

**CONSUMERS ASSOCIATION OF SRI LANKA**  
**VS**  
**TELECOMMUNICATIONS REGULATORY COMMISSION OF SRI**  
**LANKA AND OTHERS**

COURT OF APPEAL

IMAM, J.

SRISKANDARAJAH, J.

C. A. 1776/03

MARCH 31,

MAY 16,

JUNE 2, 15 AND 29 AND

JULY 19, 2005

*Writ of Certiorari - Sri Lanka Telecommunications Act, No. 25 of 1991, sections 12, 17, 17(5) and 17(7) - Increase of tariffs - Legality-Locus standi to maintain application - Necessary parties - Tariff adjustment - Could it be effected from a retrospective date? - Is economic criteria a mandatory requirement in granting approval? - Alternate remedy.*

The petitioner, an Association incorporated under the Companies Act which seeks the welfare of the consumers sought to quash the approval granted by the Telecommunications Regulatory Commission (TRC) to the Sri Lanka Telecom Ltd., the 4th respondent to increase tariff for the year 2003.

On the preliminary objections raised (1) that the petitioners lack *locus standii* ; (2) court cannot consider the correctness of the facts and figures relating to the tariff revision ; (3) that all necessary parties are not before court ; (4) that the petitioners have an alternative remedy ; and (5) that the 4th respondent is not amenable to writ jurisdiction -

**Held :**

- (i) The affidavit filed by the Secretary and some of the members of the Association is to the effect that they are unable to maintain a telephone facility which has become a necessity in the present world because of ever increasing tariffs. It is evident that in the interest of the members of the Association and in the interest of the public in keeping with the objects of the Association the petitioner is questioning the legality of the tariff increase for the year 2003 approved by the 1st respondent in concurrence with the 2nd respondent ; the petitioner is not a busy body.

- (ii) The Director General, Telecommunication (DGT) is not a necessary party. The DGT is a member of the 1st respondent Commission (TRC) and he functions subject to the general direction and control of the Commission ; he need not individually be made a party.
- (iii) Whether the 4th respondent - Sri Lanka Telecom Ltd., is amenable to writ jurisdiction or not is not a relevant issue. The petitioner is only challenging the approval granted by the 1st and 2nd respondents (Minister of Mass Communication).
- (iv) The publication in the newspapers of the proposed tariff increase is not a notification under Section 12 for public hearing and the publication does not call for any representations from the public. There was an alternate remedy to object to the tariff increase.
- (v) Court cannot consider whether it is justifiable to grant a tariff increase in 2003 under the prevailing circumstances, as it is a factual assessment, but court can consider whether the approval granted by the 1st and 2nd respondents is *ultra vires* or not.

Preliminary objections overruled.

**Held further :**

- (i) The final tariff revision approved on 27.07.2003, was in accordance with clause 18.3 of the shareholder agreement but not in conformity with the economic criteria laid down in condition 20.1 of the license.
- (ii) The Minister's approval in tariff adjustments are related to the relevant years and such adjustments shall have effect from 1st January of the relevant year. Any tariff adjustment for the year 2002, should have been effected from 1st January, 2002. As the public has to be given prior notice on tariff adjustment it cannot be effective from a retrospective date and it has to be effected from a prospective date. Hence any proposal for a tariff adjustment for the year 2002 should have been made before the 1st of January 2002.
- (iii) The Minister, the 2nd respondent or the 1st respondent (TRC) could not have approved the tariff adjustment as it cannot come into operation on the 1st of January of the year 2002 ; any adjustment in tariff after 05.08.2002 has to be in accordance with the license conditions 2001 and 2002.

*Per* Sriskandarajah, J.

"The 4th respondent (Sri Lanka Telecom Ltd.) - entitled for tariff adjustment without limitation under the shareholders agreement is

restricted for the five years commencing from 1998. If it has not utilized its entitlement within that stipulated period it cannot claim the said entitlement after the expiration of the said five year period”.

- (iv) The approval for tariff adjustment granted to the 4th respondent by the 1st respondent with the concurrence of the 2nd respondent on 27.08.2003, contravenes the economic criteria laid down in licence condition 20.1. Compliance with economic criteria is a mandatory requirement in granting approval to tariff adjustments.

