO fund etc. ought not to be included in the Adjusted Gross Revenue for the purpose of computation of license fee.

The Union of India filed its reply before the Tribunal contending that the licensees having unconditionally accepted the migration package and having taken the benefit of the same are bound by the terms and conditions of the license agreement and cannot be permitted to resile from the same. In its order dated 07.07.2006, the Tribunal rejected the contentions of the Union of India and held that under Section 4 of the Telegraph Act, the Central Government can take percentage of the share of gross revenue of a licensee realised from activities of the licensee under the license and therefore revenue received by a licensee from activities beyond licensed activities would be outside the purview of Section 4 of the Telegraph Act. The Tribunal further held that Section 11 (1) (a) of the TRAI Act mandates the Central Government to seek recommendations from the Telecom Regulatory Authority (for short 'the TRAI') on the license fee payable by the licensee and as no effective constitution had been made by the TRAI, the matter should be remanded to the TRAI and the TRAI can consider the matter and send its

recommendations to the Tribunal. The Tribunal however made it clear that the TRAI will bear in mind the findings of the Tribunal that revenue of the licensee derived from non-license activities will not be included in the Adjusted Gross Revenue for the purpose of determining the license fee payable by the licensee.

5. The Union of India, challenged the order dated 07.07.2006 of the Tribunal before this Court in Civil Appeal No. 84 of 2007 under Section 18 of the TRAI Act. While this Civil Appeal was pending before this Court, the TRAI sent its recommendations on the incorporation of the Adjusted Gross Revenue which had been sought by the Tribunal by its order dated 07.07.2006. Accordingly, when Civil Appeal No. 84 of 2007 came up for hearing before this Court on 19.01.2007, this Court took the view that as the TRAI had already submitted its recommendations to the Tribunal, there was no reason to interfere and dismissed the appeal giving liberty to the Union of India to urge all the contentions raised in the Civil Appeal before the Tribunal.

6. When the Tribunal heard the parties on the recommendations of the TRAI, the Union of India contended that as this Court had given liberty to urge all the contentions raised in the Civil Appeal before the Tribunal, the Union of India was entitled to re-open the issue whether the validity of the definition of Adjusted Gross Revenue in the license agreement could be questioned before the Tribunal. The licensees, on the other hand, contended before the Tribunal that as the Civil Appeal of Union of India has been dismissed by this Court, the Union of India was not entitled to argue the matter *de novo* and the earlier order dated 07.07.2006 of the Tribunal had become final. In its fresh order dated 30.08.2007 (for short 'the impugned order') the Tribunal held that its earlier order dated 07.07.2006 having become final, it cannot be re-opened after the dismissal of Civil Appeal No.84 of 2007 by this Court. The Tribunal held that its finding in the earlier order dated 07.07.2006 that Adjusted Gross Revenue will include only revenue arising from licensed activity and not

revenue from activities outside the license cannot be re-agitated by the Union of India.

7. Having held that Adjusted Gross Revenue will include only revenue arising from licensed activity, the Tribunal in the impugned order considered the recommendations of the TRAI regarding the heads of revenue to be included and the heads of revenue to be excluded from the Adjusted Gross Revenue and decided as follows:

(i) The Tribunal accepted the recommendation of the TRAI that income from dividend even though part of the revenue does not represent revenue from licensed activity and, therefore, cannot be included in the Adjusted Gross Revenue.

(ii) The Tribunal accepted the recommendation of the TRAI that interest earned on investment of savings made by a licensee after meeting all liabilities including liability on account of the share of the Government in the gross revenue cannot be included in the Adjusted Gross Revenue, but, interest on investment of funds received by a licensee by way of deposits from customers

on account of security against charges and on account of concessions given in the charges payable for using the telecom services have to be included in the Adjusted Gross Revenue as these are related to telecom service, which is part of the licensed activity.

(iii) The Tribunal did not fully accept the recommendation of the TRAI on capital gains and held that sale of assets of a licensee such as immovable properties, securities, warrants or debt instruments are not part of the licensed activity and, therefore, capital gains earned by a licensee on such sale of assets cannot form part of the Adjusted Gross Revenue.

(iv) The Tribunal accepted the recommendation of the TRAI that gains from Foreign Exchange rates fluctuations are also not part of the licensed activity of telecom service providers and, therefore, cannot constitute part of the Adjusted Gross Revenue.

(v) The Tribunal did not fully accept the recommendation of the TRAI on reversal of provisions like bad debts, taxes and vendors' credits and held that all these

reversals have to be excluded from the Adjusted Gross Revenue.

(vi) The Tribunal also accepted the recommendation of the TRAI that rent from property owned by the licensee should be excluded from the Adjusted Gross Revenue, provided it is clearly established that the property is not in any way connected with establishing, maintaining and working of telecommunication.

(vii) The Tribunal accepted the recommendation of the TRAI that income from renting and leasing of passive infrastructures like towers, dark fibre, etc. should be part of the Adjusted Gross Revenue as they are parts of the licensed activity of the licensee.

(viii) The Tribunal accepted the recommendation of the TRAI that revenue from sale of tenders, directories, forms, forfeiture of deposits/earnest money in relation to telecom service should form part of the Adjusted Gross Revenue, but held that management fees, consultancy fees and training charges from telecom service should

not form part of the Adjusted Gross Revenue as these activities do not require a license.

(ix) The Tribunal held that payments received on behalf of third party should not form part of the Adjusted Gross Revenue and did not accept the recommendation of the TRAI in this regard.

(x) The Tribunal did not accept the recommendation of the TRAI that the revenue from TV up-linking and Internet service should form part of the Adjusted Gross Revenue as these activities are covered under a separate license.

(xi) The Tribunal accepted the recommendation of the TRAI that sale of handsets or telephone equipment bundled with telecom service should be part of the Adjusted Gross Revenue because such sale comes within the licensed activity.

(xii) The Tribunal accepted the recommendation of the TRAI that receipts from USO Fund will not form part of the Adjusted Gross Revenue.

(xiii) The Tribunal accepted the recommendation of the TRAI that revenue receipts on account of ADC (Access Deficit Charge) should form part of the Adjusted Gross Revenue.

(xiv) The Tribunal accepted the recommendation of the TRAI that costs on account of port charges, interconnection set-up charges, leased lines sharing of infrastructure, roaming signaling charges and content charges should form part of the Adjusted Gross Revenue.

(xv) The Tribunal did not accept the recommendation of the TRAI that bad debts, waivers and discounts should form part of the Adjusted Gross Revenue and held that such losses incurred by a licensee should be excluded from the Adjusted Gross Revenue.

(xvi) The Tribunal accepted the recommendation of the TRAI that service tax payable by the licensee should be included or excluded from

the Adjusted Gross Revenue on accrual basis and also accepted the recommendation of the TRAI that interconnection usage should also be included or excluded from the Adjusted Gross Revenue on accrual basis.

