

CASE NO.:
Appeal (civil) 1033 of 2004

PETITIONER:
UNION OF INDIA

RESPONDENT:
TATA TELESERVICES (MAHARASHTRA) LTD

DATE OF JUDGMENT: 23/08/2007

BENCH:
H.K. SEMA & P.K. BALASUBRAMANYAN

JUDGMENT:
J U D G M E N T

P.K. BALASUBRAMANYAN, J.

1. This appeal by the Union of India, the respondent in a proceeding before the Telecom Disputes Settlement & Appellate Tribunal (for short, 'the TDSAT') in a petition filed by the respondent herein under Section 14 of the Telecom Regulatory Authority of India Act, 1997 (for short 'the Act') is under Section 18 of the Act. The respondent approached the TDSAT praying for a declaration that the action of the Union of India in raising a claim and in recovering the amount as per its demand dated 10.8.1999, was bad in law and be set aside, for a declaration that the set off made by invoking condition 19 of the licence the respondent had with the appellant in respect of the Maharashtra Service Area was illegal and unauthorised and for setting aside the same, for directing the appellant to refund an amount of Rs.50 crores together with interest from the date of the purported set off of that amount with the amounts due to the respondent till the date of refund and for other consequential and incidental reliefs. In answer, the appellant contended that it was entitled to make the set off and the set off made was authorised and legal and that there is no reason to interfere with the set off and the respondent was not entitled to the recovery of Rs.50 crores with interest thereon. A claim that the appellant is entitled to recover as damages from the respondent a sum of Rs.654.25 crores towards the loss suffered by it on account of the respondent herein failing to fulfil its obligations under the Letter of Intent issued to it in respect of the Karnataka Telecom Circle was also put forward. The TDSAT upheld the claim of the respondent, rejected the claim of the appellant that it was entitled to a legal or equitable set off of the sum of Rs.50 crores and more importantly held that it has no jurisdiction to entertain a counter claim at the instance of the appellant. Of course, it was also pointed out that the counter claim itself was not properly framed and was somewhat vague. Thus the claim of the respondent was accepted and a direction was issued to the appellant to refund the sum of Rs.50 crores to the respondent with interest thereon at 17 per cent per annum from the date the said amount was appropriated by the appellant till its payment along with costs of the proceedings. This adjudication of the TDSAT is challenged in this appeal.

2. Section 18 of the Act provides for an appeal to this Court from an order or decision of the TDSAT whether in exercise of its appellate jurisdiction or in exercise of its original

jurisdiction on one or more of the grounds specified in Section 100 of the Code of Civil Procedure. The two substantial questions of law sought to be adjudicated on are (1) whether the TDSAT was justified in not accepting the plea of set off raised by the appellant and (2) whether the TDSAT has not failed to exercise the jurisdiction vested in it by law in declining to go into the merits of the counter claim made by the appellant and in rejecting the same as being not maintainable.

3. The question whether the plea of set off, whether legal or equitable is liable to be upheld might depend on our conclusion on the question whether a counter claim at the instance of the Union of India in a proceeding initiated before the TDSAT by a licensee or service provider, is maintainable. If we hold that the counter claim is maintainable, necessarily the same would have to be adjudicated on, on merits and the result of such an adjudication would have impact on the plea of set off put forward by the appellant. Of course, if our answer to the said question is that the counter claim is not maintainable, then we have to decide independently whether the finding entered by the TDSAT on the plea of set off is vitiated by a substantial error of law or not. We will, therefore, first tackle the question whether the counter claim made by the Union of India was maintainable.

4. It may be true that in the prayer portion in the written statement an order or decree in terms of the counter claim had not been sought for by the appellant. But the claim as made in the written statement relates to the claim based on the failure of the respondent, after having conveyed its acceptance of the Letter of Intent to provide service in the Karnataka Telecom Circle and the damages allegedly suffered by the appellant as a consequence and the entitlement of the appellant to reimbursement of the specified sum from the respondent. Even if there is some vagueness in the counter claim, as felt by the TDSAT, we think that the TDSAT might have directed the appellant before us, to make its counter claim more specific and in a proper manner. After all, a defect of deficiency could be permitted to be cured. We are, therefore, not impressed by the argument on behalf of the respondent before us that the counter claim was rather vague and the same was rightly rejected for that reason by the TDSAT. After all, this vagueness can be directed to be removed in the interests of justice, if it were to be held that the counter claim can be maintained by the Union of India.