#### **APPLICATION for a writ of certiorari**

#### **Cases referred to :**

1. *Premadasa vs. Wijewardena* (1991) 1 Sri LR 333 at 343
2. *Meril vs. Dayananda de Silva* (2001) 2 Sri LR at 41-42
3. *Longreve vs Home office* - 1996 QB. 623

*Peter Jayasekara with P. Liyanaratchi and Kosala Senadheera* for petitioner.

*Sumathi Dharmawardena*, State Counsel for 1st-3rd respondents.

*Ronald Perera* for 4th respondent.

*Cur. adv. vult.*

July 25, 2005

#### **SRISKANDARAJAH, J.**

This is an application for a writ of certiorari to quash the approval granted by the 1st and the 2nd Respondents to the 4th Respondent operator to increase tariff for the year 2003 as stated in P9, P9(a) to (d).

The Petitioner is an Association incorporated under the Companies Act, No. 17 of 1982, which seeks the welfare of the consumers. The 1st Respondent is a Statutory Institution vested with regulatory functions to regulate and control the Telecommunications Industry by virtue of powers vested on it by the Sri Lanka Telecommunication Act, No. 25 of 1991 as amended. The 2nd Respondent is the Minister in charge of the Ministry of Mass Media including the Telecommunications Industry and the 1st Respondent functions under the 2nd Respondent's Ministry.

The 1st, 2nd, 3rd and 4th Respondents raised the following preliminary objections to this application :

- (a) The Petitioner has no *locus standi* to make this Application.

- (b) In terms of Section 22 b of the Telecommunications Act, No. 25 of 1991 as amended, the Chief Executive of the 1st Respondent Commission is the Director General Telecommunications and the Petitioner has failed to make the said Director General Telecommunications as a party to this application. Hence a necessary party to this application is not made a party to this application.

I will deal with the above two preliminary objections first.

The Respondents submit that the Petitioner has no standing to make this application. The Petitioner instituted this proceeding as a corporate body namely "Consumers Association of Sri Lanka" an Association incorporated under the Companies Act, No. 17 of 1982 which can sue and be sued. The Secretary of the Petitioner Association in his counter affidavit has stated that the Petitioner Association is an Association of Consumers of Sri Lanka and it has filed this application of public interest and on behalf of its members. He claimed that the public as well as the members of the Petitioner's Association are unable to maintain a telephone facility, which has become a necessity in the present world, because of the ever-increasing tariffs. The Memorandum of Association of the Petitioner X2 has one of its Primary Objects in 3(1) as follows :

"To secure the maintenance and improvement of the standards of goods and services sold to the public and represent and protect the interest of the consumers in all fields in Sri Lanka and abroad including litigation for their rights."

The standing rules applicable to applications for prerogative writs have to be considered in the light of the developments taking place in the relevant laws. In *Premadasa v Wijeyawardena and others*<sup>(1)</sup> at 343 Thambiah J. after analyzing the recent statutory and other development that have taken place in England in regard to standing has observed that :

"The law as to *locus standi* to apply for certiorari may be stated as follows : the writ can be applied for by an aggrieved party who has a grievance or by a member of the public. If the applicant is a member of the public he must have sufficient interest to make the application."

In recent years, the standing of persons who have a particular interest or grievance of their own over and above the rest of the community has

been progressively widened. In *Meril v Dayananda de Silva*<sup>21</sup> Gunawardana J. observed :

"I strongly feel that.....denying *locus standi* to an applicant for judicial review for no better reason than that his interest or grievance is shared by many others in common with the applicant is as illogical and irrational as refusing to treat any one member of the public for a disease which has assumed proportions and has affected virtually the entire community".

On the question of standing of the Petitioner it is necessary to take note of the fact the affidavit filed by the Secretary and some of the members of the Association to the effect that they are unable to maintain a telephone facility, which has become a necessity in the present world, because of the ever-increasing tariffs. It is evident that in the interest of the members of this Association and in the interest of the public in keeping with the objects of the Association that the Petitioner is questioning the legality of the tariff increase for the year 2003 approved by the 1st Respondent in concurrence with the 2nd Respondent. Hence, the Petitioner Association cannot be named as a *busy body interfering in the function of the Government or Institution established by law* but they have an interest shared with the members of the public. Therefore, this court holds that the Petitioner has the *necessary locus standi* to make this application.