(xvii) The Tribunal did not accept the recommendation of the TRAI that its recommendations with regard to items, which are to be included or excluded from the gross revenue, should be effective from a prospective date and instead held that the findings of the Tribunal with regard to items, which are included or excluded from the Adjusted Gross Revenue, will be effective from the date the licensee approached the Tribunal.

8. Mr. Soli Sorabjee and Mr. Rakesh Dwivedi, learned senior counsel appearing for the Union of India in the different Civil Appeals before us submitted that the Union of India had challenged the order dated 07.07.2006 of the Tribunal before this Court in Civil Appeal No.84 of 2007 and this Court while disposing of

the Civil Appeal gave liberty to the Union of India to urge all the contentions raised in the Civil Appeal before the Tribunal. They submitted that the Tribunal was thus not correct in coming to the conclusion that Union of India could not re-open the issue decided in the order dated 07.07.2006 that revenue realised from activities beyond the licensed activities cannot form part of the Adjusted Gross Revenue when the said issue had been raised by the Union of India in the Civil Appeal before this Court. They further submitted that in any case the Union of India had taken a specific ground in ground No.4 of the Memorandum of Appeal in Civil Appeal No.84 of 2007 that the Tribunal had no jurisdiction or power to examine the correctness of the terms of the license which had been unconditionally accepted and acted upon the licensee. They submitted that it is well settled by decisions of this Court that the rule of *res judicata* or *estoppel* is not applicable to pure question of law relating to the jurisdiction of the court and in support of their submissions cited the decisions of this Court in *Isabella Johnson* vs. *M.A. Susai (Dead) by LRs.* [(1991) 1 SCC

494] and *Chandrabhai K. Bhoir and Others* vs. *Krishna Arjun Bhoir and Others* [(2009) 2 SCC 315] in which this Court has taken a view that an order without jurisdiction is a nullity and it is not binding on the parties. They argued that as the order dated 07.07.2006 of the Tribunal questioned the definition of Adjusted Gross Revenue in the license agreement, the order of the Tribunal was without jurisdiction and was a nullity.

9. Mr. Sorabjee and Mr. Dwivedi next submitted that the Tribunal failed to appreciate that license fee or payment made under the license agreement is really in the nature of price or consideration for parting with the exclusive privilege of the Central Government and is binding on the Central Government and the licensee and the licensee having signed the contract and agreed to the terms and conditions therein including the payment to be made cannot question the terms of the payment before the Tribunal. They submitted that this Court has consistently taken this view while deciding matters of exclusive privilege of the Government in *Har Shankar & Ors.* vs. *The Deputy Excise & Taxation Commissioner &*

Others [(1975) 1 SCC 737], *Government of A.P.* vs. *M/s Anabeshahi Wine & Distilleries Pvt. Ltd* [(1988) 2 SCC 25], *Assistant Excise Commissioner & Anr.* vs. *Issac Peter & Ors.* [(1994) 4 SCC 104], *State of Orissa & Ors.* vs. *Narain Prasad & Ors.*[(1996) 5 SCC 740], *State of M.P. & Ors.* vs. *KCT Drinks Ltd.* [(2003) 4 SCC 748] and *State of Punjab & Anr.* vs. *Devans Modern Breweries Ltd. & Ors.* [(2004) 11 SCC 26]

10. Mr. Sorabjee and Mr. Dwivedi further submitted that the definitions of Gross Revenue and Adjusted Gross Revenue are part of the package comprising the terms and conditions of the license and a licensee cannot take the license on the one hand and dispute the definitions of Gross Revenue and Adjusted Gross Revenue on the other hand. They submitted that if the licensee wants to operate the telecom license he has to accept the definitions of Gross Revenue and Adjusted Gross Revenue for the purpose of computing the fee that he will have to pay for the license to the Central Government. They relied on the decisions of this Court in *Shyam Telelink Limited* vs. *Union of India* [(2010) 10

SCC 165] and in *Bharti Cellular Limited* vs. *Union of India & Ors.* [(2010) 10 SCC 174] for the proposition that a person taking advantage under an instrument which both grants a benefit and imposes the burden, cannot take the benefit without discharging the burden.

11. Mr. Sorabjee and Mr. Dwivedi finally submitted that under Section 11(1)(a)(ii) of the TRAI Act, 1977, the TRAI makes recommendations, either *suo motu* or on a request from the licensor, on the terms and conditions of license to a service provider and the first proviso to Section 11(1) of the TRAI Act clearly states that such recommendations of the TRAI shall not be binding upon the Central Government. They submitted that the recommendations of the TRAI with regard to what heads of revenue should be included and what heads of revenue should be excluded from the Adjusted Gross Revenue, therefore, are not binding on the Central Government. They submitted that notwithstanding the aforesaid clear statutory provision the Tribunal has considered the recommendations of the TRAI and accepted most of these recommendations,

notwithstanding the fact that the Central Government filed its objections to the recommendations of the TRAI before the Tribunal and hence the impugned order of the Tribunal is not sustainable in law.

12. Mr. C.S. Vaidyanathan, learned senior counsel appearing for the Cellular Operators Association, which is an association of some of the licensees, submitted that the Tribunal in its earlier order dated 07.07.2006 had merely interpreted the definition of Adjusted Gross Revenue to cover revenue from all activities of the licensee under the license and that the finding in its order dated 07.07.2006 that revenue realized from activities of the licensee which are beyond the licensed activities cannot form part of the Adjusted Gross Revenue for the purpose of license fee could not be re-agitated after Civil Appeal No.84 of 2007 filed by the Union of India against the order dated 07.07.2006 of the Tribunal had been dismissed by this Court on 19.01.2007. In support of the submission, he relied on *K. Vidya Sagar* v. *State of U.P. and Others* [(2005) 5 SCC 581] in which this Court has held that the reliefs

claimed by the petitioner under Article 32 of the Constitution cannot be granted if he had claimed the same reliefs in a writ petition filed in the High Court under Article 226 of the Constitution and the writ petition had been dismissed and the Special Leave Petition preferred against the decision of the High Court had also been disposed of by this Court with the directions that he may ventilate his grievance in accordance with law. He also relied on *Indian Oil Corporation Limited* v. *Collector of Central Excise, Baroda* [(2007) 13 SCC 803] wherein this Court has held that if the Revenue had not appealed against an earlier order or not pressed an earlier appeal involving an identical issue, it was disentitled from pressing the appeal involving the same question in a subsequent case.

