IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
SPECIAL LEAVE PETITION (CIVIL) N0.804 of 2017

IN THE MATTER OF:

Karmanya Singh Sareen & Anr ....Petitioner

Vs.

Union of India & Ors. ...Respondents

SHORT COUNTER AFFIDAVIT ON BEHALF OF RESPONDENT NO. 1

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(G. S. Makker)
Advocate for the
Department of Telecommunications
Ministry of Communication
Supreme Court of India, New Delhi

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In the matter of:

Karmanya Singh Sareen & ANR .....PETITIONER

Vs.

Union of India & Ors. ...RESPONDENTS

COUNTER AFFIDAVIT ON BEHALF OF THE RESPONDENT NO. 1

I, Prashik Jawade, aged 31 years, working as Assistant Director General (NT-II) in Department of Telecommunications, Ministry of Communications at New Delhi do hereby solemnly affirm and say as follows:

1. That the present Special Leave Petition has been filed by the Petitioners, wherein the Union of India through Secretary, Department of Telecommunications had been impleaded as Respondent No. 1. The deponent is working as Assistant Director General (NT-II) in Department of Telecommunications, Ministry of Communications at New Delhi and is filing the present Affidavit in aforesaid capacity. The Deponent being well conversant with the facts and circumstances of the case on basis of official records of the case is therefore competent to swear the present counter affidavit on behalf of the Respondent No. 1.

2. That the deponent has gone through the contents of Special Leave Petition and the annexures filed with the

petition and have understood the contents thereof. The Deponent has also perused the records pertaining to the present case, and therefore filing present Counter Affidavit on the basis of records of the case. The deponent denies each and every averment raised by the Petitioners in the present Special Leave Petition except what has been specifically admitted herein under.

PRELIMINARY SUBMISSIONS:

3. That rapid advances in technology has resulted in newer uses of Internet. It has resulted into growth of a new breed of services known as Over-The-Top (OTT) services. The term Over-The-Top (OTT) refers to applications and services (e.g. WhatsApp, Skype, Viber, WeChat, Facebook messenger etc.) which are accessible over the Internet and ride on telecom operators' networks offering Internet access services e.g. social networks, search engines, amateur video aggregation sites etc.

4. That the characteristics of OTT services are such that Telecom Service Providers (TSPs) realise revenues from the increased data usage of the internet-connected customers for various applications (popularly known as Apps). The TSPs have no control, no rights and no responsibilities for content on these Apps. They are also not involved in planning, selling, or enabling OTT Apps.

5. That on the other hand, OTT providers make use of the TSPs' infrastructure to reach their customers and offer products/services for revenue realization and also compete with the traditional services (i.e. communication services) offered by TSPs.

6. That based on the kind of service they provide, there are basically three types of OTT Apps:

   a. Messaging and voice services, (Communication services);

   b. Application eco-systems (mainly non-real time), linked to social networks, e-commerce; and

   c. Video / audio content.

7. That the arrival of smartphones with multimedia and advanced communication functions has revolutionized the OTT services market. The greater processing power, easy customisable interface and support of high data rate connectivity make innovation and adoption of OTT Apps easier. The rapid growth of OTT services marks an inflection point in the complex strategic relationship between TSPs and OTT providers. Similar to other technological advancements, a key distinctive characteristic of OTT services is that it has evolved faster than regulation can keep pace with it.

8. <u>Initiatives towards OTT Policy Formulation:</u>

   Telecom Regulatory Authority of India (TRAI) Consultation Process on OTT:

Telecom Regulatory Authority of India (TRAI) issued a consultation paper titled "Regulatory Framework for Over-The-Top (OTT) Service" on 27.03.2015. The objective of the Consultation Paper (CP) was to analyse the implications of the growth of OTTs and consider whether or not changes are required in the current regulatory framework. The paper focused on possible regulatory and licensing framework for OTT services in the light of international experience and related safety, security and privacy concerns. TRAI is yet to submit its recommendations to the Department of Telecommunications (DoT).

9. Department of Telecommunications (DoT) Committee on Net Neutrality:

DoT had constituted a six-member committee on 19th Jan, 2015 in order to have proper policy response with respect to various issues involved in net- neutrality along with examination of the economic impact on the telecom sector that arises from the existence of a regulated telecom services sector and unregulated content and applications sector including over-the-top (OTT) services. After taking into consideration economic, security, privacy, innovation etc. related impact of OTT services, the committee recommended various measures including calibration of regulatory response and its phasing to be appropriately determined after public consultations and

TRAI's recommendations to this effect. The report of the DoT Committee on Net Neutrality is attached as Annexure-I.

10. That the committee report was placed in public domain (discussion forum of MyGov portal and DoT website) in July, 2015 for public comments and suggestions.

11. DoT's Request to TRAI for its Recommendations:

While citing the non-conclusive consultation process titled 'Regulatory Framework for Over-The-Top (OTT) Service', DoT has asked TRAI vide its letter dated 03.03.2016 (copy attached as Annexure-II) to provide its recommendations on net-neutrality including issues like economic, security and privacy aspects of OTT services along with all relevant standpoints covered in the said consultation paper. In view of DoT's request, TRAI floated pre-consultation paper on net-neutrality on 30.05.2016 asking for stakeholder comments in response to DoT request for recommendation on the issue. Subsequently, it has floated the consultation paper on net-neutrality on 04.01.2017. The last dates for submission of comments and counter comments have been extended by TRAI to 12.04.2017 and 26.04.2017 respectively.