5. According to the TDSAT, Section 16 of the Act prescribes the procedure and powers of the TDSAT. No right has been given by that provision to the Union of India to make a counter claim in a petition filed by a petitioner before the TDSAT seeking certain amounts as due from the Union of India as the licensor. The question is whether this restricted view taken by the TDSAT is justified on the scheme of the Act.

6. The Objects and Reasons for enacting the Act and creating the TDSAT indicate that the TDSAT will consist of a Chairperson who has been a Judge of the Supreme Court of India or a Chief Justice of a High Court, and two to four members who have held the post of Secretary or Additional Secretary to the Government of India or any equivalent post in the Central Government or the State Government for a minimum period of three years. The powers and functions of the Authority, as set out in the Objects and Reasons, include settlement of disputes between service providers. The

preamble to the Act indicates that it is an Act to provide for the establishment of the TDSAT to regulate the telecommunication service, adjudicate disputes, dispose of appeals and to protect the interests of service providers and consumers of the telecom sector, to promote and ensure orderly growth of the telecom sector and for matters connected therewith or incidental thereto. The Act defines \023Licensee\024 as any person licensed under sub-section (1) of Section 4 of the Indian Telegraph Act, 1885 (13 of 1885) for providing specified public telecommunication service. It defines \023Licensor\024 as meaning the Central Government or the telegraph authority who grants a licence under Section 4 of the Indian Telegraph Act, 1885 (13 of 1885). A \023service provider\024 is defined as meaning, the Government as a service provider and it includes a licensee. Section 14 of the Act deals with the establishment of the TDSAT. It appears to be appropriate to set down the said Section hereunder:

\02314. Establishment of Appellate Tribunal \026

The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to \026

- (a) adjudicate any dispute \026
- (i) between a licensor and a licensee;
 - (ii) between two or more service providers;
 - (iii) between a service provider and a group of consumers:

Provided that nothing in this clause shall apply in respect of matters relating to \026

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

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

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

(b) hear and dispose of appeal against any direction, decision or order of the Authority under this Act.\024

7. The Section indicates that the TDSAT has been constituted to adjudicate on any dispute between a licensor and a licensee or between two or more service providers. Though it also includes adjudication on a dispute between a service provider and a group of consumers, it excludes matters coming within the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under the Monopolies and Restrictive Trade Practices Act, 1964, the

complaint of an individual consumer that is maintainable before a Consumer Disputes Redressal Forum and a dispute between a telegraph authority and any person referred to in Section 7B of the Indian Telegraph Act, 1885. Section 14A of the Act provides that the Central Government or a State Government or a local authority or any person may make an application to the Appellate Tribunal for adjudication of any dispute referred to in clause (a) of Section 14. Section 14A, therefore, contemplates not only the filing of a claim before the TDSAT by a licensee or a consumer, but also by the Central Government or a State Government which could be a licensor or a service provider. Section 14B deals with the composition of TDSAT. It is to consist of a Chairperson and not more than two Members to be appointed, by notification, by the Central Government. The selection of the Chairperson and Members of the Appellate Tribunal shall be made by the Central Government in consultation with the Chief Justice of India. Section 14C provides the qualification of the Chairperson and the Members and the Chairperson has either to be a Judge of the Supreme Court or the Chief Justice of a High Court or a retired Judge of the Supreme Court or a retired Chief Justice of the High Court. A Member has to be one who has held the post of Secretary to the Government of India or any equivalent post in the Central Government or the State Government for a period of not less than two years or a person who is well versed in the field of technology, telecommunication, industry, commerce or administration. Under Section 14 of the Act, the jurisdiction of the TDSAT has to be exercised by a Bench consisting of one member or two members and in case of difference of opinion between two members, the point of difference has to be referred to the Chairperson, who shall decide the point himself and the ultimate decision will be according to the majority opinion. Section 15 ousts the jurisdiction of the Civil Court and it reads thus:
15. Civil court not to have jurisdiction
No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