13. Mr. Vaidyanathan next submitted that the TRAI had opined that Adjusted Gross Revenue for the purpose of levy of license fee shall mean the Gross Revenue accruing to the licensee by way of operations mandated under the license, but the Central Government had rejected this opinion of the TRAI on 10.10.2000. He

submitted that this Court had held in *Cellular Operators Association of India & Ors.* v. *Union of India & Ors.* [(2003) 3 SCC 186] that the TRAI's recommendations have to be given weightage because the TRAI was a specialized body and if the Central Government rejected the recommendation of the TRAI, it has to be based on logical and concrete reasoning. He submitted that the recommendations of the TRAI that only revenues arising out of the activities carried out under the license cannot be found fault with and, therefore, the revenue realized from non-telecom activities cannot form part of the Adjusted Gross Revenue. He submitted that the view taken by the Tribunal that the revenue realized from activities outside the license of the licensee cannot be included in the Adjusted Gross Revenue for the purpose of levy of license fee is absolutely correct. He submitted that under the proviso to Section 4 of the Telegraph Act, the Central Government has the power to determine the conditions including the payment for grant of license 'as it thinks fit', but the expression 'as it thinks fit' does not give a *carte blanche* to the Central Government to levy

license fee on non-telecom activities. He cited *State of U.P.* v. *Devi Dayal Singh* [(2000) 3 SCC 5] in which Ruma Pal, J. writing the judgment for the Court, interpreted Section 2 of the Indian Tolls Act, 1851 which enables the State Government to levy toll at such rates 'as it thinks fit' and held that it is only with reference to the meaning of the word 'toll' that the State Government must justify the levy on the public by the construction of the bridge. Mr. Vaidyanathan argued that the expression 'as it thinks fit' in the proviso to Section 4 of the Telegraph Act would therefore have to be interpreted in the context of the license granted by the Central Government under Section 4 of the Telegraph Act for telecom activities and as the license granted under Section 4 of the Telegraph Act is only for carrying on telecom activities, revenues realized from non-telecom activities cannot be included in the Adjusted Gross Revenue for the purpose of levy of license fee.

14. Mr. Vaidyanathan next submitted that in any case the discretion vested in the Central Government under the proviso to Section 4 of the Telegraph Act has to be

exercised in accordance with law and in a reasonable manner. In support of the submission, he cited the decision in *Delhi Science Forum and Others v. Union of India* [(1996) 2 SCC 405] in which this Court interpreting the first proviso to Section 4(1) of the Telegraph Act held that the power to grant license on such conditions and for such considerations mentioned in the proviso to Section 4(1) of the Telegraph Act can be exercised by the Central Government only on well-settled principles and norms which can satisfy the test of Article 14 of the Constitution. He vehemently argued that the judgments of this Court for grant of exclusive privilege for liquor license cited by Mr. Sorabjee and Mr. Dwivedi have no application to grant of a license under the proviso to Section 4 of the Telegraph Act.

15. Mr. Vaidyanathan submitted that the appellants have filed Civil Appeal Nos.1229-1230 of 2008 against the impugned order of the Tribunal because they are mainly aggrieved with the conclusion of the Tribunal in the impugned order that the items which are to included or excluded from the Adjusted Gross Revenue as

recommended by the TRAI and as accepted by the Tribunal would be effective from the date the licensee approached the Tribunal. He submitted that the reliefs granted by the Tribunal to the licensees should relate back to the date of wrongdoing and in support of this submission he relied on *Kamla Bakshi* v. *Khairati Lal* [(2000) 3 SCC 681]. He submitted that the Tribunal does not possess the power of prospective overruling and, therefore, the impugned order of the Tribunal should relate back to the date of the license agreement.

16. Mr. Shyam Diwan, learned counsel appearing for the Reliance Communications Ltd. in Civil Appeal Nos. 9946-9961 of 2010 submitted that the orders dated 07.07.2006 and 30.08.2007 are really declaratory in nature and are within the powers of the Tribunal and all licensees are entitled to benefit from the aforesaid orders of the Tribunal and this would ensure a level playing field for all the licensees.

17. Mr. Ramji Srinivasan, learned counsel appearing for the Association of Telecom Service Providers of India, submitted that the Union of India is not right in its

contention that the Tribunal did not have the jurisdiction to pass the order dated 07.07.2006 holding that revenue realized from activities by the licensee which are beyond the licensed activities cannot form part of the Adjusted Gross Revenue for the purpose of license fee. He argued that Section 14 (a)(i) of the TRAI Act conferred power on the Tribunal to adjudicate "any" dispute between a licensor and a licensee and it is in exercise of this power conferred by Section 14(a)(i) of the TRAI Act that the Tribunal has passed the order dated 07.07.2006. He relied on the decision of this Court in *Union of India* v. *Tata Teleservices (Mahrashtra) Ltd*. [2007) 7 SCC 517] in support of this contention. He submitted that the order dated 07.07.2006 of the Tribunal was within the powers of the Tribunal and had become final after the dismissal of Civil Appeal No.84 of 2007 of the Union of India by this Court on 19.01.2007.

18. Mr. Srinivasan next submitted that the fifth proviso to Section 11(1) of the TRAI Act states that if the Central Government having considered the recommendation of the TRAI, comes to a *prima facie* conclusion that such

recommendation cannot be accepted or needs modification, it shall refer the recommendation back to the TRAI for its reconsideration and the TRAI may, within fifteen days from the receipt of such reference, forward to the Central Government its recommendation after considering the reference made by the Central Government and it is only after receipt of such further recommendation, if any, of the TRAI that the Central Government shall take a final decision. He submitted that the Tribunal in its order dated 07.07.2006 has found that the initial recommendation of the TRAI to include only revenue derived from the licensee from the licensed activities as part of the gross revenue was not acceptable to the Central Government and hence the Central Government referred the issue back to the TRAI and the TRAI, after considering the views of the Central Government, made some changes but in principle again recommended that the gross revenue should be only that revenue which was derived from the licensed activities. He submitted that the Tribunal in its order dated 07.07.2006 has further found that this second

recommendation of the TRAI was not accepted by the Central Government because it had obtained the opinion of a renowned expert in accountancy, who advised the Central Government that the definition of Adjusted Gross Revenue should be such as to be less prone to reduction of license fee liability by way of accounting jugglery and something which is easy to verify. He submitted that the Tribunal held in the order dated 07.07.2006 that this recommendation of the renowned expert was not communicated to the TRAI and as a result, the TRAI could not consider this opinion of the renowned expert and give its views. He argued that the Tribunal rightly held in the order dated 07.07.2006 that the opinion of the renowned expert in accountancy not having been placed before the TRAI has vitiated the proceedings contemplated under Section 11(1)(a) of the TRAI Act, which mandates the Central Government to seek recommendations of the TRAI.

19. Mr. Srinivasan next submitted that the definition of Adjusted Gross Revenue in the license agreement so as to include in gross revenue items, which according to the

Accounting Standard 9 (nine), do not come within the definition of revenue. He referred to the Format of Statement of Revenue and License Fee (Appendix-II to Annexure-II of the License Agreement) to show that the licensee is required to give information in a statement on various items which are not truly of a revenue nature and which fall totally outside the licensed activities of the telecom license.

