

(2022) 12 DEL CK 0076

In the Delhi High Court

Case No : Civil Writ Petition No. 11173 Of 2019

World Phone Internet Services Private Limited

APPELLANT

Vs

Union Of India And Ors.

RESPONDENT

Date of Decision : 08-12-2022

Acts Referred:

Indian Telegraph Act, 1885 — Section 4

Telecom Regulatory Authority of India Act, 1997 — Section 11

Citation : (2022) 12 DEL CK 0076

Hon'ble Judges : Prathiba M. Singh, J

Bench : Single Bench

Advocate : Sanjoy Ghose, Bipul Kedia, Anupam Prakash, Karan Bindra, Shailendra Kumar, Kumar Ankur, Asheesh Jain, Keshav Mann, Vishal Kumar, Mukul Rohatgi, Ajit Warriar, Varun Pathak, Amee Rana, Akhil Shandilya, Kapil Sibal, Tejas Karia, Swait Aggarwal, Shashank Mishra, Vaarish Salwani, Parv Kaushik

Final Decision : Disposed Of

Judgement

Prathiba M. Singh, J

1. This hearing has been done through hybrid mode.
2. The Petitioner - World Phone Internet Services Pvt. Ltd. has filed the present petition seeking the following prayers:

"a) Pass an order directing the Respondents to enforce current regulations as applied to the Internet Telephony Services of Facebook messenger and WhatsApp to ensure that same are in compliance with the same regulatory/license framework as licensed TSPs/ITSPs/ISP's;

b) Pass an order directing the Respondents to enforce its regulations and make Facebook messenger and WhatsApp accountable for regulatory requirements as required under the UAS/ISP or Unified License granted under Section 4 of the Indian Telegraph Act 1885 and those issued by the Government from time to

time;

c) Pass an order directing Respondent no 2 to forthwith immediately take steps to prevent services that are Licensed services as that of the Petitioner herein from being provided by Facebook messenger and WhatsApp;

d) Pass an order directing the Respondent no 2 to stop the unlicensed services of Facebook messenger and WhatsApp until they comply with the requirements as required under the UAS/ISP or Unified License granted under Section 4 of the Indian Telegraph Act 1885 and those issued by the Government from time to time;

e) Pass an order directing the Respondent no 2 to impose penalties for prior non compliance by Facebook and WhatsApp as required under the UAS/ISP or Unified License granted under Section 4 of the Indian Telegraph Act 1885 and those issued by the Government from time to time"

3. The case of the Petitioner is that it is an Internet Telephony Service Provider (hereinafter "ITSP"). It had entered into License Agreement bearing No.511/200-LR for category "A" Internet Service Providers for providing internet services (including internet telephony) in 2002, whereunder the Department of Telecommunication (hereinafter "DoT") imposed license fees of 6-8% of the Adjusted Gross Revenue earned from Internet Telephony. The license agreement has been renewed in 2019, by license agreement bearing no.DS-11/114/2015-DS-III. According to the Petitioner, the permissibility of internet telephony through various online communication channels such as Facebook and WhatsApp has worked to its detriment. While on the one hand, an ITSP pays the license fees per its license agreement (even for telephony services), such other companies and platforms are not regulated and do not pay any amounts to the Government. It was under these circumstances that the writ petition was filed seeking the above reliefs.

4. Notice was issued in this petition on 21st October, 2019. The affidavit of the DoT dated 25th November, 2022 has been filed on record. As per the said affidavit, which is sworn by the Assistant Director General, Department of Communication, Ministry of Communication and Information Technology, TRAI's recommendation suggesting that the regulatory framework for Over-The-Top (OTT) services is not required, has not been accepted. the Digital Communications Commission in its 19th meeting on 26th July, 2022, had referred the matter back to TRAI to suggest a suitable regulatory mechanism for OTT. Thus the Government has sent the said recommendations back to TRAI, and sought re-examination and re-consideration of the issue. Relevant paragraphs of the said affidavit are set out below:

"2. That the present Affidavit is being filed on behalf of Respondent No. 2 in view of the directions passed by this Hon'ble Court vide Order dated 08.09.2022, thereby, directing Respondent No. 2, to state on affidavit the status of the recommendations made by Telecom Regulatory Authority of India (hereinafter

referred to as "TRAI") to the Department of Telecommunication (hereinafter referred to as "DoT") regarding Regulatory Framework for Over-The-Top services. (hereinafter referred to as "OTT")

3. It is stated that TRAI vide its recommendations on Regulatory Framework for OTT Communication services dated 14.09.2020 suggested that it is not an opportune moment to recommend a comprehensive regulatory framework for OTT services, beyond the extant laws and regulations prescribed presently, and furthermore suggested that this matter should be looked into afresh when more clarity emerges in International Jurisdictions particularly the study undertaken by ITU (International Standardization Body).

