

(2019) 03 DEL CK 0009

In the Delhi High Court

Case No : Civil Writ Petition No. 1507, 1508 Of 2018, Civil Miscellaneous
Application Nos. 6169, 6171, 25847 Of 2018

Syniverse Technologies (India) Pvt. Ltd.

APPELLANT

Vs

Telecom Regulatory Authority Of India And Anr

RESPONDENT

Date of Decision : 08-03-2019

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)(g)
Indian Telegraph Act, 1885 — Section 4, 11(1)(b)(i), 11(1)(b)(ii), 11(1)(b)(iii), 11(1)(b)(iv), 11(1)(b)(v), 11(4), 36, 36(1)
Airports Economic Regulatory Authority of India Act, 2008 — Section 13(4)

Citation : (2019) 174 DRJ 432

Hon'ble Judges : S. Ravindra Bhat, J;Prateek Jalan, J

Bench : Division Bench

Advocate : C.S. Vaidyarathan, Jafar Alam, Vishal Binod, Saahil Kaul, Anirudh Gupta, Arjan Natarajan, Vinod Diwakar, Kashish Bajaj, Meet Malhotra, Neerav Merchant, Ujjal Banerjee, Akash Khurana

Final Decision : Allowed

Judgement

1. The petitioners in these two cases are Mobile Number Portability [hereinafter referred to as "MNP"] service providers licensed under the Indian Telegraph Act, 1885. They have challenged the validity of the Telecommunication Mobile Number Portability Per Port Transaction Charge and Dipping Charge [Amendment] Regulations, 2018 [hereinafter referred to as "the impugned Amendment"] issued by the respondent Telecom Regulatory Authority of India [hereinafter referred to as "TRAI"]. The impugned Amendment seeks to amend Regulation 3 of the Telecommunication Mobile Number Portability Per Port Transaction Charge and Dipping Charge Regulations, 2009 [hereinafter referred to as "the PPTC Regulations"].

Background and Regulatory Provisions

2. "Porting" is the process by which mobile telephone subscribers may transfer

their mobile connection from one telecom service provider [hereinafter referred to as "TSP"] to another. TRAI introduced MNP in India by issuing the MNP Regulations, which were notified on 23.09.2009. These Regulations were made under Section 36(1) read with sub-clauses (i), (iii) and (v) of Section 11(1)(b) of the Act. The MNP Regulations provided inter alia for the licensing of MNP service providers, such as the petitioners herein, who would be tasked with various functions enumerated thereunder.

The PPTC Regulations were simultaneously issued inter alia to quantify the compensation payable to MNP service providers.

3. The following provisions of the MNP Regulations (as amended by Amendment Regulations of 2012, 2013 and 2015) are relevant for the purposes of these petitions:-

"2. Definitions.- In these regulations, unless the context otherwise requires,-

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(e) "Donor Operator" means a Cellular Mobile Telecom Service provider or Unified Access Service provider, to whose network the mobile number belongs at the time the subscriber makes a request for porting;

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(i) "Mobile Number Portability" means the facility which allows a subscriber to retain his mobile telephone number when he moves from one Access Provider to another irrespective of the mobile technology or from one cellular mobile technology to another of the same Access Provider;

(j) "Mobile Number Portability Service provider" means an entity who has been granted a license under Section 4 of the Indian Telegraph Act, 1885 (13 of 1885) for providing Mobile Number Portability Service;

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(n) "Per Port Transaction charge" means the charge payable by the Recipient Operator to the Mobile Number Portability Service provider for processing the porting request in respect of a mobile number;

(o) "porting" means the process of moving, by a subscriber, of his mobile number or numbers, as the case may be, from one Access Provider to another Access Provider or from one mobile technology to another of the same or any other Access Provider;

(p) "porting charge" means such charge as may be levied by a Recipient Operator from a subscriber for porting his mobile number;

(q) "Recipient Operator" means an Access Provider who will be providing mobile telecommunication service to the subscriber after porting and includes his authorised agent;

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4. Obligation to provide Mobile Number Portability.-Every Access Provider shall facilitate in its entire network, Mobile Number Portability to all subscribers, both pre-paid and post-paid and shall, upon request, provide the same on a non-discriminatory basis.