20. Mr. Srinivasan submitted that since the Tribunal in the impugned order confined the relief to the licensees who had approached the Tribunal and that too with effect from the date the licensees approached the Tribunal, the Association of Telecom Service Providers of India filed a Review Application before the Tribunal praying that the relief granted by the Tribunal should be extended to all members of the Association and that the relief should be effective from the date of the demand and not from the date the licensee approached the Tribunal, but by order dated 14.09.2007 the Tribunal dismissed the Review Application and, therefore, the Association of Telecom Service Providers of India have

filed Civil Appeal Nos.179-180 of 2008. He vehemently argued that the Tribunal ought to have granted the relief to all members of the Association and should have made the relief effective from the date of the agreement and not from the date when the licensee approached the Tribunal.

21. Mr. Gopal Jain, learned counsel appearing for M/s Bharti Broadband, submitted that the Tribunal in its order dated 07.07.2006 had already decided Petition No. 98 of 2005 of M/s Bharti Broadband and the Union of India had not filed any appeal against M/s Bharti Broadband and, therefore, the order dated 07.07.2006 of the Tribunal so far as M/s Bharti Broadband is concerned, had become final. He relied on a recent judgment of this Court in *State of Uttaranchal & Anr*. v. *Sunil Kumar Vaish & Ors*. in Civil Appeal No.5374 of 2005 saying that there must be finality to litigation. He argued that general principles of *res judicata* should apply in a proceeding before the Tribunal and the Union of India cannot be permitted to raise the issues which

had been finally decided by the order dated 07.07.2006 of the Tribunal.

22. Mr. Jain next submitted that M/s Bharti Broadband has filed Civil Appeal No.2065 of 2008 against the impugned order because it is aggrieved by the conclusion of the Tribunal in the impugned order that the reliefs granted in the impugned order to the licensee will be effective from the date the licensee approached the Tribunal. He relied on *P.V. George* v. *State of Kerala* [(2007) 3 SCC 557] to contend that the Tribunal does not have the power to give prospective effect to its judgment. He argued that Bharti Broadband should, therefore, be entitled to the reliefs with effect from the date of demand i.e. 05.08.2005.

23. Mr. Vikas Singh, learned counsel appearing for M/s Bharti Airtel, submitted that the order dated 07.07.2006 of the Tribunal had merged with the order dated 19.01.2007 of this Court in Civil Appeal No.84 of 2007 by which the Civil Appeal was dismissed and therefore that in these appeals this Court cannot re-open the issues which had been closed by the order dated

19.01.2007 passed in Civil Appeal No.84 of 2007. In support of the submission, he relied on the decisions of this Court in *Kunhay Ahmed & Ors*. v. *State of Kerala & Anr*. [(2000) 6 SCC 359], *Supreme Court Employees' Welfare Association* v. *Union of India & Anr*. [(1989) 4 SCC 187] and *State of Manipur* v. *Thingujam Brojen Meetei* [(1996) 9 SCC 29]. He also relied on the decision of this Court in *Medley Pharmaceuticals Limited* v. *Commissioner of Central Excise and Customs* [(2011) 2 SCC 601] for the proposition that dismissal of an appeal under Article 136 of the Constitution after grant of leave by a non-speaking order attracted the doctrine of merger.

24. We have considered the submissions of learned counsel for the parties and we find that in *Cellular Operators Association of India & Ors.* v. *Union of India & Ors.* (supra) this Court considered the scope of the appeal under Section 18 of the TRAI Act and held that an appeal under Section 18 of the TRAI Act before this Court has to be confined to only substantial questions of law which arise out of the order of the Tribunal. We

have therefore formulated the following substantial questions of law which arise for decision in these appeals:

(i) Whether after dismissal of Civil Appeal No.84 of 2007 of the Union of India against the order dated 07.07.2006 of the Tribunal, by this Court by order dated 19.01.2007, the Union of India can re-agitate the question decided in the order dated 07.07.2006 that the Adjusted Gross Revenue will include only revenue arising from licensed activities and not revenue from activities outside the license of the licensee.

(ii) Whether the TRAI and the Tribunal have jurisdiction to decide whether the terms and conditions of license which had been finalised by the Central Government and incorporated in the license agreement including the definition of Adjusted Gross Revenue.

(iii) Whether as a result of the Union of India not filing an appeal against the order dated 07.07.2006 of the Tribunal passed in favour of some of the licensees, the said order dated 07.07.2006 had not become binding on the Union of India with

regard to the issue that revenue realised from activities beyond the licensed activities cannot be included in the Adjusted Gross Revenue.

(iv) Whether the licensee can challenge the computation of Adjusted Gross Revenue, and if so, at what stage and on what grounds.

25. The first substantial question of law which we have to decide is whether after dismissal of Civil Appeal No.84 of 2007 of the Union of India by this Court on 19.01.2007 against the order dated 07.07.2006 of the Tribunal, the Union of India can re-agitate the question decided in the order dated 07.07.2006 that the Adjusted Gross Revenue will include only revenue arising from licensed activities and not revenue from activities outside the license of the licensee. For deciding this question, we must first look at the language of the order dated 19.01.2007 of this Court in Civil Appeal No.84 of 2007. The order dated 19.01.2007 is quoted hereinbelow:

"Heard the parties.

Pursuant to the direction of the TDSAT in the impugned order, a fresh recommendation has been made by the TRAI. In view thereof, we see no reasons to interfere. The appeal is dismissed. The appellant is, however,

given liberty to urge the contentions raised in this petition before the TDSAT." (Emphasis Supplied)

It will be clear from the language of the order dated 19.01.2007 that while dismissing the appeal, the Court has given liberty to the appellant, namely, Union of India, to urge the contentions raised in Civil Appeal No.84 of 2007.

26. In Civil Appeal No.84 of 2007, the Union of India has urged 22 Grounds and Ground Nos.1 to 6 of the Memorandum of Appeal are extracted hereibelow :

1. Because the judgment and order dated 7.7.2006 passed by the Hon'ble TDSAT is wrong, erroneous, contrary to law and deserves to be set aside.

2. Because the Hon'ble TDSAT failed to appreciate that the migration package accepted and acted upon by the respondents herein itself provided for definition of Gross Revenue and Adjusted Gross Revenue.

3. Because the Hon'ble TDSAT failed to appreciate that the license unconditionally accepted the migration package, exploited the licenses on the terms and conditions mentioned therein and thereafter challenged the definition of Adjusted Gross Revenue.

4. Because the Hon'ble TDSAT failed to appreciate that it had no jurisdiction or power to examine the correctness of terms of the license which

had been unconditionally accepted and acted upon by the licensee.

