Cellular Operators Association of India and Others Vs Telecom Regulatory Authority of India and Others

Court: DELHI HIGH COURT

Date of Decision: Feb. 29, 2016

Acts Referred: Constitution of India, 1950 - Article 14, Article 19(1)(a), Article 19(1)(g), Article 21, Article 265 Electricity Act, 2003 - Section 111, Section 178, Section 178(2), Section 76(1), Section 79, Section 79(1), Section 79(1)(g), Section 79(1)(j

Citation: (2016) 3 CompLJ 53 : (2016) 228 DLT 491

Hon'ble Judges: G. Rohini, C.J. and Jayant Nath, J.

Bench: Division Bench

Advocate: Harish Salve, Abhishek Manu Singhvi, Gopal Jain, Sr. Advocates, Munjal Bajpai, Shashwat Bajpai and Madhur Bharatiya, Advocates, for the Appellant; P.S. Narasimha, ASG, Sanjay Kapur, Anmol Chandan and Rajiv Kapur, Advocates, for the Respondent

Final Decision: Dismissed

Judgement

G. Rohini, C.J.

1. The petitioners are Telecom operators/Associations of telecom operators who offer telecommunication services.

2. This petition is filed challenging the validity of the Telecom Consumer Protection (Ninth Amendment) Regulations, 2015 notified on 16.10.2015

by the Telecom Regulatory Authority of India (for short "TRAI") in exercise of the powers conferred by Section 36 read with Section 11(1)(b)(v)

(i) of Telecom Regulatory Authority of India Act, 1997.

3. By the said Amendment dated 16.10.2015 which has come into force w.e.f. 01.01.2016, every originating service provider providing cellular

mobile telephone service is made liable to credit the calling consumer i.e. a consumer who initiates a voice call, by one rupee for each call drop

within its network for a maximum of three call drops per day. Further the service provider shall also provide the details of the amount credited to

the calling consumer within 4 hours of the occurrence of call drop through SMS/USSD message. In case of post paid consumers such details of

amount credited in the account of calling consumer shall be provided in the next bill.

4. Before adverting to the various grounds upon which the impugned amendment is assailed, it may be mentioned that Telecom Regulatory

Authority of India, Act 1997 (for short "the Act") has been enacted to provide for the establishment of TRAI and Telecom Disputes Settlement

and Appellate Tribunal (for short "the TDSAT") to regulate the telecommunication services, adjudicate disputes and dispose of appeals and to

protect the interests of service providers and consumers of the telecom sector, to promote and ensure orderly growth of telecom sector and for

matters connected therewith or incidental thereto.

5. In terms of Section 3 of the Act, Telecom Regulatory Authority of India (TRAI) has been established and its powers and functions have been

enumerated in Chapter III consisting Section 11 to Section 13. Section 36 of the TRAI Act empowers TRAI to make regulations consistent with

the Act and the rules made thereunder to carry out the purposes of the Act. In exercise of the powers so conferred, TRAI has made regulations

providing for various matters. In the present case, we are concerned with two sets of such regulations, namely, Standards of Quality of Service of

Basic Telephone Service (Wire-line) and Cellular Mobile Telephone Service Regulations, 2009 (for short "Quality of Service Regulations") and

Telecom Consumers Protection Regulations, 2012 (for short "Consumer Regulations").

6. By virtue of the impugned Telecom Consumer Protection (Ninth Amendment) Regulations 2015 (hereinafter referred to as "impugned

regulations"), TRAI has amended the Telecom Consumers Protection Regulations, 2012 as under;

2. In regulation 2 of the Telecom Consumers Protection Regulations, 2012 (hereinafter referred to as the principal regulations), after clause (ba),

the following clauses shall be inserted, namely:--

(bb) ""call drop"" means a voice call which, after being successfully established, is interrupted prior to its normal completion; the cause of early

termination is within the network of the service provider;"";

(bc) ""calling consumer"" means a consumer who initiates a voice call;"";

3. After Chapter IV of the principal regulations, the following Chapter shall be inserted, namely;-

CHAPTER V

RELIEF TO CONSUMERS FOR CALL DROPS

16. Measures to provide relief to consumers. - Every originating service provider providing Cellular Mobile Telephone Service shall, for each call

drop within its network,

(a) credit the account of the calling consumer by one rupee:

Provided that such credit in the account of the calling consumer shall be limited to three dropped calls in a day (00:00:00 hours to 23:59:59 hours);

(b) provide the calling consumer, through SMS/USSD message, within four hours of the occurrence of call drop, the details of amount credited in

his account; and

(c) In case of post-paid consumers, provide the details of the credit in the next bill.

7. The object behind the said amendment has been explained in the Explanatory Memorandum issued by TRAI as under:

19. After a careful analysis, the Authority has come to the conclusion that call drops are instances of deficiency in service delivery on part of the

CMTSPs which cause inconvenience to the consumers, and hence it would be appropriate to put in place a mechanism for compensating the

consumers in the event of dropped calls. The Authority is of the opinion that compensatory mechanism should be kept simple for the ease of

consumer understanding and its implementation by CMTSPs. While one may argue that amount of compensation should be commensurate to the

loss/suffering caused due to an event but in case of a dropped call it is difficult to quantify the loss/suffering/inconvenience caused to the consumers

as it may vary from one consumer to another and also in accordance to their situations. Accordingly, the Authority has decided to mandate

originating CMTSPs to credit one Rupee for a dropped call to the calling consumers as notional compensation. Similarly, the Authority has

decided that such credit in the account of the calling consumer shall be limited to three dropped calls in a day (00:00:00 hours to 23:59:59 hours).