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6. Eligibility Criteria for making a porting request.- Every subscriber shall be eligible to make a request for porting his mobile number:

Provided that ---

(a) a period of ninety days has expired from the date of activation of his mobile connection in the case of a mobile number not ported earlier; or from the date of activation of his mobile number after its last porting, in the case of a mobile number which has been ported earlier, as the case may be;

(b) there are no outstanding payments due to the Donor Operator by way of pending bills or bills, as the case may be, issued as per the normal billing cycle but before the date of application for porting;

(c) there is no pending request for change of ownership of the mobile number;

(d) the mobile number sought to be ported is not sub-judice;

(e) porting of the concerned mobile number has not been prohibited by a Court of Law.

Inserted vide Notification No. 116-4/2013-NSL-II, dated 22nd July, 2013.[(f) no corporate mobile number shall be ported unless porting request in respect of such number is accompanied by an authorisation letter from the authorised signatory of the subscriber in the format annexed to these regulations;

(g) the porting request in case of corporate mobile number, does not seek simultaneous porting of more than fifty mobile numbers;

(h) the porting request, if made for more than one corporate mobile number, such numbers belong to the same Donor Operator.]"

Inserted vide Notification No. 116-5/2012-MN, dated 8th June, 2012.[Provided further that nothing contained in para (a) of the first proviso shall apply to the subscribers of those service providers whose licenses stand quashed pursuant to the judgment and order passed by the Hon'ble Supreme Court in writ petition(Civil) No. 423 of 2010 and writ petition(Civil) No. 10 of 2011.]"

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"12. Grounds for rejection of porting request by Donor Operator.--- A request for porting of a mobile number shall not be rejected by a Donor Operator on any ground other than the following grounds, namely:-

(a) there are outstanding payments due from the subscriber by way of pending bill or bills, as the case may be, issued as per the normal billing cycle but before the date of application for porting;

(b) the porting request has been made before the expiry of a period of ninety days from the date of activation of a new connection;

Inserted vide Notification No. 116-5/2012-MN, dated 8th June, 2012.[Provided that nothing contained in clause (b) shall apply to the subscribers of those service providers whose licenses stand quashed pursuant to the judgment and order passed by the Hon?ble Supreme Court in writ petition (Civil) No. 423 of 2010 and writ petition (Civil) No. 10 of 2011.]

(c) a request for change of ownership of the mobile number is under process;

(d) the mobile number sought to be ported is sub-judice;

(e) porting of the mobile number has been prohibited by a Court of Law;

(f) Inserted vide Notification No. 116-5/2012-MN, dated 8th June, 2012. [deleted]

(g) the unique porting code mentioned in the porting request does not match with the unique porting code allocated by the Donor Operator for the mobile sought to be ported;

(h) there are subsisting contractual obligation in respect of which an exit clause has been provided in the subscriber agreement but the subscriber has not complied with such exit clause:

Inserted vide Notification No. 116-4/2013-NSL-II dated 22nd July 2013. [(i) in case of a corporate mobile number, the porting request is not accompanied by authorisation letter from the authorised signatory of the subscriber;

(j) the validity period of the Unique Porting Code has expired before its receipt by the Donor Operator.]

Inserted vide Notification No. 116-4/2013-NSL-II dated 22nd July 2013.[Provided that while rejecting a request for porting, on any ground specified in clause (a) to (j), each corporate mobile number shall be treated separately:

Provided further that if the Donor Operator rejects a porting request on the grounds specified in clauses (h) and (i), he shall indicate the full details of the grounds on which the porting request has been rejected and retain a copy of such records for a minimum period of six months.]"

13. Withdrawal of porting request.---(1) A subscriber may, within twenty four hours of making a request for porting, withdraw such request by informing the Recipient Operator in writing:

Provided that a subscriber withdrawing his porting request shall not be entitled to

any refund of the porting charge paid by him to the Recipient Operator.