5. Because the Hon'ble TDSAT failed to appreciate that in fact some licensee obtained new license which contains the definition of 'Gross Revenue' and 'Adjusted Gross Revenue' which has been unconditionally accepted by the appellants.

6. Because the Hon'ble TDSAT failed to appreciate that under Section 4 of the Indian Telegraph Act, 1885 it is the exclusive privilege of the Central Government to establish, maintain and work telegraph/telecom and this privilege can be given to the private parties by granting licenses on such terms and conditions as the Central Government thinks fit and appropriate."

Thus, as per the express language of the order dated 19.01.2007 of this Court in Civil Appeal No.84 of 2007, Union of India could raise each of the grounds extracted above before the Tribunal. Hence, even if we hold that the order dated 07.07.2006 of the Tribunal got merged with the order dated 19.01.2007 of this Court passed in Civil Appeal No.84 of 2007, by the express liberty granted by this Court in the order dated 19.01.2007, Union of India could urge before the Tribunal all the contentions covered under Ground Nos.1 to 6 extracted above including the contention that the definition of

Adjusted Gross Revenue as given in the license could not be challenged by the licensee before the Tribunal and will include all items of revenue mentioned in the definition of Adjusted Gross Revenue in the license.

27. The second substantial question of law which we have to decide is whether the TRAI and the Tribunal had jurisdiction to decide on the validity of the terms and conditions of license including the definition of Adjusted Gross Revenue finalised by the Central Government and incorporated in the license. For deciding this question, we must look at the provisions of Section 4(1) of the Telegraph Act and the proviso thereto and the relevant provisions of the TRAI Act which are quoted hereinbelow:

Section 4 (1) of the Telegraph Act:

"4. Exclusive privilege in respect of telegraphs, and power to grant licenses.—(1) Within India, the Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs:

Provided that the Central Government may grant a license, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of India."

Relevant Provisions of the TRAI Act:

Section 2(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;

2 (ea) “licensor” means the Central Government or the telegraph authority who grants a license under Section 4 of the Indian Telegraph Act, 1885 (13 of 1885);

2 (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 electromagnetic means but shall not include broadcasting services:

[provided that the Central Government may notify other service to be telecommunication service including broadcasting services.]

“11(1). **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 license to a service provider;

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

(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 license 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;

(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 requirements 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 license 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 license 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 modification, 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."

"14(a)(i). **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."

28. A bare perusal of sub-section (1) of Section 4 of the Telegraph Act shows that the Central Government has the exclusive privilege of establishing, maintaining and working telegraphs. This would mean that only the Central Government, and no other person, has the right to carry on telecommunication activities. Interpreting the expression "exclusive privilege" of State Government

under the State Excise Act to sell liquor, this Court has held in *State of Orissa and Others v. Harinarayan Jaiswal and Others* [(1972) 2 SCC 36]:

"the fact that the Government was the seller does not change the legal position once its exclusive right to deal with those privileges is conceded. If the Government is the exclusive owner of those privileges, reliance on Article 19(1)(g) or Article 14 becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government – nor can there be any infringement of Article 14, if the Government tries to get the best available price for its valuable rights."

This position of law has been reiterated by this Court in *Har Shankar & Ors. v. The Deputy Excise & Taxation Commissioner & Others* (supra) and in subsequent decisions of this Court.

29. The proviso to sub-section (1) of Section 4 of the Telegraph Act, however, enables the Central Government to part with this exclusive privilege in favour of any other person by granting a license in his favour on such conditions and in consideration of such payments as it thinks fit. As the Central Government owns the exclusive privilege of carrying on telecommunication activities and as the Central Government alone has the

right to part with this privilege in favour of any person by granting a license in his favour on such conditions and in consideration of such terms as it thinks fit, a license granted under proviso to sub-section (1) of Section 4 of the Telegraph Act is in the nature of a contract between the Central Government and the licensee. A Constitution Bench of this Court in *State of Punjab & Anr. v. Devans Modern Breweries Ltd. & Ors.* (supra), relying on *Har Shankar's* case and *Panna Lal v. State of Rajasthan* [(1975) 2 SCC 633], has held in para 121 at page 106 that issuance of liquor license constitutes a contract between the parties. Thus, once a license is issued under proviso to sub-section (1) of Section 4 of the Telegraph Act, the license becomes a contract between the licensor and the licensee. Consequently, the terms and conditions of the license including the definition of Adjusted Gross Revenue in the license agreement are part of a contract between the licensor and the licensee.

30. We have to, however, consider whether the enactment of the TRAI Act in 1997 has in any way

affected the exclusive privilege of the Central Government in respect of the telecommunication activities and altered the contractual nature of the license granted to the licensee under the proviso to sub-section (1) of Section 4 of the Telegraph Act. Section 2(e) of the TRAI Act quoted above defines "licensee" to mean any person licensed under sub-Section (1) of Section 4 of the Telegraph Act for providing specified public telecommunication services and Section 2(ea) defines "licensor" to mean the Central Government or the telegraph authority who grants a license under Section 4 of the Telegraph Act. Sub-section 2(k) defines "telecommunication services" very widely so as to include all kinds of telecommunication activities. These provisions under the TRAI Act do not affect the exclusive privilege of the Central Government to carry on telecommunication activities nor do they alter the contractual nature of the license granted under the proviso to sub-section (1) of Section 4 of the Telegraph Act.

31. Section 11(1)(a)(ii) of the TRAI Act states that notwithstanding anything contained in the Telegraph Act, the TRAI shall have the function to make recommendations, either *suo motu* or on a request from a licensor on terms and conditions of license to a service provider. The first proviso, however, states that the recommendations of the TRAI shall not be binding upon the Central Government. The second, third, fourth and fifth provisos deal with the procedure that has to be followed by the TRAI and the Central Government with regard to recommendations of the TRAI. At the end of fifth proviso, it is stated that after receipt of further recommendation, if any, the Central Government shall take the final decision. These provisions in the TRAI Act show that notwithstanding sub-section (1) of Section 4 of the Telegraph Act vesting exclusive privilege on the Central Government in respect of telecommunication activities and notwithstanding the proviso to sub-section (1) of Section 4 of the Telegraph Act vesting in the Central Government the power to decide on the conditions of license including the payment to be paid by

the licensee for the license, the TRAI has been conferred with the statutory power to make recommendations on the terms and conditions of the license to a service provider and the Central Government was bound to seek the recommendations of the TRAI on such terms and conditions at different stages, but the recommendations of the TRAI are not binding on the Central Government and the final decision on the terms and conditions of a license to a service provider rested with the Central Government. The legal consequence is that if there is a difference between the TRAI and the Central Government with regard to a particular term or condition of a license, as in the present case, the recommendations of the TRAI will not prevail and instead the decision of the Central Government will be final and binding.