The Authority is of the view that such a mandate would compensate the consumers for the inconvenience caused due to interruption in service by

way of call drops, to a certain extent.

20. The Authority is also aware that communication to the consumers is important and, therefore, the Authority has decided to mandate that, each

originating CMTSP, within four hours of the occurrence of call drop within its network, inform the calling consumer, through SMS/USSD message

the details of amount credited in his account for the dropped call, if applicable.

21. The Authority is conscious of the fact that for carrying out the afore-mentioned mandate, the CMTSPs would have to make suitable provisions

in their technical systems, which would require time and effort. Accordingly, the Authority has decided that the afore-mentioned mandate would

become applicable on the CMTSPs with effect from the 1st January, 2016.

22. The Authority shall keep a close watch on the implementation of the mandate as well as the measures being initiated by the CMTSPs to

minimize the problem of dropped calls as given in their submissions during the consultation process and may review after six months, if necessary.

8. The grounds raised in the writ petition in support of the relief sought may broadly be summed up as under:

i) The Act does not empower TRAI to impose compensation to consumers. Section 11(1)(b)(i) and (v) of the Act are not applicable to the facts

of the present case and there is no provision whatsoever in the licenses granted to petitioners dealing with call drops much less payment of

compensation. On the contrary, as per the conditions of license issued under Section 4 of the Indian Telegraph Act 1885, the petitioners/Telecom

operators are mandated to roll out their network only upto 90% local service areas (LSA) in Metros and 50% in District Headquarters and there

is no requirement of mandatory coverage in rural areas. Therefore, the impugned regulations are ultra vires the Act.

ii) Though the expression ''compensation'' is used, the effect of the impugned regulations would be extraction of a tax/cess/penalty. Such extraction

of money has no legislative sanction and thus being without authority of law violates Article 265 of the Constitution of India.

iii) Since Quality of Service Regulations permits 2% of call drops, no element of fault can be attributed to the service providers upto the benchmark

of 2%. The impugned regulations having mandated the payment of compensation without granting exemption upto 2%, has in effect converted the

compensation for the call drops into a strict liability.

iv) The impugned regulations are vitiated on account of patent non application of mind and consideration of irrelevant material. Thus the same being

violative of the Wednesbury principle of reasonableness are liable to be declared arbitrary and violative of Article 14 of the Constitution of India.

v) The impugned regulations are in contravention of the preamble to the Act which requires the regulator/TRAI to protect the interests of service

providers and ensure orderly growth of the sector since there was no assessment of the difficulties in the implementation of payment of

compensation for call drops.

vi) The issue of call drops has already been taken care of by Quality of Service Regulations by specifying parameters and benchmarks for network

coverage and by providing monetary consequences for failure to meet the benchmarks. Thus, it is an occupied field and the impugned regulations

which are inconsistent with the existing Quality of Service Regulations are not sustainable under law.

vii) By enforcing the impugned regulations, TRAI cannot make the service providers liable for payment of compensation within the exempted limit

of 2% benchmark specified in Quality of Service Regulations.

viii) The impugned regulations virtually have resulted in levying penalty without ascertaining the reason for the call drop and whether the same can

be attributed to the service provider. Hence the impugned regulations are totally unreasonable and arbitrary.

ix) There being several extraneous factors such as closing down and sealing of sites, spectrum related issues and deployment of additional network

capacity by way of augmenting spectrum resources which are beyond the control of the service providers, they cannot be made liable for every call

drop ignoring the fact that Quality of Service Regulations have recognised that 100% coverage is not possible.

x) Various issues raised by service providers relating to interference and unauthorised radios/jammers are yet to be resolved by TRAI or

Department of Telecom.

xi) TRAI having amended the Quality of Service Regulations by notification dated 15.10.2015 prescribing harsher penalties for failure to adhere to

the benchmarks, the impugned regulations providing for compensation to consumers on the very same ground of call drops are unwarranted.

xii) The mandate to compensate the consumers for call drops under the impugned regulations has no nexus with the object sought to be achieved

i.e., prevention of call drops.

xiii) The implementation of the impugned regulations is impossible since the same require 100% coverage in a radio network which has even been

recognised by the Department of Telecom, Government of India while mandating the roll out obligation in the UAS licenses/Unified licenses

executed with Telecom service providers and while issuing the Notice Inviting Applications (NIA) for participation in the spectrum auction.

xiv) Impugned regulations are contrary to the stand taken by TRAI in the Technical Paper published on 10.11.2015. In fact the impugned

regulations are premature since the same were issued prior to TRAI''s Technical Paper.

xv) The impugned regulations were issued in undue haste without making any ground level survey or assessment in all service areas.

xvi) Impugned regulations are also violative of Articles 19(1)(g) and 21 of the Constitution of India as the quantum of compensation exceeds the

loss that could be suffered by the consumers.

xvii) Service provider being a vital stake holder and a compliant party cannot be penalised without any basis or rationale.

xviii) The action of TRAI in seeking to penalise the service providers by enforcing the impugned regulations for the very first call drop is manifestly

arbitrary.