The 2nd preliminary objection is that the Director General Telecommunication is a necessary party to this application but he is not made a party. The Director General is appointed under Section 22B (1) by the relevant Minister as a staff of the Commission namely ; the Chief Executive Officer of the Commission. Subsection (2) of this section provides:

"The Director-General shall, subject to the general direction and control of the Commission, be charged with the direction of the affairs and transactions of the Commission, the exercise and performance of its powers and duties and the administration and control of the employees of the Commission."

The Commission consists among others the person holding office as the Director-General. In this application, the 1st Respondent is the Commission. The Director-General is a member of the Commission and he functions subject to the general direction and control of the Commission ; hence he need not be individually made a party to this application.

For the above reasons the two preliminary objections raised by the Respondents are overruled by this Court.

The 4th Respondent in addition to the above preliminary objections raised several other preliminary objections. Namely, the 4th Respondent is not amenable to writ jurisdiction of this Court, the Petitioner has not availed itself of the alternate remedy and this Court cannot consider the correctness of the facts and figures relating to the fifth tariff revision.

The preliminary objection of the 4th Respondent is that the 4th Respondent is not amenable to writ jurisdiction, for the following reasons. That the 4th Respondent is a Public Limited Liability Company, the transaction between the Petitioner's members or the customers and the 4th Respondent are contractual in nature and the Petitioner has not demonstrated or established the existence of a statutory duty on the part of the 4th Respondent in respect of the relief claimed.

Whether the 4th Respondent is amenable to writ jurisdiction or not is not a relevant issue in this application. The Petitioner is only challenging the approval granted by the 1st and 2nd Respondents. Their decisions are amenable to writ jurisdiction. The 4th Respondent is made a party to this application as its rights are adversely affected if the relief of the Petitioner is granted and hence 4th Respondent is a necessary party to this application.

The 2nd preliminary objection is that the Petitioner has not availed itself of the alternate remedy by requesting for a hearing under Section 12 of the Sri Lanka Telecommunications Act, No. 25 of 1991 as amended.

The publication in the News Papers of the proposed tariff increase is not a notification under Section 12 of the said Act for public hearing and the publication marked P 11 does not call for any representation from the public. This publication is to fulfil the licence condition that notice of tariff increase have to be given to the general public. Therefore, this publication in News Papers cannot be considered as providing the public an opportunity to object to any tariff increase.

On the other hand, the Petitioner on its own motion had made a complaint and made representations to the 1st and 2nd Respondent by its letter of 20.03.2003 marked P4 with copies to H. E. The President and Hon. Prime Minister. In that complaint the Petitioner has expressed its concerns of any tariff increase and has requested to give a hearing in the event SLT has asked for any increase in tariff and if the Commission is considering granting the same. However, the Petitioner submitted that no hearing was given to the Petitioner.

The 4th Respondent submitted that the 1st Respondent was correct in not holding an inquiry under Section 12. In terms of the Shareholders Agreement P9 (d) and the Amendments to the Licence P3a, the 1st Respondent is bound to approve tariff revisions submitted prior to 5th August 2002. The application for the current tariff revision was submitted by the 4th Respondent on 30th July 2002. Hence, the 1st Respondent has correctly decided not to hold an inquiry under Section 12.

In these circumstances, the preliminary objection that the Petitioner had an alternate remedy to object to the tariff increase cannot be accepted.

The 3rd preliminary objection of the 4th Respondent is that this Court in exercising writ jurisdiction cannot consider the correctness of the facts and figures relating to the fifth tariff revision. The Petitioner even though complains that there is no justification for the increase in tariff for the year 2003 for various reasons, which may involve in complicated question of facts, which this court cannot consider in this application. It has also sought to quash the approval granted by the 1st and 2nd Respondents to the 4th Respondent to increase the tariff for the year 2003 on the basis of ultra vires the powers of the 1st and 2nd Respondent as it violates the conditions of the licence. This Court cannot consider in this application, whether it is justifiable to grant a tariff increase in 2003 under the prevailing circumstances, as it is a factual assessment but this Court can consider whether the approval granted by the 1st and 2nd Respondents is ultra vires or not.

For the reasons stated above this Court overrules the preliminary objections raised by the 4th Respondent.