(2) Where the Recipient Operator has not forwarded the porting request to the Mobile Number Portability Service provider till receipt of the information regarding withdrawal of the request, it shall not take any further action on such porting request.

(3) In case the Recipient Operator has already forwarded the porting request to the Mobile Number Portability Service provider, before receipt of the information regarding withdrawal of the request, it shall forthwith inform the Mobile Number Portability Service provider about the withdrawal of the porting request and the Mobile Number Portability Service provider shall forthwith inform the Donor Operator about the withdrawal of the porting request.

(4) In cases covered under sub regulation (3), the Recipient Operator shall be liable to pay the applicable Per Port Transaction charge to the Mobile Number Portability Service provider."

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"16. Rights and obligations of Mobile Number Portability Service provider:- (1) The Mobile Number Portability Service provider shall make all efforts to facilitate expeditious porting of mobile numbers through effective coordination with the Donor Operator and the Recipient Operator.

(2) The Mobile Number Portability Service provider shall use the Number Portability Database only for the purpose of porting and dipping and not for any other purpose.

(3) The Mobile Number Portability Service provider shall generate specific sets of statistics regarding the number of porting requests received, the number of portings carried out successfully and the number of failed porting requests with reasons for failures.

(4) Upon receipt of a communication under sub-regulation (4) of regulation 15 or under sub-regulation

(5) of regulation 15, from the Recipient Operator about disconnection of a ported mobile number, the Mobile Number Portability Service provider shall forthwith -

(a) remove the number from its Number Portability Database;

(b) update the Local Number Portability Database of all the Access providers and International Long Distance Operators; and

(c) restore the mobile number to the Number Range Holder.

(5) The Mobile Number Portability Service provider shall raise bills along with the relevant details in respect of Per Port Transaction charges to the concerned Recipient Operators on a monthly basis and shall deliver such bills to the concerned Recipient Operators for each month before the tenth day of the

following month or at such periodic intervals and within such time limits as may be mutually agreed upon.

(6) In case a Recipient Operator fails to pay the bill for Per Port Transaction charges within the time limit specified in sub-regulation (1) of regulation 15, the Mobile Number Portability Service provider, before taking any action, shall issue a notice to such Recipient Operator, the period of which shall be not less than fifteen days, calling upon such Recipient Operator to make payment of the outstanding dues within such period.

(7) Notwithstanding the issue of notice to the Recipient Operator under sub-regulation (6), the Mobile Number Portability Service provider shall in no case discontinue the provision of Mobile Number Portability Service to such defaulting Recipient Operator.

Inserted vide Notification No. 116-4/2013-NSL-II dated 22nd July 2013. [(8) In case of rejection of porting request of a corporate mobile number on the grounds specified in clause (i) of regulation 12, the Mobile Number Portability Service Provider shall retain the scanned copy of the authorisation letter for a minimum period of six months]."

4. The petitioners were granted licenses by the Union of India as contemplated by Regulation 2(j) of the MNP Regulations. Their function is to process requests by mobile subscribers to transfer their connections from a "donor" TSP to a "recipient" TSP. They are the only two licensed MNP service providers in India. Under these licenses, they are entitled to Per Port Transaction Fees as per TRAI regulations, directions and orders.

5. Under the PPTC Regulations (prior to the impugned Amendment), the petitioners were entitled to "Per Port Transaction Charge" [hereinafter referred to as "PPTC"] of Rs. 19/- for each request processed by them. The Regulation 3 of the unamended PPTC Regulations is reproduced below:-

"3. Per Port Transaction charge.-The Per Port Transaction charge shall be rupees Nineteen."

6. The Principal Regulations were accompanied by an Explanatory Memorandum which inter alia contained the basis for estimation of the PPTC. The Explanatory Memorandum indicated that TRAI had used the "cost plus methodology" and provided for a 15% return on capital employed. The PPTC was arrived at by dividing the total costs of the MNP service provider by the estimated number of porting subscribers over a period of five years.