9. In the counter affidavit filed on behalf of TRAI it is contended that TRAI is well within its statutory power to regulate the issue of call drops by

way of the impugned regulations and that it is the statutory responsibility of TRAI to protect the interests of the consumers of the telecom sector as

per the preamble to the Act and therefore the contention that the impugned regulations are ultra vires the Act is untenable. It is explained that the

objective of the impugned regulations is to provide relief to the consumers by suitably compensating them by imposing a financial liability on service

providers for poor quality of service. It is further stated that the impugned regulations have been framed after considerable deliberations and after

seeking comments from various stakeholders. While denying the contention of the petitioners that the issue pertaining to call drops is an occupied

field, it is submitted that the doctrine of occupied field has no applicability to the regulators. At any rate, the financial disincentive provided under

the Quality of Service Regulations is payable to TRAI towards non compliance of network and customer related parameters specified therein,

whereas the impugned regulations provide reliefs to the consumers for deficiency in service. It is also pointed out that the benchmark of 2% under

Quality of Service Regulations is applicable for the entire license service area and is averaged on monthly basis. Thus, it is contended that the two

regulations are neither mutually contradictory nor destructive as alleged by the petitioner. In fact, the impugned regulations are supplementing the

Quality of Service Regulations.

10. All other allegations of the undue haste, non application of mind, violation of principles of natural justice, arbitrariness and impossibility of

implementation have been specifically denied. It is explained that TRAI has been conducting drive tests across the country on a regular basis from

January 2014 and that more than 400 such drive tests had been conducted throughout the country during January 2014 to December 2014 and

more than 350 drive tests have been conducted from January 2015 to September 2015 which revealed that the problem of call drop is not

restricted to only a few cities nor it is limited to a select few pockets. It is explained that the obligation of the service providers to pay one rupee for

each dropped call limiting the same to three call drops per day is only a notional relief to the affected consumers. The contention of the petitioners

that the impugned regulations are contrary to the subscriber agreement has also been denied and it is explained that the terms and conditions in the

subscriber agreement are subject to the rules and regulations issued by the licensor and the regulator and therefore, the compensation to consumers

cannot be considered as contrary to the agreement with the subscribers.

11. We have heard at length Shri Harish Salve, Dr. Abhishek Manu Singhvi, Shri Gopal Jain and Shri Meet Malhotra, the learned Senior

Advocates appearing for the petitioners and Shri P.S. Narasimha, the learned Additional Solicitor General appearing for TRAI. We have also

heard Shri Pinaki Mishra, the learned Senior Counsel for respondent No. 5 as well as Shri Prashant Bhushan, Shri Vivek Chib, Shri Vimal Kirti

Singh and Shri Vakul Sharma, the learned counsels appearing for the interveners.

12. It is contended by Dr. Abhishek Manu Singhvi, the learned Senior Counsel that the impugned regulations are without authority of law and

violative of Article 265 of the Constitution of India since there is no provision under the Act which empowers TRAI to mandate payment of

compensation, which in effect amounts to levying a penalty, by the service provider to the consumer. It is also contended that the impugned

regulations are manifestly arbitrary and thus hit by Article 14 of the Constitution of India since the same (i) fastened strict liability for no fault of the

service provider, (ii) are made without application of mind to the extraneous factors like spectrum interference, sealing of towers, consumer

behaviour and etc. which are beyond the control of the service providers, (iii) are impossible of implementation, and (iv) the decision of TRAI as is

evident from the Explanatory Memorandum is not supported by any reasons and thus violative of the principles of natural justice.

13. It is also submitted by Dr. Singhvi that the impugned regulations are contrary to Quality of Service Regulations as well as the terms and

conditions of the license granted by Department of Telecoms (DoT) and Notice Inviting Applications. According to the learned Senior Counsel the

impugned regulations and Quality of Service Regulations are mutually contradictory/destructive. The further contention is that the impugned

regulations are contrary to the subscriber agreement, governing the relationship between the service provider and the subscriber, in which it was

made clear that services are subject to network availability and that 100% call drop free service or the availability of the network throughout the

service area is not guaranteed. While submitting that it is impossible to identify the reason for call drop and to segregate the call drop for the causes

attributable to the consumer so as to implement the impugned regulations, it is also contended that there cannot be a law commanding performance

of the impossible.

14. It is contended by Sh. Harish Salve, the learned Senior Counsel that the power conferred on TRAI to make regulations under Section 36 of

the Act can be exercised only "for the purposes of the Act" which include to ensure compliance of terms and conditions of license, however,

making a regulation for payment of compensation to consumer which is in the nature of a tariff, is beyond the scope of regulation making power

under Section 36 of the Act. While submitting that fixation of tariff can be only under Section 11(2) of the Act but not by way of regulations, it is

contended that the impugned regulations are ultra vires the Act. It is also submitted that by making a law for payment of compensation under the

impugned regulations, the remedy of appeal to TDSAT conferred under the Act against an order under Section 11(2) has been taken away.

15. It is contended by the learned Senior Counsel that even as per the estimates made by DoT at least 36% of the call drop occur on account of

the consumer''s fault and, therefore, making the service provider liable to compensate even for the very first call drop amounts to unreasonable and

excessive restrictions and thus hit by Article 19(1)(g) of the Constitution of India. It is also contended that the impugned regulations are illegal and

arbitrary since the same provided for penalty without there being infraction of any statute, rules or regulations. In support of the said submission,

the learned Senior Counsel placed reliance upon State of T.N. & Anr. v. P. Krishnamurthy & Ors.; , (2006) 4 SCC 517 and Global Energy Ltd.

& Anr. v. Central Electricity Regulatory Commission; , (2009) 15 SCC 570.