The Petitioner submitted that the Minister in charge of the subject of Telecommunications is authorized to issue license to operate a Telecommunication system in Sri Lanka on the recommendation of the 1st Respondent in terms of Section 17 of the Sri Lanka Telecommunications Act, No. 25 of 1991 as amended. Section 17, 5) (c) provides that the licence shall set out the terms and conditions subject to which the license is being granted. The conditions that are to be included in the licence are provided in Subsection (7) of Section 17. One of the conditions that could be included in the licence is provided in Subsection (7) (k) of Section 17, *i.e.*—conditions specifying acceptable economic criteria in accordance with which the Commission shall approve tariff adjustments proposed by an operator. The Petitioner submitted that when the first licence was issued to Sri Lanka Telecom dated 08.08.1991 P2 in condition 20.1 thereof, the

1st and 2nd Respondents had prescribed that adjustment in tariffs shall be in accordance with the economic criteria of inflation.

On 5<sup>th</sup> August 1997, the Government of Sri Lanka and NTT Company of Japan entered into an agreement and NTT invested in the 4th Respondent. After the participation by the Japanese investor, the said licence had been modified and among other conditions, condition 20.1 of the said licence was modified as set out in the schedule to the 'Modifications to the Licence Granted to "Sri Lanka Telecom" dated 5th August 1997 P3.

The modification P3 provides as follows in its schedule at paragraph 4(7) :

The following shall be inserted as Condition 20.4 of schedule 3 :-

"Conditions 20.1 and 20.2 will not come into force prior to 5th August, 2002 and the Operator shall be entitled prior to such date to propose any adjustment without limitation in tariffs as seen in its commercial judgement suited best to promote its objects and to fulfil the condition of its licence"

The Petitioner submitted that the above provisions suspended the economic criteria which was laid down in Conditions 20.1 and 20.2. The Petitioner further submitted that since 1998 the 4th Respondent with the approval of the 1st and 2nd Respondents had increased tariff four times *i. e.* in 1998 by 25%, 1999 by 25%, 2000 by 20% and in 2002 by 15%. When the 4th Respondent Company while promoting the initial public offer of its shares to the public has stated in newspapers and in the electronic media that it had earned over Rs. 3 billion as profits for the year 2003. The Petitioner submitted that its members came to hear various news reports that the 4th Respondent has again applied for a further increase in tariffs for the year 2003 hence the Petitioner association made representations to the 1st Respondent that it was opposing any further tariff increase by the 4th Respondent. The Petitioner association made this request trusting that the 1st Respondent under Section 12 or Section 9 of the said Act would consider their presentation. It has also requested the 1st Respondent to give the Petitioner Association a hearing in the event the 4th Respondent has asked for any increase in tariffs and if the 1st Respondent is considering granting the same. This request was acknowledged by the Director General of the 1st Respondent Commission by letter dated 27th March, 2003. A copy of the aforesaid letter of request of the Petitioner was sent to other authorities and in response to it the



Petitioner received a letter dated 08.04.2003 P6 from the Co-ordinating Secretary to the Honourable Minister for Consumers Affairs informing the Petitioner Association that its fears are adequately addressed on the directions of the Honourable Prime Minister.

The Petitioner submits that due to technological development in the world and in particular due to the revolution in information technology, the per line operating cost in the international telecommunications industry including in the SAARC countries is gradually decreasing at a rate of 10% annually. It also submitted the increase in per line usage has also increased approximately by 13% to 15% internationally and in Sri Lanka. These facts contribute for decrease in the tariff. Despite of this on the first week of August 2003 the members of the Petitioner Association came to know that the 1st and 2nd Respondents had approved the tariff increase requested for by the 4th Respondent. It subsequently came to know about a paper publication by the 4th Respondent outlining the increase in tariffs it would levy from 1st September 2003. The Petitioner submits that the increase in tariff approved in 2003 by the 1st and 2nd Respondents for the 4th Respondent is arbitrary, illegal, capricious, unreasonable, unfair and *mala fide*.