7. The impugned Amendment Regulations have been made on 31.01.2018. By virtue of the impugned Amendment, this amount has been reduced to Rs. 4/- and has been made payable only if the porting is "successful", i.e. if subscriber successfully transfers his connection from his original TSP. The impugned Amendment Regulations were preceded by a draft Amendment Regulation published by TRAI on 18.12.2017 to which comments were invited from the

stakeholders. An "open house" discussion was also held by TRAI to take on board the feedback of the stakeholders.

8. By Regulation 2 of the impugned Amendment, Regulation 3 of the PPTC Regulations has been substituted by the following:-

"3. Per Port Transaction charge.-The Per Port Transaction charge for each successful porting shall be rupees four."

9. The impugned Amendment Regulations are also accompanied by an Explanatory Memorandum which compares the assumptions underlying the charges fixed by the original PPTC Regulations with the audited accounts data of the MNP service providers. Relevant portions of the Explanatory Memorandum to the impugned Amendment Regulations are reproduced below:-

"1.7 However, when the Per Port Transaction cost (using Fully Allocated Cost methodology) based on the audited annual accounts of the MNPSs has been compared in 2017 with the above figures, it shows a significant decline in the per port transaction cost. Based on the audited annual accounts submitted by MNPSs for the year 2016-17, the calculation of per port transaction charge works out as follows:-".

Particulars

Unit

Amount

Total Cost*

Rs. in Lacs

1,229.57

No. of porting requests received

in Lacs

310.47

Per Port Transaction Cost

in Rs.

3.96

Licence Fee @1%

In Rs.

0.04

Per Port Transaction Charge

In Rs.

4.00

1.8 Total cost* in the above table includes the operating expenditure (after adjusting consultancy & royalty charges) and depreciation & amortization and 15% return on capital employed as per the audited annual accounts submitted by MNPSPs. While arriving at afore-mentioned cost and the per port transaction charge, the Authority has adopted the same methodology and the principle to consider the lower of the cost of two MNPSPs as it was followed at the time of initial fixation of Per Port Transaction Charge."

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"1.10 After reviewing the financial results of both the MNPSPs and the upsurge in the volume of porting requests in the past two years, the Authority opined that the present charge of Rs. 19/- is quite high as compared to cost and volumes of transaction involved. The Authority, therefore, placed draft "The Telecommunication Mobile Number Portability Per Port Transaction Charge and Dipping Charge (Amendment) Regulations, 2017" on 18th December, 2017 on TRAI's website for comments of stakeholders. The last date for receiving comments from stakeholders was 29th December, 2017, which was further extended upto 12th January, 2018 considering the requests of stakeholders. An Open House Discussion in this regard was also held on 16th January, 2018.

1.11 Most of the stakeholders (comprising TSPs and COAI) commented that the proposed per port transaction charge of Rs.4 are on higher side and should be brought down to Rs. 2.00 by the Authority, considering the surge in the MNP requests and reduction in the cost of serving such requests.

1.12 Majority of stakeholders have commented that the royalty and consultancy charges paid by MNPSPs to their parent companies are very high. Though the MNPSPs are not providing any such service which requires payment of royalty amounts. Thus, the Authority should not consider royalty free under the item Total Cost while calculating the per port transaction charges.

Moreover, only the Relevant Cost of the two MNPSPs may be taken into account for the purpose."

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"1.14 On the other hand, MNPSPs commented that the current per port transaction charge of Rs.19/- is reasonable and should not be revised downward. Considering the market consolidation scenario, subscribers will be left with fewer choices in the future to port to different operator, which will in turn lead to decline in porting volumes.

1.15 The written views/comments received from stakeholders on the draft "The Telecommunication Mobile Number Portability Per Port Transaction Charge and Dipping Charge (Amendment) Regulation, 2017" as well as during the open house discussion were analysed. After taking into consideration the views/

comments received from stakeholders and the other relevant facts, the Authority has decided that the per port transaction charge may be reduced as the costs of operations of MNPSPS have substantially gone down and at the same time the volume of MNP traffic has increased by leaps and bounds."