16. Sh. Gopal Jain, the learned Senior Counsel has relied upon Delhi Transport Corporation v. DTC Mazdoor Congress, , (1990) Suppl. 1 SCR

142 wherein the Supreme Court upheld the striking down of Regulation 9(b) of the Delhi Road Transport Authority (Conditions of Appointment

and Service) Regulations, 1952 on the ground that it was arbitrary. Placing reliance upon a judgment of this Court in W.P.(C) No. 895/2011 titled

United RWAs Joint Action v. Union of India, it is also contended by the learned Senior Counsel that the impugned regulations made as a populist

measure cannot be sustained under law.

17. It is submitted by Sh. Meet Malhotra, the learned Senior Counsel appearing for the petitioner No. 16 that because of the impossibility of

ascertaining the exact reason for the call drop, compensating the consumers for all call drops cannot be mandated by law. However, it is brought

to our notice that petitioner No. 16 - M/s. Telenor has been on a voluntary basis compensating its consumers for all call drops irrespective of

cause of failure of the call for the reason that it is impossible to actually ascertain the reason for the call drop.

18. Sh. P.S. Narasimha, the learned ASG appearing for TRAI at the outset had submitted that the impugned regulations which have been validly

notified in exercise of the power conferred under Section 36(1) of the Act, being a subordinate legislation, the interference by this Court is not

permissible on any of the grounds raised by the petitioners. It is also contended that the impugned regulations squarely fall within the scope of

Section 11(1)(b)(i) of the Act since they seek to enforce the license conditions of providing effective service. Placing reliance upon a Constitution

Bench decision of the Supreme Court in PTC India Ltd. v. CERC, , (2010) 4 SCC 603 wherein it was held that the administrative power of

fixation of tariff can co-exist with the regulation making power in respect of tariff, it is submitted that the power of TRAI to make regulations under

Section 36 is not limited by the enumerated functions under Section 11 of the Act. The learned ASG has also submitted that the regulation making

power has also the effect of overriding the existing contractual obligations between the stakeholders. In support of his submissions, the learned

ASG has also placed much reliance upon BSNL v. TRAI, , (2014) 3 SCC 222. It is further contended by the learned ASG that the compensation

mandated under the impugned regulations under no circumstances can be treated as a penalty. It is also pointed out by the learned ASG that the

compensation that has been provided under the impugned regulations to the consumers who have suffered as a result of call drop cannot be

equated to penalty.

19. While submitting that the impugned regulations have legislative flavour and under no circumstances can be treated as mere administrative act, it

is asserted by the learned ASG that the standards of judicial review applicable are entirely different from the standards that are applicable to test

the administrative acts. In support of the said submission, the learned ASG placed reliance upon Indian Express Newspapers v. Union of India; ,

(1985) 1 SCC 641 and State of T.N. and Another v. P. Krishnamurthy and Others; , (2006) 4 SCC 517. It is also submitted by the learned ASG

that the impugned regulations which are notified keeping in mind the best interest of the consumers and strike a balance between the interest of the

consumers and the service providers warrant no interference on any ground whatsoever.

Consideration of rival submissions

20. It may at the outset be noticed that the impugned regulations are in the nature of the subordinate legislation. In terms of Section 37 of the Act

they are placed before each House of the Parliament. The law is well settled that there is a presumption in favour of constitutionality or validity of a

subordinate legislation and the burden is upon him who attacks it to show that it is invalid. However, a piece of subordinate legislation does not

carry the same degree of immunity which is enjoyed by a statute passed by a competent Legislature. Subordinate legislation may be questioned on

any of the grounds on which plenary legislation is questioned. In addition it may also be questioned on the ground that it does not conform to the

statute under which it is made or that it is contrary to some other statute.

21. Since the power to make subordinate legislation is derived from the enabling Act, it is fundamental that the delegate on whom such a power is

conferred has to act within the limits of authority conferred by the Act. Rules cannot be made to supplant the provisions of the enabling Act but to

supplement it. As held in Supreme Court Employees'' Welfare Association v. Union of India; , (1989) 4 SCC 187, the validity of a subordinate

legislation is open to question if it is ultra vires the constitution or the governing Act or repugnant to the general principles of the laws of the land or

is so arbitrary or unreasonable that no fair minded authority could ever have made it. It was also held that the rules are liable to be declared invalid

if they are manifestly unjust or oppressive or outrageous or directed to be unauthorized and/or violative of the general principles of law of the land

or so vague that it cannot be predicted with certainty as to what it prohibited or so unreasonable that they cannot be attributed to the power

delegated or otherwise disclose bad faith. It was further explained by a Constitution Bench of the Supreme Court in Shree Sitaram Sugar

Company Ltd. v. Union of India; , (1990) 3 SCC 223 that the power delegated by statute is limited by its terms and subordinate to its objects and

that the delegate must act in good faith, reasonably, intra vires the power granted, and on relevant consideration of material facts. It was also

added that all the decisions of the delegate, whether characterized as legislative or administrative or quasi judicial, must be in harmony with the

constitution and other laws of the land and that they must be reasonably related to the purposes of the enabling legislation.

22. Regarding the question as to whether arbitrariness can also be a ground to question the subordinate legislation, it was observed by the

Supreme Court in Indian Express Newspapers v. Union of India , (1985) 1 SCC 641:

77. In India arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. In India any enquiry into

the vires of delegated legislation must be confined to the grounds on which plenary legislation may be questioned, to the ground that it is contrary to

the statute under which it is made, to the ground that it is contrary to other statutory provisions or that it is so arbitrary that it could not be said to

be in conformity with the statute or that it offends Article 14 of the Constitution.