The 4th Respondent submitted that Sri Lanka is a member of the World Trade Organization (WTO) and as a result certain conditions are imposed on Sri Lanka. One of which was to have a cost based tariff structure for the telecommunications service as the tariff structure prevailing at that time subsidized the tariff for domestic calls through a high tariff for international calls. The relevant part of the WTO undertaking is marked 4R4; in terms of the said undertaking this Respondent was compelled to increase the tariff for domestic calls while the cost of international calls were reduced. In order to minimize the effect on the subscriber the tariff increase was spread over a period and done in stages. Thus, the total domestic revenue was planned to be increased in slabs of 25%, 25%, 20%, 15% and 15% per year as compared to the previous year over a five-year period starting from 1998. In a similar way the tariff for overseas calls were to be reduced over the same period. However due to delays in granting approval, the tariff revision due to be effected in 2001 was in fact effected only in 2002 and the tariff revision which was due to be effected in 2002 was effected in 2003.

The 4th Respondent submitted that the fifth tariff revision that is being challenged in this application was made on an application of the 4th Respondent to the 1st Respondent dated 31.07.2002 in terms of the license granted to it and the Telecommunications Act, No. 25 of 1991 as

amended. In terms of Condition 20.4 of Schedule 3 of the license as modified "Condition 20.1 and 20.2 will not come into force prior to 5th August 2002 and the operator shall be entitled prior to such date to propose any adjustment without any limitation in tariff as seen in its commercial judgment suited best to promote its objects and to fulfil the condition of its license". The 4th Respondent's position is that it has proposed tariff adjustments on 31.7.2002 *i. e.* before 5th August, 2002 hence the tariff adjustment is not subject to any limitation. In proof of this application, the 4th Respondent did not annex any document but annexed only an acknowledgement by the 1st Respondent dated 7.8.2002 marked 4R7. The 4th Respondent submitted that for this application of tariff adjustment the approval was duly granted by the 1st Respondent under and in terms of the Act and the license on or about 24.7.2003, 4R8. This Respondent further submitted that their net profits for the year 2002 was Rs. 2,681 million and for the year 2003 was Rs. 2,383 million and this Respondent has invested over Rs. 40 billion since 1997 for the development of telecommunication network and for the improvement of the services to subscribers 4R9 to 4R15.

The 1st, 2nd and 3rd Respondents submitted that in pursuant to the Shareholder's Agreement dated 5th August, 1997 entered into between the Government of Sri Lanka, Nipon Telephone Corporation of Japan and Sri Lanka Telecom Ltd., R 1, Conditions 20.1(a), 8(b) of the licence of the 4th Respondent was temporarily suspended. The governing criteria in case of tariff increase were set out in Clause 18.3 of the Shareholder's Agreement. Clause 18.3 of the Shareholder's Agreement mandates the Minister of Post, Telecommunications and Media to approve adjustments in the rates and amounts charged in the main tariff items for the year 1998 and 1999 by each not less than 25% (including inflation) year 2000 by not less than 20% and for years 2001 and 2002 by not less than 15%. On this basis the tariff revisions were determined by the 1st Respondent in consultation with the Minister. These Respondents further submitted that 11.5% was the final tariff revision which was approved by the 1st Respondent and communicated to the 4th Respondent on 24.07.2003 even though 4th Respondent requested for a 15% tariff increment. The said tariff increase was in respect of rental and installation charges. This tariff revision is beneficial to the operator and the Telecom industry as a whole and there is no significant disadvantage to a subscriber whose consumption is below 200 units, per month. These Respondents admit that the final tariff revision approved on 27.07.2003 was in accordance

with Clause 18.3 of the Shareholder's Agreement and not in conformity with the economic criteria laid down in Condition 20.1 of the licence.

Clause 18.6 of the Shareholder's Agreement provides that the provisions of Clause 18 shall have the same effectiveness as if they were fully set out in the Licence. Clause 18.3 reads as follows :

18.3 Notwithstanding anything contained in the Licence GOSL shall procure that for each of the five years commencing on 1st January 1998 the Minister of Posts, Telecommunication and the Media (or his successor) shall approve an adjustment in the rates or amounts charged for the Main Tariff items which will have the effect that the total revenue generated by the SLT from the Main Tariff items, based on the number of subscribers, the number of domestic calls and the number of connections in the immediately preceding year, shall increase :-

- (a) for each of the years 1998 and 1999, by not less than 25% (Including inflation) ;
- (b) for the year 2000, by not less than 20% (Including inflation) ;
- (c) for each of the years 2001 and 2002 by not less than 15% (Including inflation).

provided that :

- (i) such adjustment shall have effect from 1st January in the relevant year ;
- (ii) .....
- (iii) .....
- (iv) .....