Submissions

10. Mr.C.S.Vaidyanathan, learned Senior Advocate for Syniverse Technologies India Pvt. Ltd., the petitioner in W.P.(C) 1507/2018, submitted that TRAI has entirely disregarded the submissions made by Syniverse pursuant to the draft Regulations on which it had invited comments. He drew our attention to the comments submitted by Syniverse dated 10.01.2018 wherein it had referred inter alia to the market consolidation consequent upon merger and acquisition activity amongst TSPs which would result in fewer porting requests. It had also referred to future planned cost and capital expenditure which it intended to undertake. It proposed the continuation of the prevailing price of Rs. 19/- and a revision thereof only as part of the license renewal process likely to be undertaken in March, 2019. The contention of the learned Senior Counsel was that the petitioners are unable to recover even their costs and they have been compelled to consider surrender of their licenses.

11. In support of the contention that MNP service providers were entitled to compensation for every request made by a subscriber [as provided in the original Regulation 3], and this could not be made contingent upon the success of the request [as sought to be done in the impugned Amendment], it was submitted by Mr.Vaidyanathan as well as Mr. Meet Malhotra, learned Senior Advocate appearing for MNP Interconnection Telecom Solutions India Pvt. Ltd., the petitioner in W.P.(C) 1508/2018, that the success of a porting request depends upon several factors which are not within the control of the MNP service provider, such as the eligibility of the subscriber, and the fulfillment of statutory obligations by both the subscriber and the concerned TSP under the MNP Regulations. It was further submitted that the PPTC is defined in the MNP Regulations as a charge payable for processing the porting request, which itself involves expenditure on the part of the MNP service provider. Learned counsel relied upon the judgment of the Supreme Court in Cellular Operators Association of India vs. TRAI (2016) 7 SCC 703 to submit that the impugned Amendment Regulations are also liable to be struck down on the ground that the draft circulated for comments did not provide for the payment to be made conditional upon success of the porting request.

12. On the computation of the revised charges, the petitioners have submitted that the "total cost" figures employed by TRAI in its computation are lower than the actual expenditure incurred by either of the petitioners. They submit that TRAI has used the costing figures for only one year [2016-17] and not the projected future expenditure.

13. Mr. Malhotra also submitted that the cost analysis undertaken by TRAI was

palpably flawed as it had not used the cost data of either of the MNP service providers, had "adjusted" the data without stating the nature or justification for the adjustments, disregarded the cost of software licensing [which had been considered previously] and used the specific items in the cost data of the two providers selectively. He thus contended that the impugned Amendment Regulations were based on data and analysis that lacked objectivity. He submitted that the figure of "number of porting requests" used by TRAI was exaggerated by reason of the abnormal market conditions in the relevant year [leading to a one time surge in the number of porting requests]. Mr. Malhotra also emphasized that unsuccessful porting could result from factors for which the MNP service provider was not responsible such as non-payment/blacklisting of the subscriber with the donor TSP, the number of porting requests made by the consumer, mismatch of the identification, submission of expired porting code etc. Finally, he assailed the impugned Amendment Regulations for want of transparency as required by Section 11(4) of the Act. He referred in particular, to non-disclosure of the costing data by TRAI and its failure to deal with the comments offered by stakeholders in response to the draft Regulations.

14. Mr. Arjun Natarajan, learned counsel for TRAI defended the impugned Amendment Regulations by reference to the power of TRAI under Section 36 read with Section 11(1)(b)(ii), (iii), (iv) and (v) of the Act, and to Clause 19 of the license granted by the Union of India to the petitioners. Clause 19 provides that the Per Port Transaction fees would be subject to regulation/direction/order issued by TRAI. So far as the challenge founded on Article 19 (1)(g) is concerned, Mr. Natarajan has raised an issue of maintainability as no individual shareholder has been arrayed as a petitioner in either of these petitions. He has submitted that in the absence of an individual citizen, a company cannot claim a right under Article 19(1)(g) and has relied on the judgment in *Star India Pvt. Ltd. Vs. TRAI* 146 (2008) DLT 455 upheld by the order of the Supreme Court dated 03.01.2008. Mr. Natarajan emphasized that in the legislative exercise of tariff fixation, judicial review must be exercised within very narrow bounds. On the computation of tariff, he stated that this was on the basis of the audited accounts of the two petitioners herein and adjustments have been made for apparently excessive royalty or consultancy payments made to the parent company of one of the petitioners. With regard to the inclusion of the word "successful" in the impugned Amendment Regulations the TRAI has stated that this change emerged during the consultative process and is in consumer interest as it relieves the consumer from making any payment in the event of a failed porting request.