78. That subordinate legislation cannot be questioned on the ground of violation of principles of natural justice on which administrative action may

be questioned has been held by this Court in Tulsipur Sugar Co. Ltd. v. Notified Area Committee, Tulsipur [, AIR 1980 SC 882 : (1980) 2 SCR

1111 : (1980) 2 SCC 295], Rameshchandra Kachardas Porwal v. State of Maharashtra [, (1981) 2 SCC 722 : AIR 1981 SC 1127 : (1981) 2

SCR 866] and in Bates v. Lord Hailsham of St. Marylebone [(1972) 1 WLR 1373 : (1972) 1 All ER 1019 (Ch D)]. A distinction must be made

between delegation of a legislative function in the case of which the question of reasonableness cannot be enquired into and the investment by

statute to exercise particular discretionary powers. In the latter case the question may be considered on all grounds on which administrative action

may be questioned, such as, non-application of mind, taking irrelevant matters into consideration, failure to take relevant matters into consideration,

etc, etc. On the facts and circumstances of a case, a subordinate legislation may be struck down a arbitrary or contrary to statute if it fails to take

into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or, say, the

Constitution. This can only be done on the ground that it does not conform to the statutory or constitutional requirements or that it offends Article

14 or Article 19(1)(a) of the Constitution. It cannot, no doubt, be done merely on the ground that it is not reasonable or that it has not taken into

account relevant circumstances which the Court considers relevant.

23. Reiterating the above noticed principles of law, the grounds upon which a subordinate legislation can be challenged are summed up in State of

T.N. v. P. Krishnamurthy & Ors.; , (2006) 4 SCC 517 as under:

(a) Lack of legislative competence to make the sub-ordinate legislation.

(b) Violation of Fundamental Rights guaranteed under the Constitution of India.

(c) Violation of any provision of the Constitution of India.

(d) Failure to conform to the Statute under which it is made or exceeding the limits of authority conferred by the enabling Act.

(e) Repugnancy to the laws of the land, that is, any enactment.

(f) Manifest Arbitrariness/unreasonableness (to an extent where the Court might well say that the legislature never intended to give authority to

make such rules).

24. Coming to the case on hand, the impugned regulations are indisputably in the nature of subordinate legislation. There is no dispute about the

legislative competence of TRAI to make the impugned regulations, however, the challenge is primarily on two grounds, viz., the impugned

regulations have exceeded the limits of authority conferred by the Act and that the same are vitiated by manifest arbitrariness/unreasonableness.

25. Therefore, the two points that arise for consideration are as under:--

(i) Whether the impugned regulations are beyond the scope of the regulation making power conferred on TRAI and thus ultra vires the Act.

(ii) Whether the mandate under the impugned regulations that the service provider shall compensate the consumer for three call drops per day is

manifestly arbitrary and is liable to be quashed.

Re Point No. 1

26. The contention on behalf of the petitioners in this regard is of twofold. Firstly, that the Act does not empower TRAI to impose strict liability on

the service provider by mandating them to compensate the subscribers/consumers for call drops. It is sought to be elaborated that Section 11(1)

(b)(v) of the Act which empowers TRAI to lay down and ensure the standards of quality of service to be provided by the service providers does

not include the power to levy compensation. In the absence of any express provision under the Act, TRAI cannot fasten strict liability for no fault

of the service providers and, therefore, the impugned regulations are ultra vires the Act. It is also contended that the impugned regulations amount

to colourable exercise of power and that the levy of compensation under the impugned regulations is nothing but penal exaction without authority of

law and thus is violative of Article 265 of the Constitution of India.

27. Secondly, that the subject matter of the impugned regulations has already been covered by Quality of Service Regulations which provide for

parameters and benchmarks for network coverage and also prescribed the monetary consequences in the event such benchmarks are not met.

Therefore, according to the petitioner, it is an occupied field and it is not open to TRAI to again provide for call drops by way of the impugned

regulations. While referring to the provisions of the Quality of Service Regulations which inter alia provided for a call drop benchmark of 2% and

financial disincentives for failure to meet the benchmark, it is contended that the strict liability imposed under the impugned regulations is in

contravention of the fault based liability provided under the Quality of Service Regulations. The impugned regulations which are made ignoring the

standard of performance for call drops prescribed under the Quality of Service Regulations are not only in direct conflict with the provisions of the

said regulations but the same are also inconsistent with the scheme and the purpose of the Act, i.e., to ensure that a fair set of standards are

provided for and that they are adhered to rigorously by the service providers.

28. Per contra, the contention on behalf of TRAI is that the impugned regulations are for a different purpose and aimed at a distinct measure. At

any rate, the petitioner''s contention that Quality of Service Regulations are exhaustive and TRAI cannot make any other regulations to ensure

quality of service is untenable in the light of the power conferred on TRAI under Section 11(1)(b)(v) of the Act.

29. For proper appreciation of the above contentions, it is necessary to refer to Sections 11 and 36 of the Act which read as under:

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 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;

(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 inter-connect 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.

(emphasis supplied)

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 (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;

(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 charges under clause (c) of sub-section (1) of section 11.