8. Section 16 of the Act provides that the TDSAT shall not be bound by the procedure laid down in the Code of Civil Procedure, but will be guided by the principles of natural justice and subject to the other provisions of the Act have the power to regulate its own procedure. It is also to have the specified powers under the Code of Civil Procedure like summoning of witnesses, discovery, issue of requisition of any public record, issue of commission, review of its decisions, dismissing an application for default or deciding it ex parte, for restoring an application dismissed for default or setting aside a decision rendered ex parte and any other matter which may be prescribed. Sub-section (3) of Section 16 specifies that every proceeding before the TDSAT shall be deemed to be a judicial proceeding in terms of the Indian Penal Code and the TDSAT shall be deemed to be a civil court for the purpose of Section 195 and Chapter XXVI of the Code of Criminal Procedure. Section 17 confers right on the parties to legal representation. Parties could authorise one or more chartered accountants, company secretaries, cost accountants or legal practitioners or any of its officers to represent its case. Section 18 confers the right of appeal to the Supreme Court on

a substantial question of law. Section 19 provides that orders passed by the TDSAT shall be executable as decrees through the TDSAT, but it has also the power to transmit any order made by it to a civil court to execute the order as if it were a decree made by that court. Section 20 provides for penalties for wilful failure to comply with the orders of the TDSAT. Section 27 of the Act one again indicates that no civil court has jurisdiction in respect of any matter which the Authority is empowered by or under the Act to determine.

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

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

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

12. Section 14A of the Act gives the right to the Central Government, or to the State Government to approach TDSAT on its own. Going by the definitions in the Act, both Governments could be service providers. The Central Government could also be the licensor. Thus, either as a licensor or a service provider, the Central Government could make an application to TDSAT seeking an adjudication of any dispute between it and the licensee or between it and another service provider or between it and a group of consumers. It has actually to make its claim in TDSAT. There is no reason to whittle down the right given to the Central Government to approach the TDSAT for an adjudication of its claim which

comes under Section 14(1) of the Act. Normally, a right to make a claim would also include a right to make a cross-claim or counter claim in the sense that the Central Government could always make an independent claim on matters covered under the Act and such a claim will have to be entertained by the TDSAT. This the Central Government could do even while it is defending a claim made against it in TDSAT, by way of a separate application. If a subject matter is capable of being raised before the TDSAT by the Central Government or the State Government by way of a claim by making an application under Section 14 of the Act, it would not be logical to hold that the same claim could not be made by way of a counter claim when the other side, namely, the licensee or consumers, had already approached the TDSAT with a claim of their own and the Central Government is called upon to defend it. It is, therefore, not possible to accept an argument that a counter claim by the Central Government or State Government cannot be entertained by the TDSAT. We hold that the TDSAT has jurisdiction to entertain a counter claim in the light of Section 14(1) and 14A of the Act.

13. The thrust of the argument on behalf of the respondent before us was, in a case where, a licence had not actually been issued to a party by the Central Government, the dispute could not be said to be one between a licensor and a licensee, contemplated by Section 14(a)(i) or (ii) of the Act. It is submitted that only on the actual grant of a licence, a person would become a licensee under the Central Government and only a dispute arising after the grant of a licence would come within the purview of the Act. The wording of the definition of licensee is emphasised in support. Considering the purpose for which the Act is brought into force and the TDSAT is created, we think that there is no warrant for accepting such a narrow approach or to adopt such a narrow construction. It will be appropriate to understand the scope of Section 14(a)(i) of the Act and for that matter Section 14(a)(ii) of the Act also, as including those to whom licenses were intended to be issued and as taking in also disputes that commence on the tender or offer of a person being accepted. In other words, a dispute commencing with the acceptance of a tender leading to the possible issue of a licence and disputes arising out of the grant of licence even after the period has expired would all come within the purview of Section 14(a) of the Act. To put it differently, Section 14 takes within its sweep disputes following the issue of a Letter of Intent pre grant of actual licence as also disputes arising out of a licence granted between a quondam licensee and the licensor.

14. In the case on hand, the Notice Inviting Tender defined a \021licensee\022 as a registered Indian Company that will be awarded licence for providing the service. Now, pursuant to that invitation, the predecessor of the respondent submitted its tender and the appellant accepted it. A Letter of Intent was also issued. The respondent accepted and started negotiating for certain modifications, which apparently the appellant was willing to consider. But ultimately, the contract did not come into being. The licence was not actually granted. It is the case of the appellant that the appellant had suffered considerable loss because of the respondent walking out of the obligation undertaken by acceptance of the Letter of Intent. According to the learned Additional Solicitor General appearing for the appellant, such a dispute would also come within the purview of Section 14 of the Act going by the definition of licensee and the meaning given to it in the Notice Inviting Tenders. The argument of learned Senior Counsel on behalf of the

respondent is that the expressions \023licensor\024 and \023licensee\024 are defined in the Act and the respondent had not become a licensee and the appellant had not become a licensor since the agreement was never entered into between the parties for providing telecom services in the Karnataka Telecom Circle and the attempt to rope in an intending licensee to whom a Letter of Intent has been issued or the entering into a contract is proposed, cannot be countenanced since the respondent has not become a licensee within the meaning of the Act and consequently this was not a dispute that came within the purview of Section 14(1) of the Act.