12. Present Status towards Policy Formulation on OTT Services:

TRAI is currently examining various issues involved in possible regulatory and licensing framework for OTT services and net-neutrality vide its above consultation papers dated 27.0 3.2015 and 04.01.2017 respectively. The recommendations of TRAI are awaited. Meanwhile, DoT has asked TRAI vide its letter dated 20-03-2017 to expedite the consultation process on 'Regulatory Framework for Over-The-Top (OTT) Service' and submit its recommendations to DoT on priority.

13. Department of Telecommunications is seized of the issue and shall finalize policy direction on various aspects of regulatory and licensing framework for OTT services and net-neutrality after taking into account the TRAI recommendations on the subject, recommendations of DoT's committee on net-neutrality and comments & suggestions received in this regard.

PARA WISE REPLY ON MERITS:

14. That the contents of Para 1.1 to para 1.4 of the SLP needs no reply on behalf of answering Respondent.

15. That the contents of Para 2.1 of the SLP needs no reply on behalf of answering Respondent.

16. That in reply to the contents of Para 2.2 of the SLP it is submitted that the Telecom Regulatory Authority of India (TRAI) had issued a consultation paper titled "Regulatory Framework for Over-The-Top (OTT) Service" on 27.03.2015. The paper focused on possible regulatory

and licensing framework for OTT services in the light of international experience and related safety, security and privacy concerns. The recommendations from TRAI to Department of Telecommunications (DoT) are awaited. DoT shall finalise policy direction on various aspects of regulatory and licensing framework for OTT services after taking into account the TRAI recommendations on the subject, recommendations of DoT's committee on net-neutrality and comments & suggestions received in this regard.

17. That the contents of Para 2.3 to para 2.13 of the SLP needs no reply on behalf of answering Respondent.

18. That the contents of Para 3 of the SLP needs no reply on behalf of answering respondent.

19. That the contents of Para 4 of the SLP needs no reply on behalf of answering respondent.

20. That the contents of Para 5.1 to 5.14 of the SLP needs no reply on behalf of answering respondent.

21. That in reply to Para 5.15 of the SLP it is stated that Telecom Regulatory Authority of India (TRAI) had issued a consultation paper titled "Regulatory Framework for Over-The-Top (OTT) Service" on 27.03.2015. The paper focused on possible regulatory and licensing framework for OTT services in the light of international experience and related safety, security and privacy concerns. The recommendations from TRAI to Department of

Telecommunications (DoT) are awaited. DoT shall finalize policy direction on various aspects of regulatory and licensing framework for OTT services after taking into account the TRAI recommendations on the subject, recommendations of DoT's committee on net-neutrality and comments & suggestions received in this regard.

22. That the contents of Para 5.16 to 5.24 of the SLP needs no reply on behalf of answering respondent.

23. That in reply to Para 5.25 of the SLP it is stated that Telecom Regulatory Authority of India (TRAI) had issued a consultation paper titled "Regulatory Framework for Over-The-Top (OTT) Service" on 27.03.2015. The paper focused on possible regulatory and licensing framework for OTT services in the light of international experience and related safety, security and privacy concerns. The recommendations from TRAI to Department of Telecommunications (DoT) are awaited. DoT shall finalise policy direction on various aspects of regulatory and licensing framework for OTT services after taking into account the TRAI recommendations on the subject, recommendations of DoT's committee on net-neutrality and comments & suggestions received in this regard.

24. That the contents of Para 5.26 to 5.28 of the SLP needs no reply on behalf of answering respondent.

25. That in reply to Para 5.29 of the SLP it is stated that Telecom Regulatory Authority of India (TRAI) had issued

a consultation paper titled "Regulatory Framework for Over-The-Top (OTT) Service" on 27.03.2015. The paper focused on possible regulatory and licensing framework for OTT services in the light of international experience and related safety, security and privacy concerns. The recommendations from TRAI to Department of Telecommunications (DoT) are awaited. DoT shall finalize policy direction on various aspects of regulatory and licensing framework for OTT services after taking into account the TRAI recommendations on the subject, recommendations of DoT's committee on net-neutrality and comments & suggestions received in this regard.

26. That the contents of Para 5.30 to 5.60 of the SLP needs no reply on behalf of answering respondent.

27. That the contents of Para 6.1 to 6.5 of the SLP needs no reply on behalf of answering respondent.

28. That the contents of Para 7 of the SLP needs no reply on behalf of answering respondent in view of the Preliminary Submission made in this Affidavit .

29. That the contents of Para 8 (i) to 8 (v) of the SLP needs no reply on behalf of answering respondent and the instant SLP deserves to be dismissed in view of the Preliminary Submission made in this Affidavit .

30. That no new facts and pleadings have been raised in the present Counter Affidavit which have not been raised or pleaded before the Courts below.

Deponent

(प्रशिक जवादे)
(PRASHIK JAWADE)
सहायक महानिदेशक (एन.टी.)
Asstt. Director General (NT)
दूरसंचार विभाग, भारत सरकार
Deptt. of Telecom, Govt. of India
नई दिल्ली/New Delhi

VERIFICATION

I, Prashik Jawade, working as Assistant Director General (NT-II) in Department of Telecommunications, Ministry of Communications at New Delhi do hereby verify that the facts stated above herein are true to my knowledge, information and belief derived from relevant files and records and nothing has been concealed.

Verified at New Delhi of this 20th day of March 2017.

Deponent

(प्रशिक जवादे)
(PRASHIK JAWADE)
सहायक महानिदेशक (एन.टी.)
Asstt. Director General (NT)
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