32. In contrast to this recommendatory nature of the functions of the TRAI under clause (a) of sub-section (1) of Section 11 of the TRAI Act, the functions of the TRAI under clause (b) of sub-section (1) of Section 11 of the TRAI Act are not recommendatory. This will be clear from the very language of clause (b) of sub-section (1) of

Section 11 of the TRAI Act which states that the TRAI shall discharge the functions enumerated under sub-clauses (i), (ii) and (ix) under clause (b) of sub-section (1) of Section 11 of the TRAI Act. Under clause (c) of sub-section (1) of Section 11 of the TRAI Act, the TRAI performs the function of levying fees and other charges in respect of different services and under clause (d) of sub-section (1) of Section 11, the Central Government can entrust to the TRAI other functions. These functions of the TRAI under clauses (c) and (d) of sub-section (1) of Section 11 of the TRAI Act are also not recommendatory in nature. That the functions of the TRAI under clause (a) are recommendatory while the functions of the TRAI under clauses (b), (c) and (d) are not recommendatory will also be clear from the provisos 1st to 5th which refer to the recommendations of the TRAI under clause (a) of sub-section (1) of Section 11 of the TRAI Act and not to clauses (b), (c) and (d) of sub-section (1) of Section 11 of the TRAI Act. The scheme of TRAI Act therefore is that the TRAI being an expert body discharges recommendatory functions under clause (a) of sub-

section (1) of Section 11 of the TRAI Act and discharges regulatory and other functions under clauses (b), (c) and (d) of sub-section (1) of Section 11 of the TRAI Act. TRAI being an expert body, the recommendations of the TRAI under clause (a) of sub-section (1) of Section 11 of the TRAI Act have to be given due weightage by the Central Government but the recommendations of the TRAI are not binding on the Central Government. On the other hand, the regulatory and other functions under clauses (b), (c) and (d) of sub-section (1) of Section 11 of the TRAI Act have to be performed independent of the Central Government and are binding on the licensee subject to only appeal in accordance with the provisions of the TRAI Act.

33. A reading of Section 14 (a)(i) of the TRAI Act would show that the Tribunal has the power to adjudicate any dispute between a licensor and a licensee. A licensor, as we have seen, has been defined under Section 2(ea) of TRAI Act to mean the Central Government or the Telegraph Authority who grants a license under Section 4 of the Telegraph Act and a licensee has been defined in

Section 2(e) of the TRAI Act to mean any person licensed under sub-section (1) of Section 4 of the Telegraph Act providing specified telecommunication services. The word 'means' in Sections 2(e) and 2(ea) of the TRAI Act indicates that the definitions of licensee and licensor in Sections 2(e) and 2(ea) of the TRAI Act are exhaustive and therefore would not have any other meaning. As Justice G.P. Singh puts it in his book '*Principles of Statutory Interpretation'* 12th Edition at pages 179-180:

"when a word is defined to 'mean' such and such, the definition is prima facie restrictive and exhaustive ….".

A dispute between a licensor and a licensee referred to in Section 14(a)(i) of the TRAI Act, therefore, is a dispute after a person has been granted a license by the Central Government or the Telegraph Authority under sub-section (1) of Section 4 of the Telegraph Act and has become a licensee and not a dispute before a person becomes a licensee under the proviso to sub-section (1) of Section 4 of the Telegraph Act. In other words, the Tribunal can adjudicate the dispute between a licensor and a licensee only after a person had entered into a

license agreement and become a licensee and the word "any" in Section 14(a) of the TRAI Act cannot widen the jurisdiction of the Tribunal to decide a dispute between a licensor and a person who had not become a licensee. The result is that the Tribunal has no jurisdiction to decide upon the validity of the terms and conditions incorporated in the license of a service provider, but it will have jurisdiction to decide "any" dispute between the licensor and the licensee on the interpretation of the terms and conditions of the license.

34. Coming now to the facts of the cases before us, clause (iii) of the letter dated 22.07.1999 of the Government of India, Ministry of Communications, Department of Telecommunications, to the licensees quoted above made it clear that the license fee was payable with effect from 01.08.1999 as a percentage of gross revenue under the license and the gross revenue for this purpose would be total revenue of the licensee company excluding the PSTN related call charges paid to DOT/MTNL and service tax calculated by the licensee on behalf of the Government from the subscribers. It was

also made clear in the aforesaid clause (iii) that the Government was to take a final decision after receipt of the TRAI's recommendation on not only the percentage of revenue share but also the definition of revenue. In accordance with this clause (iii) the Government took the final decision on the definition of Adjusted Gross Revenue and incorporated the same in the license agreement. Once the licensee had accepted clause (iii) of the letter dated 22.07.1999 that the license fee would be a percentage of gross revenue which would be the total revenue of the licensee company and had also accepted that the Government would take a final decision not only with regard to the percentage of revenue share but also the definition of revenue for this purpose, the licensee could not have approached the Tribunal questioning the validity of the definition of Adjusted Gross Revenue in license agreement on the ground that Adjusted Gross Revenue cannot include revenue from activities beyond the license. If the wide definition of Adjusted Gross Revenue so as to include revenue beyond the license was in any way going to affect the licensee, it was open for

the licensees not to undertake activities for which they do not require license under clause (4) of the Telegraph Act and transfer these activities to any other person or firm or company. The incorporation of the definition of Adjusted Gross Revenue in the license agreement was part of the terms regarding payment which had been decided upon by the Central Government as a consideration for parting with its rights of exclusive privilege in respect of telecommunication activities and having accepted the license and availed the exclusive privilege of the Central Government to carry on telecommunication activities, the licensees could not have approached the Tribunal for an alteration of the definition of Adjusted Gross Revenue in the license agreement.

35. Regarding the recommendations of the TRAI under Section 11(1)(a)(i) of the TRAI Act, we find that the Tribunal in its order dated 07.07.2006 has held that the opinion of the renowned expert in the accountancy that any other definition of Adjusted Gross Revenue would lead to reduction of license fee liability by way of

accounting jugglery was not placed before the TRAI and as a result there was no proper and effective consultation with the TRAI and the weightage that was due to the recommendations of the TRAI was not given effect to. In our considered opinion, if the Tribunal found that there was no effective consultation with the TRAI on the opinion of the expert on accountancy, the Tribunal could have at best, if it had the jurisdiction to decide the dispute, directed the TRAI to consider the opinion of the expert on accountancy and send its recommendations to the Central Government and directed the Central Government to consider such fresh recommendations of the TRAI as provided in the provisos to section 11(1) of the TRAI Act. Instead the Tribunal has considered the recommendations of the TRAI and passed the fresh impugned order dated 30.08.2007 contrary to the very provisions of Section 11(1)(a) of the TRAI Act and the provisos thereto. At any rate, as the Central Government has already considered the fresh recommendations of the TRAI and has not accepted the same and is not agreeable to alter the definition of

Adjusted Gross Revenue, the decision of the Central Government on the point was final under the first proviso and the fifth proviso to Section 11(1) of the TRAI Act, 1997.