By the Modification of Licence P3 dated 5th August 1997 Conditions 20.1 and 20.2 of the Licence which stipulates criteria for adjustment in Main Tariff Items were suspended until 5th August 2002. By Clause 18.3 of the Shareholder's Agreement which is made part and parcel of the License, a different criteria was introduced for adjustment in the rates or amounts charged for the Main Tariff items for each of the five years commencing from 1st January 1998. It also provides that the Minister of Posts, Telecommunication and the Media (or his successor) shall approve an adjustment in the rates or amounts charged for the Main Tariff Items as per the percentage of increase specified for the each of the five years. Clause 18.3 further provides that such adjustment shall have effect from 1st January in the relevant year. It is evident from these provisions that

the Conditions 20.1 and 20.2 of the licence is suspended only for five years and the operator was given an opportunity to propose any adjustment without limitation in tariff within that five years. Even if the operator proposes adjustments without limitation at any time within the said five year period the Minister shall approve an adjustment subject to the limitation set out of each year in Clause 18.3 of the Share holder's Agreement. Accordingly, the Minister's approval in tariff adjustments are related to the relevant years and such adjustment shall have effect from 1st January in the relevant year. Therefore, any tariff adjustment for the year 2002 should have been effected from 1st January 2002. As the public has to be given prior notice on tariff adjustment it cannot be effected from a retrospective date and it has to be effected from a prospective date hence any proposal for a tariff adjustment for the year 2002 should have been made before the 1st of January, 2002 and approved. The position of the 4th respondent is that he made a proposal for tariff increase for the year 2002 on 31st of July 2002. A copy of this proposal is not annexed to the 4th Respondent's affidavit but the Counsel admitted that the proposal contains a tariff adjustment which is not in terms of the Condition 20.1 of the Licence. He submitted that the 4th Respondent is entitled to propose any adjustment without limitation before 5th August, 2002. The approval for tariff adjustment was granted by the 1st Respondent based on two letters of the 4th Respondent dated 31st July 2002 and 27th January, 2003 Copies of these letters are neither annexed to the affidavit of the 4th Respondent nor to the other Respondents. Therefore, the Court is not in a position to ascertain which of these letters contained the actual proposal for a tariff revision. It is significant for the reason that no unlimited proposal for tariff revision could be made after 5th August, 2002. Whatever it may be the approval of the Tariff revision was granted by the 1st Respondent on 24.07.2003 4R8 and directed to implement this revision after giving 30 days notice to its customers. After giving 30 days notice this revision came into effect from 1st September 2003. The approval letter of 4R8 has a caption "Fifth Tariff Re-balancing" but it does not refer to the year. The Respondents submitted that the fifth tariff re-balancing refers to the tariff revision provided for the year 2002 in Clause 18.3 of the Shareholder's Agreement. If that position is correct then the Minister the 2nd Respondent or the 1st Respondent could not have approved this tariff adjustment as it cannot come into operation on the 1st of January of that year (2002) as provided by the 1st proviso to Clause 18.3 of the said agreement and on the other hand it is

very much after the 5th August, 2002. By this time the suspension on the licence Condition 20.1 and 20.2 has been lifted and it is in full force. Therefore, any adjustment in tariff after 5th August, 2002 has to be in accordance with the Licence Condition 20.1 and 20.2. These conditions provide :

20.1 The operator shall be entitled to propose such adjustments in tariffs as seen in its commercial judgment suited best to promote its objects and to fulfil the conditions of its Licence. These adjustments in tariffs shall be in accordance with the following criteria :

(a) With respect to Main Tariff Items :