30. As could be seen, Section 11 of the Act delineates the functions of the TRAI which included the function to ensure compliance with the terms

and conditions of the licence [Clause (i) of Section 11(1)(b)] and to ensure the quality of service so as to protect the interests of the consumers of

telecommunication service [Clause (v) of Section 11(1)(b)]. Apparently, the said power exercisable under Section 11 is regulatory. That apart,

under Section 36 of the Act, TRAI has also been conferred with regulation making power. Thus, TRAI under the scheme of Act exercises both

regulatory and regulation making powers.

31. The purport of such dual powers conferred on a statutory authority was considered by the Supreme Court in PTC India Ltd. v. CERC; ,

(2010) 4 SCC 603 while dealing with the powers of Central Electricity Regulatory Commission (CERC) under the provisions of the Electricity

Act, 2003. Section 178 of the Electricity Act, 2003 empowers CERC to make regulations whereas Section 79 enumerates the functions to be

discharged by CERC under the said Act. One of the questions that fell for consideration was whether trading margin fixation under the Electricity

Act can only be done by an order under Section 79(1)(j) and not by regulations under Section 178. The Constitution Bench of the Supreme Court

after extensively referring to the provisions of the Electricity Act, 2003 held:

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. (See Shri Sitaram Sugar Co. Ltd. v. Union of India[, (1990) 3 SCC 223].)

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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.

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57. One must keep in mind the dichotomy between the power to make a regulation under Section 178 on the one hand and the various

enumerated areas in Section 79(1) in which the Central Commission is mandated to take such measures as it deems fit to fulfil the objects of the

2003 Act. Applying this test to the present controversy, it becomes clear that one such area enumerated in Section 79(1) refers to fixation of

trading margin. Making of a regulation in that regard is not a precondition to the Central Commission exercising its powers to fix a trading margin

under Section 79(1)(j), however, if the Central Commission in an appropriate case, as is the case herein, makes a regulation fixing a cap on the

trading margin under Section 178 then whatever measures the Central Commission takes under Section 79(1)(j) have to be in conformity with

Section 178.

(emphasis supplied)

32. Thus, the question whether CERC can enact regulations only on topics enumerated in Section 178(2) or whether the said power has to

correlate to the functions ascribed to CERC was concluded as under:

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).

33. It is clear from the above decision of the Constitution Bench that the power to regulate and the power to make regulations possessed by the

regulator under a statute co-exist and that the regulation making power is in no way limited by the administrative powers. Placing reliance upon the

ratio laid down in PTC India (Ltd.) v. CERC (supra), a three-Judge Bench of the Supreme Court in BSNL v. TRAI & Ors.; , (2014) 3 SCC 222

analyzed the scope of the powers conferred upon TRAI under TRAI Act as amended by Act 2 of 2000 and held:

80. After the Amendment of 2000, TRAI can either suo motu or on a request from the licensor make recommendations on the subjects

enumerated in Sections 11(1)(a)(i) to (viii). Under Section 11(1)(b), TRAI is required to perform nine functions enumerated in sub-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

TRAI can issue directions on the particular subject. For effective discharge of functions under various clauses of Section 11(1)(b), TRAI 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, TRAI can either issue directions or make regulations.

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88. 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 sub-clauses (i) to (vi) of

Section 11(1)(b). In fact, by framing regulations under Section 36, TRAI can facilitate the exercise of functions under various clauses of Section

11(1)(b) including sub-clauses (i) to (vi).

89. We may now advert to Section 36. Under sub-section (1) thereof TRAI can make regulations to carry out the purposes of the TRAI Act

specified in various provisions of the TRAI 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 TRAI Act and the rules made thereunder. There is no other restriction on the power of

TRAI 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 TRAI. Three of these topics relate to meetings of TRAI, the procedure to be followed at such

meetings, the transaction of business at the meetings and the register to be maintained by TRAI. The remaining two topics specified in clauses (e)

and (f) of Section 36(2) are directly referable to Sections 11(1)(b)(viii) and 11(1)(c). These are substantive functions of TRAI. 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 TRAI

under Section 36(1) or that Section 36(2) restricts the scope of Section 36(1).

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98. 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 (sic). Section 11(2), which contains a non obstante clause vis-Ã¯Â¿Â½-vis the Indian Telegraph Act, 1885, lays down that TRAI may,

from time to time, by order notify the rates at which the telecommunication services within or outside India shall be provided under the TRAI Act

subject to the limitation specified in Section 11(3). Under Section 12(1), TRAI 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 TRAI

Act on which reliance has been placed by the learned counsel for the respondents in support of their argument that TRAI 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), TRAI can issue such directions to service providers, as it

may consider necessary, for proper functioning by service providers. Section 13 lays down that TRAI 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, TRAI can issue directions to the service providers. The TRAI Act speaks of many players like the licensors and

users, who do not come within the ambit of the term ""service provider"". If TRAI 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), TRAI 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) TRAI has encroached upon the field occupied by Sections 12(4) and 13 of the TRAI Act.

99. 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 TRAI can, by general or special order, delegate to any member or officer of TRAI or any other person such of its powers and functions under

the TRAI 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 TRAI Act are placed on a 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 TRAI can

be made ineffective or modified by Parliament and by no other body.

100. 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 TRAI under Section 36(1) to make regulations is wide and pervasive. The exercise of this power is only subject to the provisions

of the TRAI Act and the rules framed under Section 35 thereof. There is no other limitation on the exercise of power by TRAI under Section

36(1). It is not controlled or limited by Section 36(2) or Sections 11, 12 and 13.