Discussion

15. Before entering into an analysis of the impugned Amendment Regulations, it is necessary to delineate the scope of our examination. The Supreme Court has, in several decisions, laid down the parameters for judicial review of subordinate legislation, including in some cases dealing with price fixation. At the outset, it

cannot be disputed that the impugned Amendment Regulations being in the nature of price or tariff fixation, the executive or regulatory authorities are entitled to a high degree of deference. However, there are certain grounds, albeit relatively narrow, on which the Court is duty bound to interfere. The Constitution Bench judgment in *Shri Sitaram Sugar Co. Ltd. vs. Union of India* (1990) 3 SCC 223 and the judgment in *COAI* (supra) (which also deals with TRAI regulations) provide very relevant guidance for the purposes of the present case.

16. In *Shri Sitaram Sugar*, the Constitution Bench held inter alia that the power to fix tariffs or prices under statutory powers was in the nature of a legislative exercise. The Court cited several earlier decisions in support of this conclusion, including *Saraswati Industrial Syndicate Ltd. vs. Union of India* (1974) 2 SCC 630; *Prag Ice Mills vs. Union of India* (1978) 3 SCC 459; *Union of India vs. Cynamide India Ltd.* (1987) 2 SCC 720; and *State of U.P. vs. Renusagar Power Co.* (1988) 4 SCC 59. Having arrived at this conclusion, the Court, in paragraphs 45 to 52 of its decision, and relying upon several judgments (including those of the English and American courts), elaborated upon the scope of judicial review in such a case. For the purposes of the present judgment, we may summarise the law settled by the Constitution Bench in the following terms: Regardless of the characterization of a function as "legislative" or "quasi-judicial", certain minimum standards are expected of decision-making authorities. These include the application of objective criteria, reasonableness, consideration of relevant material, fidelity to the Constitution and the parent statute, and good faith. Equally, such actions must not be characterized by any extraneous considerations, reliance on non-existent facts or arbitrariness.

17. The principles laid down in *Shri Sitaram Sugar* (supra) have been cited in several later judgments of the Supreme Court including judgments rendered soon after, e.g. *India Cement Ltd. vs. Union of India* (1990) 4 SCC 356, and *Shri Malaprabha Coop. Sugar Factory Ltd. vs. Union of India* (1994) 1 SCC 648, and the more recent decisions in *Parisons Agrotech Private Ltd. vs. Union of India* (2015) 9 SCC 657, *Essar Steel Ltd. vs. Union of India* (2016) 11 SCC 1 and *Union of India vs. Cipla Ltd.* (2017) 5 SCC 262.

18. The judgment of the Supreme Court in *COAI* (supra) is analogous to the present case in several respects, and some of the arguments considered therein mirror the submissions made before us. In that judgment, the Supreme Court declared the Telecom Consumers Protection (Ninth Amendment) Regulations 2015 [hereinafter referred to as "the TCP Regulations"] as ultra vires the TRAI Act, as well as Articles 14 and 19(1)(g) of the Constitution. In paragraph 34 of the judgment, the Court quoted the following passage from *State of T.N. vs. P.Krishnamurthy* (2006) 4 SCC 517, laying down the tests by which subordinate legislation can be judicially reviewed:

"15. 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. It is also well recognised that a subordinate legislation can be

challenged under any of the following grounds:

- (a) Lack of legislative competence to make the subordinate 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).