36. We may now deal with the authorities relied upon by the Tribunal and learned counsel for the parties. In *Cellular Operators Association of India & Ors.* v. *Union of India & Ors.* (supra), the Cellular Operators Association of India approached the Tribunal under Section 14 of the TRAI Act challenging the decisions of the Government permitting the fixed service providers to offer WLL with limited mobility and the recommendations of the TRAI in this regard. The Tribunal dismissed the application and the Cellular Operators filed an appeal under Section 18 of the TRAI Act before this Court. This Court held that WLL with limited mobility as recommended by the TRAI could be permitted if the question of level playing field of the Cellular Operators was duly considered and they were duly compensated but the Tribunal had not considered the relevant materials on this issue and had only arrived at a bald conclusion that the Cellular

Operators have already been compensated in various ways. With these findings, this Court set aside the decision of the Tribunal and remitted the matter to the Tribunal for reconsideration with special emphasis on the question of level playing field on the basis of the materials already on record. In this decision, this Court was not called upon to consider whether a licensee having accepted the terms of the license could challenge before the Tribunal the validity of a clause in the terms of license and whether the Tribunal would have jurisdiction to decide such a challenge.

37. In *Delhi Science Forum and Others v. Union of India* (supra) after the National Telecom Policy, 1994 was announced for inducting the private sector into basic telephone services and notice was published inviting tenders from private parties and tenders were submitted for different circles, but before licenses could be granted by the Central Government, writ petitions were filed in different High Courts as well as in this Court and all the writ petitions filed before different High Courts were transferred to this Court and heard together. The Writ

Petitioners questioned the validity and propriety of the new telecom policy saying that it shall endanger the national security of the country and shall not serve the economic interest of the nation. This Court while upholding the new Telecom Policy held that the proviso to sub-section (1) of Section 4 of the Telegraph Act enables the Central Government to grant license to private bodies, but such power should be exercised on well-settled principles and norms which can satisfy the test of Article 14 of the Constitution. Thus, this is not a case like the present one, in which the licensees having accepted the terms of the license have challenged the definition of Adjusted Gross Revenue incorporated in the terms of the license.

38. In *State of U.P.* v. *Devi Dayal Singh* (supra), a truck owner, Devi Dayal Singh, challenged the right of the State Government to recover by way of toll under Section 2 of the Tolls Act, 1851, an amount for the actual construction of the bridge. This Court held that Section 2 of the Tolls Act, 1851 which enables the State Government to levy toll at such rates 'as it thinks fit' and

the only restriction is latent in the word "toll" itself. This was therefore not a case of dispute between the Government and the contractor where the contractor had challenged a stipulation of the contract. In the present case, on the other hand, the licensees had accepted the terms of the license and after having taken the benefits of the license is now trying to wriggle out from the terms of the license and in particular the definition of the Adjusted Gross Revenue.

39. In *Union of India* v. *Tata Teleservices (Mahrashtra) Ltd*. (supra) cited by Mr. Srinivasan, a letter of intent was issued to Tata Teleservices and this was accepted by Tata Teleservices but ultimately the contract did not come into being and the license was not actually granted. The Union of India suffered a considerable loss because Tata Teleservices had walked out of the obligation undertaken by the acceptance of the letter of intent. The Additional Solicitor General appearing for the Union of India submitted that such a dispute would also come within the purview of Section 14 of the TRAI Act, going by the definition of licensee and the meaning

given to it in the notice inviting tenders. The Tribunal held that expression "licensor" or "licensee" occurring in Section 14 (a)(i) of the TRAI Act would not exclude a person who had been given a letter of intent and who had accepted the letter of intent but was trying to negotiate some further terms of common interest before a formal contract was entered into and the work was to be started. This was thus a case where this Court treated a person who had accepted the letter of intent of the licensor as a licensee, although a formal contract had not entered into. In this case this Court has not held that a licensee could dispute the validity of a term or condition which was incorporated in the license agreement.

40. On the other hand, we find from the long line of decisions in *Har Shankar & Ors.* vs. *The Deputy Excise & Taxation Commissioner & Others* (supra), *Government of A.P.* vs. *M/s Anabeshahi Wine & Distilleries Pvt. Ltd* (supra), *Assistant Excise Commissioner & Anr.* vs. *Issac Peter & Ors.* (supra), *State of Orissa & Ors.* vs. *Narain Prasad & Ors.* (supra), *State of M.P. & Ors.* vs. *KCT*

Drinks Ltd. (supra), *State of Punjab & Anr.* vs. *Devans Modern Breweries Ltd. & Ors.* (supra), *Shyam Telelink Limited* vs. *Union of India* (supra) and in *Bharti Cellular Limited* vs. *Union of India & Ors.* (supra), that this Court has consistently taken a view that once a licensee has accepted the terms and conditions of a license, he cannot question the validity of the terms and conditions of the license before the Court. We, therefore, hold that the TRAI and the Tribunal had no jurisdiction to decide on the validity of the definition of Adjusted Gross Revenue in the license agreement and to exclude certain items of revenue which were included in the definition of Adjusted Gross Revenue in the license agreement between the licensor and the licensee.

41. The next substantial question of law which we have to decide is whether as a result of Union of India not filing an appeal against the order dated 07.07.2006 in favour of some of licensees, the order dated 07.07.2006 had not become binding on the Union of India with regard to issues which had been decided by the Tribunal in the said order dated 07.07.2006. According to the

learned counsel for the licensees in whose favour order dated 07.07.2006 has been passed and against whom no appeal was filed by the Union of India challenging the order dated 07.07.2006, the order dated 07.07.2006 of the Tribunal could not be re-opened because of the principle of *res judicata*. In the opening paragraph of the order dated 07.07.2006, the Tribunal has stated:

"By this batch of petitions the Association of Unified Telecom Service Providers of India, Cellular Operators Association of India and some individual Telecommunication Service Providers are questioning the validity of the definition of Adjusted Gross Revenue (AGR) in the licenses given to various telecom service providers."

Finally, in the operative part of the order dated 07.07.2006, the Tribunal has directed as follows:

"Apart from the principal question whether the State Government can include the gross income of the licensee from non-licensed activity in the AGR; the petitioners have also challenged individually the various components of AGR as enumerated in the licence.