(emphasis supplied)

34. In the light of the law laid down in BSNL v. TRAI & Ors. (supra), it is not open to the petitioners to contend that the impugned regulations are

not in conformity with the statute or that the same are beyond the regulation making power conferred under Section 36 of the Act. As held in the

said decision, under sub-section (1) of Section 36 of the Act, TRAI can make regulations to carry out the purposes of the Act specified in various

provisions of the Act including Section 11. The power vested in TRAI under Section 36(1) to make regulations is wide and pervasive, the only

rider being that the exercise of the said power shall be subject to the provisions of the Act and the Rules made thereunder. As held by the Supreme

Court, for effective discharge of the functions under various clauses of Section 11(1)(b) of the Act, TRAI can frame appropriate regulations under

Section 36 and can facilitate the exercise of functions under various clauses of Section 11(1)(b) including sub-clauses (i) to (vi).

35. There can be no dispute that the impugned regulations have been made to ensure quality of services extended to the consumers by the service

providers. As per clause (v) of Section 11(1)(b) of the Act, ensuring the quality of service provided by the service providers so as to protect the

interest of the consumers of telecommunication service is one of the functions required to be discharged by TRAI and apparently the impugned

regulations are made to carry out the said purpose of the Act. It can therefore be held without any hesitation that the impugned regulations are well

within the scope of the regulation making power conferred on TRAI under Section 36 of the Act. The contention of the petitioners that the

enumerated power under Section 11(2) has excluded/limited the regulation making power of TRAI under Section 36 of the Act therefore cannot

be countenanced. We do not find any substance even in the contention that the obligation to compensate the consumers is relatable to fixation of

tariff provided under sub-section (2) of Section 11 of the Act and therefore the same cannot be imposed by way of regulations. In view of our

conclusion that the impugned regulations are well within the domain of TRAI under Section 36 of the Act, the contention that the compensation so

levied is relatable to tariff, in our opinion, is irrelevant for the purpose of deciding the validity of the impugned regulations. Similarly the contention

that the compensation provided under the impugned regulations amounts to imposition of penalty is liable to be rejected since what is provided

under the impugned regulations is only notional compensation to consumers who have suffered as a result of call drop. According to us, the same

can under no circumstances be termed as penalty.

36. We are, therefore, of the view that the impugned regulations cannot be held to be beyond the scope of the regulation making power on TRAI

on any ground whatsoever.

Re Point No. 2

37. We have already noticed the settled law that the subordinate legislation is outside the purview of administrative action and therefore it cannot

be questioned on the ground of violation of principles of natural justice, non-application of mind or failure to take relevant matters into

consideration. In Indian Express Newspapers (Bombay)(P) Ltd. v. Union of India; , (1985) 1 SCC 641, it was held:

77. In India arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. In India any enquiry into

the vires of delegated legislation must be confined to the grounds on which plenary legislation may be questioned, to the ground that it is contrary to

the statute under which it is made, to the ground that it is contrary to other statutory provisions or that it is so arbitrary that it could not be said to

be in conformity with the statute or that it offends Article 14 of the Constitution.

78. That subordinate legislation cannot be questioned on the ground of violation of principles of natural justice on which administrative action may

be questioned has been held by this Court in Tulsipur Sugar Co. Ltd. v. Notified Area Committee, Tulsipur [, AIR 1980 SC 882 : (1980) 2 SCR

1111 : (1980) 2 SCC 295], Rameshchandra Kachardas Porwal v. State of Maharashtra [, (1981) 2 SCC 722 : AIR 1981 SC 1127 : (1981) 2

SCR 866] and in Bates v. Lord Hailsham of St. Marylebone [(1972) 1 WLR 1373 : (1972) 1 All ER 1019 (Ch D)]. A distinction must be made

between delegation of a legislative function in the case of which the question of reasonableness cannot be enquired into and the investment by

statute to exercise particular discretionary powers. In the latter case the question may be considered on all grounds on which administrative action

may be questioned, such as, non-application of mind, taking irrelevant matters into consideration, failure to take relevant matters into consideration,

etc, etc. On the facts and circumstances of a case, a subordinate legislation may be struck down a arbitrary or contrary to statute if it fails to take

into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or, say, the

Constitution. This can only be done on the ground that it does not conform to the statutory or constitutional requirements or that it offends Article

14 or Article 19(1)(a) of the Constitution. It cannot, no doubt, be done merely on the ground that it is not reasonable or that it has not taken into

account relevant circumstances which the Court considers relevant.

38. The law laid down in the above decision has been reiterated in State of Tamil Nadu & Anr. v. P. Krishnamurthy (supra) and again by the

Constitution Bench in PTC India Ltd. v. CERC (supra) and it was made clear that the subordinate legislation is beyond the reach of administrative

law.

39. It is clear from the ratio laid down in the abovesaid decisions that though delegated legislation can also be challenged as being unreasonable,

the unreasonableness is not to be judged in the same standard as unreasonableness of administrative action. The delegated legislation can be struck

down unreasonable only if it is manifestly arbitrary or if so unreasonable that Parliament never intended to confer such power on the Regulator. It is

also clear that delegated legislation cannot be challenged on the ground that it does not take into account all relevant factors or that it takes into

account irrelevant factors, the only exception being that the delegated legislation must take into account such vital factors that are expressly or

impliedly prescribed by the statute.