16. The court considering the validity of a subordinate legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity."

19. The Article 14 test of "manifest arbitrariness", in its application to delegated legislation, has been explained in COAI [paragraphs 43-44] with reference to *Indian Express Newspapers (Bombay) Private Ltd. vs. Union of India* (1985) 1 SCC 641 and *Khoday Distilleries Ltd. vs. State of Karnataka* (1996) 10 SCC 304. The position which emerges from these authorities is that a subordinate legislation would certainly be hit by Article 14 if it is capricious, or incapable of reasonable or logical explanation. In that sense, it is in fact a measure which Parliament could never have intended to authorize, and thus ultra vires the powers of the statutory delegate.

20. Keeping the above authorities in mind, therefore, we are required to assess the validity of the impugned Amendment Regulation applying the tests described above, but without going into the prohibited territory of a review on the merits of the matter. On such an analysis, for the reasons explained hereinbelow, we find that there are several infirmities in the impugned Amendment Regulations, which constitute violation of the statutory framework, and are also contrary to the mandate of Article 14 of the Constitution.

21. The first of these relates to transparency in the decision-making process, as mandated by the Act. The regulation-making power of TRAI contained in Section 36 of the Act is intended to enable TRAI to carry out the purposes of the Act. The functions of the TRAI are enumerated in Section 11, of which Section 11(4) expressly imposes an obligation of transparency on TRAI in the discharge of the powers and functions assigned to it. The interpretation of this provision has been

considered in detail in the Supreme Court judgment in COAI (supra) [paragraphs 80-92]. The Court's reliance inter alia upon Section 13(4) of the Airports Economic Regulatory Authority of India Act, 2008 and the decision of the English Court of Appeals in *R.vs. North and East Devon Health Authority, ex p Coughlan* (2001) QB 213, lead to the clear conclusion that, at a minimum, transparency requires consultation with all stakeholders, permitting them to make submissions, taking those submissions into account and clearly documenting and explaining the decisions of the authority. The process employed by TRAI in passing the impugned Amendment Regulations fall short of the required standard on two grounds:

(a) First, the draft Amendment Regulations published by TRAI did not propose limiting PPTC to cases of successful porting alone, but contemplated continuation of the existing regime of compensating the MNP service provider for every request made. There was thus no opportunity for the stakeholders to comment on this aspect of the proposed amendment. TRAI has justified this on the basis that the change has been incorporated as a result of stakeholder comments during the consultative process and could not, therefore, have been published earlier. In fact, from this prospective, it could be suggested that this is an example of the authority's responsiveness to the stakeholder comments and adoption of an effective and transparent process of consultation. However, in our view, if TRAI was minded to accept a proposal of such a fundamental nature, some further consultation was required. It may be that such further consultation is not called for in every case where draft regulations are modified in response to stakeholder comments, but changes which have a drastic impact on the scheme of the regulations such as the one under consideration, do require a further opportunity to be given to the affected stakeholders. As in the present case, it is quite evident that there may be many situations where the interests of all stakeholders are not identical. The MNP service providers [the petitioners herein] are the ones most adversely affected by the restriction placed on their entitlement. They ought to have been consulted prior to making this new amendment during the consultative process.

(b) Further, the Explanatory Memorandum of the impugned Amendment Regulations does not reveal adequate consideration of the comments offered by the MNP service providers. For example, their submission regarding the ongoing market consolidation among TSPs and the likelihood of a consequent reduction in the number of porting requests has been noted but no justification has been given for taking a different view. Similarly, the cost data, including projected costs do not appear to have been reflected in the considerations which led to the impugned Amendment Regulations. The cost data actually considered by TRAI has been criticized by the petitioners as a combination of the costs incurred by each of them. Thus, for some elements of cost, TRAI has employed the data submitted by Syniverse and for other elements it has adopted the data of MNP Interconnection. TRAI has not been able to explain satisfactorily the rationale for a consideration of this nature, which would obviously lead to a lack of coherence

in the calculations made. In a regulatory exercise of the sort with which we are concerned, the integrity and objectivity of the data used by the regulator are of utmost importance.