15. We have already indicated that a specialised tribunal has been constituted for the purpose of dealing with specialised matters and disputes arising out of licenses granted under the Act. We therefore do not think that there is any reason to restrict the jurisdiction of the tribunal so constituted by keeping out of its purview a person whose offer has been accepted and to whom a letter of intent is issued by the Government and who had even accepted that letter of intent. Any breach or alleged breach of obligation arising after acceptance of the offer made in response to a Notice Inviting Tender, would also normally come within the purview of a dispute that is liable to be settled by the specialised tribunal. We see no reason to restrict the expressions \023licensor\024 or \023licensee\024 occurring in Section 14(a)(i) of the Act and to exclude a person like the respondent who had been given a Letter of Intent regarding the Karnataka Circle, 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. To exclude disputes arising between the parties thereafter on the failure of the contract to go through, does not appear to be warranted or justified considering the purpose for which the TDSAT has been established and the object sought to be achieved by the creation of a specialised tribunal. In Cellular Operators Association of India and others vs. Union of India and others [(2003) 3 SCC 186] this Court had occasion to consider the spread of Sections 14 and 14A of the Act. This Court held that the scope of Sections 14 and 14A are very wide and is not confined by restrictions generally imposed by judge made law on the tribunal exercising an appellate jurisdiction. Of course, their Lordships were considering in particular, the case of appellate jurisdiction. But this Court further said that the tribunal has the power to adjudicate on any dispute but while answering the dispute, due weight had to be given to the recommendations of the authority under the Act which consists of experts. This decision, though it did not directly deal with the power of the TDSAT as the original authority but was dealing with the power of the TDSAT as an appellate authority and the power of this Court in appeal, clearly gives an indication that there is no need to whittle down the scope of Sections 14 and 14A of the Act.

16. It has also to be noted that while prescribing the procedure under Section 16 of the Act, what is said is that the TDSAT shall not be bound by the procedure laid down by the Code of Civil Procedure but it shall be guided by the principles of natural justice. It is significant to note that it is not a case of exclusion of the powers under the Code of Civil Procedure and conferment of specific powers in terms of sub-section (2) of that Section. It is really a right given to the TDSAT even to go outside the procedural shackles imposed by the Code of Civil Procedure while dealing with a dispute before it. Therefore, it will be difficult to keep out the provisions for the

filing of a counter claim enshrined in Order VIII Rule 6A of the Code of Civil Procedure which could be applied by the TDSAT. The sweep of Order VIII Rule 6A of the Code now takes in even claims independent of the one put forward in the application if it is one the respondent therein has against the applicant. On the whole, we are of the view that the TDSAT was in error in dismissing the counter claim as not maintainable.

17. In the light of our finding that the counter claim was maintainable and it requires to be investigated, we think that the proper course is to set aside the finding rendered by the TDSAT on the plea of set off raised by the appellant. This is in view of the fact that acceptance of the counter claim or even a part thereof might throw open the question of legal or equitable set-off, to be considered in the light of the finding on the counter claim. Therefore, we think this to be an appropriate case where we should reopen the whole matter without going into the merits of the contentions of parties on the plea of set off raised by the appellant and leave the question to be decided by the TDSAT along with the counter claim that has been made by the appellant. On taking note of the objection that the counter claim has not been made specific and has not been put forward in a proper manner, we are satisfied that it would be appropriate to direct the appellant to make a proper counter claim before the TDSAT within three months from today. The TDSAT thereafter will give the respondent an opportunity to file its written statement to the counter claim and then decide the claim made by the respondent and the counter claim afresh in accordance with law.

18. We, thus, allow this appeal and setting aside the decision of the TDSAT, remand the claim and the counter-claim for a fresh adjudication and disposal in accordance with law. We leave the parties to suffer their respective costs in this Court.