40. In the case on hand, there is no dispute about the power of TRAI to make regulations under Section 36 of the Act. The impugned regulations

have been made in exercise of the power so conferred under Section 36 keeping in mind the paramount interest of the consumers. It is also evident

from the material available on record that a transparent and consultative process was followed by TRAI in making the impugned regulations. The

consultation process with all stakeholders was started in September, 2015 itself. After hearing all the stakeholders and after taking into

consideration all the relevant factors, the Technical Paper on call drop in cellular networks was issued by TRAI on 13.11.2015 which addressed

all the issues that are sought to be raised in the present petition. As is evident from the Technical Paper, the compensation provided under the

impugned regulations is only for those call drops which have occurred in the originating service provider network. This aspect has also been

reiterated by TRAI in its letter dated 26.11.2015 stating that the impugned regulations would apply only to calls which are dropped due to the

problem of the originating network and not for the call drops occurring in the network of terminating service provider. It is also relevant to note that

the impugned regulations do not penalise every call drop but the compensation is limited only to three call drops a day per consumer. Therefore,

the contention that 100% performance is demanded under the impugned regulations is factually incorrect and without any basis.

41. The Technical Paper published by TRAI reflects that to test the effectiveness of the impugned regulations, TRAI had ascertained from the

Telecom Equipment Manufacturers that their network counters/indicators are capable to pin point the exact cause for the call drop and data was

collected from the service providers after activating the said network counters/indicators. In the light of the particulars of the analysis furnished in

Chapter 2 of Technical Paper, it appears to us that the impossibility of implementation of the impugned regulations pleaded by the petitioners is

without any basis. It is also brought to our notice that the possibility of identification of the reasons for call drop, i.e. whether it is network related

or subscriber related has not been disputed by Telecom Equipment Manufacturers like M/s. Nokia and M/s. Ericsson. The learned ASG

appearing for TRAI has also submitted that a number of research studies have been carried out across the world regarding the call drop probability

in the network and the detection of root cause and the outcome of the same has made it clear that the identification of the reason for call drop is

possible if the required counters/course codes are acquired by the service providers and the same are mapped appropriately to the CDR. In the

written synopsis submitted on behalf of TRAI, while furnishing the details of some of the reports of performance evaluations made in several parts

of the world, the copies of the said reports have also been enclosed to substantiate the plea of TRAI that identification of call drop reasons is not

impossible.

42. It was also highlighted in the Technical Paper that due to technological advancement, the issue of call drop can now be addressed by the

service providers by adopting various other means for which appropriate steps are required to be taken by the service providers themselves. It

may also be pointed out that it was made clear in the Explanatory Memorandum to the impugned regulations that TRAI shall keep a close watch

on the implementation of the impugned regulations and may review the same after six months. Therefore, we are unable to accept the allegations of

the petitioner that the impugned regulations suffered from manifest arbitrariness or unreasonableness.

43. We also find force in the submission of the learned ASG that the impugned regulations attempt to balance the interest of the consumers with the

interest of the service providers by limiting the call drops to be compensated to three and also mandating to compensate only the calling consumer

but not the receiving consumer.

44. On a careful study of ''Quality of Service Regulations'' and ''Consumer Regulations'', it appears to us that the purpose and object as well as the

area of operation of the said regulations are entirely different. While the object of Quality of Service Regulations is to prescribe a network

standard, the object of the Consumer Regulations is to prescribe a consumer base standard. Moreover, the benchmark prescribed under Quality

of Service Regulations operates as a deterrent measure whereas the provisions of the impugned amendment to the Consumer Regulations are

compensatory in nature. Further, the financial disincentive provided under the Quality of Service Regulations is collected by TRAI whereas the

compensation provided under the Consumer Regulations as amended is directly credited to the concerned consumer. It is also relevant to note that

the network standard or tolerance of 2% imposed by the Quality of Service Regulations has been prescribed as a quality parameter for the entire

network area and the same is distinct and different from the compensation provided to the consumers for the dropped calls specifying an individual

standard. We are therefore unable to appreciate the contention of the petitioners that Quality of Service Regulations and Consumer Regulations are

mutually contradictory/destructive.

45. Though it is contended by the learned Senior Counsels appearing for the petitioners that the service providers are facing problems in installation

of mobile towers resulting in frequent call drops, the learned ASG has disputed the same pointing out that as per the drive tests conducted by

TRAI in 2014 and 2015, the problem of call drops has been identified in various places for reasons unrelated to mobile towers. We decline to

enter into the said controversy since this court does not have the expertise to adjudicate on the rival claims. Be that as it may, even assuming that

TRAI had failed to take into consideration the said factor while making the impugned regulations, we are of the view that the same cannot be a

valid ground to challenge the validity of the impugned regulations made by way of subordinate legislation.

46. For the aforesaid reasons, particularly in view of the fact that the liability to compensate the consumers under the impugned regulations is

limited only to originating calls with a cap of three calls per day per consumer and nominal compensation of one rupee for each call drop has been

prescribed, we are unable to hold that the impugned regulations are manifestly arbitrary. We found that absolutely no case is made out by the

petitioners to rebut the presumption that the impugned regulations are intra vires.

Conclusion

47. We accordingly uphold the validity of the impugned regulations. In the result, the writ petition shall stand dismissed. All pending applications

shall also stand dismissed.

48. Since the impugned regulations have not been stayed by this court during the pendency of this petition, we make it clear that the petitioners are

bound to comply with Regulation 16 of the Telecom Consumers Protection Regulations, 2012, as inserted by the impugned Notification dated

16.10.2015, with effect from 01.01.2016 and TRAI is at liberty to take appropriate steps in accordance with law for compliance of the same.

49. No costs.