4. It is stated that the recommendations of TRAI dated 14.09.2020 were considered by the Government of India in the 19th meeting of the Digital Communications Commission (hereinafter referred to as "DCC") held on 26.07.2022.

5. It is stated that the TRAI's recommendations dated 14.09.2020 have subsequently been referred back to TRAI for re-examination and reconsideration, so as to suggest a suitable regulatory mechanism for OTTs, including issues relating to 'Selective banning of OTT Services' as part of its recommendations in accordance with the provisions of Section 11 of TRAI Act, 1997."

5. The letter dated 7th September, 2022 vide which the Ministry had communicated the above position to TRAI has also been attached and reads as under:

"To.

The Secretary.

Telecom Regulatory Authority of India

Mahanagar Doorsanchar Bhawan.

Jawaharlal Nehru Marg, New Delhi- 110002.

Sub: Reference back on recommendations of TRAI on 'Regulatory Framework for Over-The-Top (OTT) Communication Services'- regarding

This has reference to the recommendations of TRAI on 'Regulatory Framework for Over-The-Top (OTT) Communication Services' dated 14.09.2020. These recommendations have been considered by the Government and the following is submitted in this regard-

i. Whereas TRAI has recommended that "No regulatory interventions are required in respect of issues related with Privacy and security of OTT services at the moment, it has not provided any detailed justification for recommending the same.

ii. In view of the humongous growth of OTT services in the recent past and these

services having reached a matured stage, there is a need to holistically look into the various aspects of these services including regulatory, economic, security, privacy and safety aspects. This is also in keeping with the para 2.2 of the National Digital Communications Policy-2018 which mentions about the policy goal for "Ensuring a holistic and harmonized approach for harnessing Emerging Technologies". It has been mentioned therein that a policy framework for 'Over The Top' services will be developed.

iii. The above-said recommendations dated 14.09.2020 are based on the Consultation Paper of TRAI dated 12th November, 2018 on 'Regulatory Framework for Over-The-Top (OTT) Communication Services'. The consultation revolved mainly on the issue of imbalance between TSPs and OTT players providing services that can be regarded as same or similar to services offered by TSPs and issues relating to economic aspects of such OTT services. On the other hand, the Consultation Paper of 2015 titled 'Regulatory Framework for Over-The-Top (OTT) Service' focused on possible regulatory and licensing framework for OTT services along with related safety, security and privacy concerns in addition to Net Neutrality issues.

iv. Further, recommendations dated 14.09.2020 are at variance to TRAI's earlier recommendations on Privacy, Security and Ownership of the Data in the Telecom Sector dated 16.07.2018 wherein it was concluded that "since these entities are not governed by the license conditions, applicable for Telecom Service Providers, the need for regulation of these entities of the digital eco-system to ensure protection of consumers' privacy and data security is urgent and inescapable."

2. A kind reference is also invited to the recommendation no. 14 of the 26th report of the Parliament's Standing Committee on Communication and Information Technology on the subject 'Suspension of Telecom Services/Internet and its impact' (attached as Annexure-I), gist of which is as under-

The Committee strongly recommended that the Department urgently examine the recommendation of TRAI and come out with a policy which will enable the selective banning of OTT services with suitable technological intervention, such as Facebook, Whatsapp, Telegram services during period of unrest/crisis that are liable to be used by the terrorists or antinational element/forces to ferment trouble in the specified regions. The Committee look forward to positive development in this regard.

With respect to the abovementioned recommendation of the Parliament's Standing Committee, DoT replied that it will explore the possibility of regulation of OTT services and banning services on selective basis in consultation with TRAI, MeitY and MHA."

3. In view of above, it is requested that TRAI may reconsider its recommendations on 'Regulatory Framework for Over-The-Top (OTT) Communication Services' dated 14.09.2020 and suggest a suitable regulatory mechanism for OTTs, including issues relating to "selective banning of OTT

services” as part of its recommendations in accordance with the provisions of section 11 of TRAI Act 1997, as amended in 2000.”

6. In view of the above stand of MEITY, Id. Senior Counsel for the Petitioner submits that in the reconsiderations and deliberations which may be held by TRAI, the Petitioner may be allowed to participate, both by means of written representation and oral submissions, if the need so arises, and the petition may be disposed of on this basis. Id. Senior Counsels for Respondent Nos. 3 and 4, refute these assertions.

7. Considering the fact that the entire matter is to be reconsidered by TRAI, it shall now hold stakeholder consultations including from the Petitioner, Respondent Nos.3 & 4 and any other stakeholders, concerning the recommendations to be given.

8. Considering the extensive prevalence and use of internet telephony, TRAI would expeditiously conduct this stakeholders’ consultation and give its recommendations accordingly.

9. The present petition, along with all pending applications, is disposed of in these terms. It is clarified that the issues raised by the parties has not been considered on merits or adjudicated, by this Court.