- (i) the rate of aggregate increase may be equal to or less than the rate of inflation less two (2) percentage points over the period since the previous adjustment in Main Tariff Items ;
- (ii) the rate of aggregate increase shall be determined by calculating the percentage increase in total revenue from the Main Tariff Items which would result from the proposed adjustments in tariff to any item therein as specified in (iii) below on the assumption that the numbers of subscribers and the domestic calls and the relevant composition thereof (call mix) are held constant ;
- (iii) the operator shall be entitled to propose different rates or amounts for any item comprised in the main Tariff Items provided that the aggregate increase does not exceed the increase specified in Sub-paragraph (i) as calculated in Sub-paragraphs (ii) and (iv) and provided that no item may be increased by more than the rate of inflation ;
- (iv) the rate of inflation specified in Paragraph (i) shall be the percentage increase in the level of Colombo Cost of Living Index between the last month of publication prior to the date of the proposed adjustment in Main Tariff Items and the month of publication of equivalent interval of elapsed time prior to the date of the previous adjustments in Main Tariff Items, provided that in the case of the first proposed adjustment, the date on which this licence enters into force shall be deemed to be the date of the previous adjustment in Main Tariff Items.

(b) .....

(c) .....

20.2 If the rate of inflation has been negative for any twelve months period following a change in Main Tariff Items, the Authority may require the operator to propose changes in tariffs such that the rate of decrease in Main Tariff Items is equal to or greater than the rate of deflection over a period since the previous adjustment in Main Tariff Items.

20.3 In this Condition –

“Main Tariff Items” mean business rentals, domestic rentals and call charges excluding international call charges.

The Counsel for the Respondents submitted that the approval granted by the 1st Respondent by 4R8 is not in conformity with or under Condition 20.1 of the Licence but it was granted in lieu of the tariff adjustment the 4th Respondent is entitled for the year 2002 during which year the Licence Condition 20.1 was suspended. The 4th Respondent’s entitlement for tariff adjustment without limitation under the Shareholder’s Agreement is restricted for the five years commencing from 1998. If it has not utilised its entitlement within the stipulated period it cannot claim the said entitlement after the expiration of the said five-year period. For the reason that the suspension of licence conditions are lifted after the said five years and the Licence Conditions are in force, they impose limitation on tariff adjustments. The unlimited tariff adjustment for the year 2002 under Clause 18.3 should have come into effect from the 1st January of the year 2002 but in any event, it cannot come into effect on 1st September, 2003 as it contravenes Condition 20.1 (the economic criteria) of the licence. As provided by Section 17(7) (k) of the said Act, economic criteria is laid down in Condition 20.1 and 20.2 of the licence in accordance with the Commission shall approve tariff adjustments proposed by the operator. The approval for tariff adjustment granted to the 4th Respondent by the 1st Respondent with the consultation of the 2nd Respondent on 24.07.2003 4R8 contravenes the economic criteria laid down in Licence Condition 20.1. Compliance of economic criteria is a mandatory requirement in granting approval to tariff adjustments. Hence the approval granted by 4R8 is unlawful.

The Counsel for the Respondents invited the court to take into consideration the effect of granting relief to the Petitioner by quashing the tariff increase effected on 1st September, 2003. Over 870,000 customers

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have paid the revised tariff rates to the 4th Respondent and 4th Respondent has paid tax to the Government from the amount charged from the customers from 1st September, 2003 to date and this will have serious consequences. The court also has to take into consideration that the Petitioner has filed this application in October 2003 and sought an interim order staying the implementation of the increased tariff. In a comparable situation in an English case, *Congreve v Home Office*<sup>(3)</sup> the Home Office had issued many thousands of demands and had to undertake a big operation to repay money unlawfully received. In this case, the increase in licence fees took effect on a fixed date and it was in no way unlawful for a licence-holder to obtain a licence during the currency of their previous licence in order to avoid the sharp increase in the licence fees before that date at a lower fee. The Home Office had no power to prevent this, but they tried to enforce a policy of exacting a higher fee by resorting to their power to revoke licence. Lord Denning MR said ;

“But when the licensee has done nothing wrong at all, I do not think the Minister can lawfully revoke the licence, at any rate, not without offering him his money back and not even then except for good cause. If he should revoke it without giving reasons, or for no good reasons, the court can set aside his revocation and restore the licence. It would be a misuse of power conferred on him by Parliament ; and these courts have the authority-and, I would add, the duty-to correct a misuse of power by a Minister of his department, no matter how much he may resent it or warn us of the consequences if we do.”.

For the reasons stated above this Court issues a writ of certiorari quashing the approval of the 1st Respondent to the 4th Respondent to increase tariffs by its letter of 24.07.2003 and the Court allows this application without cost.

**IMAM, J.** – I agree.

*Application allowed.*