In view of the fact we have come to the conclusion that there has not been an effective consultation with the TRAI which is mandatory under the TRAI Act, we think we should not further delve into the exercise of finding out which component of the AGR, as defined by the Government in the conditions of licence, deserves to be retained and which component which the petitioners contend is not derived from the licensed revenue of the licensee should be excluded at this stage. We think it more appropriate that the matter should be remanded to

the TRAI which is the 3rd Respondent herein, before whom the Government should produce the material relied by it while rejecting TRAI's recommendation so that TRAI can consider the same and send its conclusions to this Tribunal and thereafter, this Tribunal will have the benefit of a comprehensive recommendation of the TRAI after considering the materials relied upon by the Government. While forming its conclusions the TRAI shall hear the Government as well as the licensees and consider the materials that may be placed before it by either side. In this process it is not necessary for the TRAI to hold fresh consultative proceeding unless it thinks necessary. During this proceeding before the TRAI the petitioners shall place before it their contentions in regard to the various components of AGR which they have challenged before this Tribunal and the TRAI after hearing the Government on this issue also, send its recommendations to this Tribunal preferably within three months of the receipt of this order.

Further, while considering the issue now remitted to the TRAI, the TRAI will bear in mind our finding in regard to the inclusion in gross revenue of the licensee revenue derived from non-licensed activities……"

Thus, the Tribunal in its order dated 07.07.2006 has not just decided a dispute on the interpretation of Adjusted Gross Revenue in the license, but has decided on the validity of the definition of Adjusted Gross Revenue in the license. As we have already held, the Tribunal had no jurisdiction to decide on the validity of the terms and conditions of the license including the definition of Adjusted Gross Revenue incorporated in the license

agreement. Hence, the order dated 07.07.2006 of the Tribunal in so far as it decides that revenue realized by the licensee from activities beyond the license will be excluded from Adjusted Gross Revenue *dehors* the definition of Adjusted Gross Revenue in the license agreement is without jurisdiction and is a nullity and the principle of *res judicata* will not apply. In *Chandrabhai K. Bhoir and Others* vs. *Krishna Arjun Bhoir and Others* (supra) this Court relying on *Chief Justice of A.P.* vs. *L.V.A. Dixitulu* [(1979) 2 SCC 34, *Union of India* vs. *Pramod Gupta* [(2005) 12 SCC 1] and *National Institute of Technology* vs. *Niraj Kumar Singh* [(2007) 2 SCC 481] has held:

"an order passed without jurisdiction would be a nullity. It will be a *coram non judice* and *non est* in the eye of the law. Principle of *res judicata* would not apply to such cases".

We accordingly hold that the order dated 07.07.2006 of the Tribunal was not binding on the Union of India even in those cases in which the Union of India did not file any appeal against the order dated 07.07.2006 before this Court.

42. The last substantial question of law which we have to decide is whether the licensee can challenge the computation of Adjusted Gross Revenue and if so at what stage and on what grounds. Section 14 (a)(i) of the TRAI Act, as we have seen, provides that the Tribunal can adjudicate any dispute between the licensor and the licensee. One such dispute can be that the computation of Adjusted Gross Revenue made by the licensor and the demand raised on the basis of such computation is not in accordance with the license agreement. This dispute however can be raised by the licensee, after the license agreement has been entered into and the appropriate stage when the dispute can be raised is when a particular demand is raised on the licensee by the licensor. When such a dispute is raised against a particular demand, the Tribunal will have to go into the facts and materials on the basis of which the demand is raised and decide whether the demand is in accordance with the license agreement and in particular the definition of Adjusted Gross Revenue in the license agreement and can also interpret the terms and

conditions of the license agreement. We, however, find from the order dated 07.07.2006 that instead of challenging any demands made on them, the licensees have questioned the validity of the definition of Adjusted Gross Revenue in the licenses given to them and the Tribunal has finally decided in its order dated 30.08.2007 as to what items of revenue would be part of Adjusted Gross Revenue and what items of revenue would not be part of Adjusted Gross Revenue without going into the facts and materials relating to the demand on a particular licensee.

43. In the result, we allow these appeals and set aside the impugned order dated 30.08.2007 of the Tribunal. There shall be no order as to costs.

CIVIL APPEAL Nos. 2479 of 2008, 1552 of 2009, 7049 of 2010, 7062 of 2010, 7063-7064 of 2010, 7443 of 2010, 7446 of 2010, 7126 of 2010, 7444 of 2010, 7445 of 2010, 9646-9661 of 2010, 2030 of 2011, 2031 of 2011, 2270 of 2011, 3245 of 2011, 5450-5451 of 2011, CIVIL APPEALS ARISING OUT OF SLP (C) Nos. 1786-1787 OF 2009 AND CIVIL APPEALS ARISING OUT OF SLP (C) Nos. 6641-6642 OF 2010:

Leave granted in Special Leave Petitions.

2. In these appeals, different orders of the Tribunal have been impugned. The orders of the Tribunal, which have been impugned, are based on the order dated 30.08.2007 of the Tribunal which we have set aside. The orders impugned in these appeals are, therefore, set aside and the matters are remitted to the Tribunal to pass fresh orders in accordance with law.

3. The appeals stand disposed of accordingly with no order as to costs.

.....J.
(R. V. Raveendran)

.....J.
(A. K. Patnaik)

New Delhi,
October 11, 2011.

Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5059 OF 2007

Union of India & Anr. … Appellants

Versus

Association of Unified Telecom Service Providers of India & Ors. … Respondents

WITH

CIVIL APPEAL NOs.179-180 OF 2008, 363 of 2008, 1229-1230 of 2008, 2065 of 2008, 2479 of 2008, 1552 of 2009, 3868 of 2009, 7049 of 2010, 7062 of 2010, 7063-7064 of 2010, 7443 of 2010, 7446 of 2010, 7126 of 2010, 7444 of 2010, 7445 of 2010, 9646-9661 of 2010,

2030 of 2011, 2031 of 2011, 2270 of 2011, 3245 of 2011, 5450-5451 of 2011, 311-314 & 317-318 of 2008, CIVIL APPEAL Nos. 8627-8628 OF 2011 (Arising out of SLP (C) Nos. 1786-1787 of 2009) AND CIVIL APPEAL Nos. 8625-8626 OF 2011 (Arising out of SLP (C) Nos. 6641-6642 of 2010)

SUPPLEMENTARY ORDER

We have delivered today the judgment in these cases and while answering the last substantial question of law, we have held that when a particular demand is raised on a licencee, the licensee can challenge the demand before the Tribunal and the Tribunal will have to go into the facts and materials on the basis of which the demand is raised and decide whether the demand is in accordance with the license agreement and in particular the definition of Adjusted Gross Revenue in the license agreement and can also interpret the terms and conditions of the license agreement.

2. It is stated by Mr. C.S. Vaidyanathan, learned senior counsel for some of the licencees that demands have already been raised on them. He submitted that two months' time be granted to the licencees to raise their disputes before the Tribunal and in the meanwhile the demands should not be enforced.

3. If the demands have been raised, we grant two months' time to the licencees to raise the dispute before the Tribunal against the demands and during this period of two months, the demands will not be enforced.

.....J.
(R.V. RAVEENDRAN)

New Delhi; .....J.
October 11, 2011. (A.K. PATNAIK)