22. A further substantive ground of challenge is that limiting the PPTC to successful requests, is not consistent with the definition of the term in Regulation 2(n) of the MNP Regulations. The said definition defines PPTC as the charge payable to the MNP service provider for processing the porting request. Even where a porting request is ultimately unsuccessful, the MNP service provider would necessarily have expended resources in processing it. There is, therefore, neither a statutory basis, nor any other reasonable explanation, for the limitation placed by impugned Amendment. The MNP Regulations and the PPTC Regulations are part of the same scheme and must be capable of harmonious and consistent construction. The legal position that the impugned Regulations can be scrutinized in the context of cognate regulatory provisions is clear from paragraph 60 to 62 of COAI (supra).

23. The inconsistency between the impugned Amendment Regulations and the MNP Regulations is evident from another angle as well. The manner of making a request for porting of a mobile number and the action required by the recipient TSP, the MNP service provider and the donor TSP prior to a successful porting are set out in Regulations 7 to 10 of the MNP Regulations. Regulations 12 and 13 provide for the grounds of rejection by a donor operator and the withdrawal of a porting request by the subscriber. The rights and obligations of an MNP service provider are enumerated in Regulation 16. It is clear from the scheme of the MNP Regulations, and indeed admitted by TRAI in the written submissions filed before us, that the success of a porting request depends upon various factors, many of which are not attributable to the MNP service provider at all. For example, the subscriber may have outstanding payments due to the donor operator or may be in violation of some other contractual requirement. The MNP service provider's role and obligations are clearly and expressly delineated in the MNP Regulations. In COAI, the Supreme Court has held (albeit in the context of different Regulations) that a service provider cannot be prejudiced in situations which are not within its control. We are of the view that a similar reasoning would apply to the present situation where the MNP service provider is being deprived of any compensation even when the failure of the porting request may be despite its efficient and satisfactory discharge of the responsibility placed upon it.

24. The last and perhaps most glaring ground for interference is the absurdity of applying a figure derived by dividing the total costs of the MNP service provider by the "number of porting requests" to successful requests alone. A mere glance at paragraph 1.7 of the Explanatory Memorandum to the impugned Amendment Regulations shows that the figure of Rs. 4/- has been calculated by dividing the "Total Cost" by the "Number of Porting Requests Received" and adding the "License Fee" of 1%. Thus the divisor or denominator used, viz. "number of

porting requests received" did not make any distinction between those requests which were successful and those which were not. The variable so used is obviously different from the number of "successful portings" but the same figure of Rs. 4/- has been applied to successful portings by virtue of the Amendment Regulations. If TRAI was inclined to compensate MNP service providers only for successful porting requests, then the number of successful porting requests should have been utilized to determine the PPTC. It is wholly arbitrary and unreasonable to arrive at a figure by incorporating a particular factor and then employ that very same figure to a completely different variable.

25. In view of the above, we hold that the impugned Amendment Regulations are illegal and unsustainable, on several grounds. In brief, we may summarize them as follows:-

- a. Lack of transparency, inasmuch as, the consultation paper issued by TRAI did not indicate that porting charges would be payable only for successful transactions.
- b. The Explanatory Memorandum to the impugned Amendment Regulations does not reveal adequate consideration of the comments submitted by the MNP service providers in response to the consultation paper.
- c. Limiting the entitlement of the MNP service providers to situations of successful porting is not only contrary to the statutory scheme, but also penalizes them for failures which may not be attributable to them at all.
- d. The impugned Amendment is also ex facie arbitrary and unreasonable as the per-port transaction charge of Rs. 4/- has been computed on the basis of the number of porting requests received but the same charge has ultimately been granted only for "each successful porting".

26. In view of our findings above, we do not consider it necessary to examine the challenge to the impugned Amendment Regulations based on Article 19(1)(g) of the Constitution, or the respondents preliminary objection thereto, based on the judgment in *Star India* (supra).

Conclusion

27. For the reasons aforesaid, the impugned Telecommunication Mobile Number Portability Per Port Transaction Charge and Dipping Charge [Amendment] Regulations, 2018, are hereby quashed as being ultra vires the powers of the TRAI under the TRAI Act, and also contrary to Article 14 of the Constitution. The writ petitions are allowed but without any orders as to costs.