

Lesson-4: E-Tutorial No.10-Appellate Tribunal

Revised -4/6/21

(Chapter- X of the I.T.Act)

1. Latest Amendmenments in Composition of Cyber Appellate Tribunal (now APPELLATE TRIBUNAL) & its Functioning

CHAPTER X

I- THE [APPELLATE TRIBUNAL]¹

(Sub by 2017 amend. In Finance

Act,2017)

Section. 48. [Appellate Tribunal]².64[(1) The Telecom Disputes Settlement and Appellate Tribunal established under section 14 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997), shall, on and from the commencement of Part XIV of Chapter VI of the Finance Act, 2017 (7 of 2017), be the Appellate Tribunal for the purposes of this Act and the said Appellate Tribunal shall exercise the jurisdiction, powers and authority conferred on it by or under this (IT)Act.]³

(2) The Central Government 5[shall specify, by notification] the matters and places in relation to which the 2[Appellate Tribunal] may exercise jurisdiction.

II- Omitted Provisions by the Finance Act, 2017⁴

[S.49. [Composition of Cyber Appellate Tribunal.] Omitted by the Finance Act, 2017 (7 of 2017), s. 169 (w.e.f. 26-5-2017).

S. 50. [Qualifications for appointment as Chairperson and Members of Cyber Appellate Tribunal.] Omitted by s. 169, *ibid.* (w.e.f. 26-5-2017).

S,51. [Term of office, conditions of service, etc., of Chairperson /Members.] Omitted by s. 169, *ibid.* (w.e.f. 26-5-2017).

S. 52. [Salary, allowances and other terms and conditions of service of Chairperson and Members.] Omitted by s. 169, *ibid.* (w.e.f. 26-5-2017).

S. 52A. [Powers of superintendence, direction, etc.] Omitted by s. 169, *ibid.* (w.e.f. 26-5-2017).

S. 52B. [Distribution of business among Benches.] Omitted by s. 169, *ibid.* (w.e.f. 26-5-2017).

S. 52C. [Power of Chairperson to transfer cases.] Omitted by s. 169, *ibid.* (w.e.f. 26-5-2017).

S. 53. [Filling up of vacancies.] Omitted by the Finance Act, 2017 (7 of 2017), s. 169 (w.e.f. 26-5-2017).

S. 54. [Resignation and removal.] Omitted by s. 169, *ibid.* (w.e.f. 26-5-2017).]

¹ Sub by {APPELLATE TRIBUNAL } in 2017 amend. In Finance Act,2017

² Subs. by Act 7 of 2017, s. 169, for —Cyber Appellate Tribunal|| (w.e.f. 26-5-2017)

³ Subs. by s. 169, *ibid.*, for — Establishment of Appellate Tribunal|| (w.e.f. 26-5-2017).

⁴ Omitted by s. 169, *ibid.* (w.e.f. 26-5-2017).

Telecommunications Dispute Settlement Appellate Tribunal (TDSAT): APPELLATE TRIBUNAL

Background of TDSAT: Now APPELLATE TRIBUNAL

(u/r IT Act,(inserted by the Finance Act,2017)

Telecom Regulatory Authority of India Act (TRAI) was enacted in 1997. This Act established a Telecom Regulatory Authority of India (TRAI). Apart from regulatory functions, TRAI was also empowered to adjudicate upon disputes among Service Providers or between the Service Providers and a group of Consumers, and quality of telecommunication services and interests of consumers. TRAI was vested with the power to issue directions to the Service Providers. *Appeals from the decisions of TRAI lay to the High Court and appeals therefrom lay to the Supreme Court.*

The adjudicatory powers of TRAI were challenged before the Delhi High Court in the latter's capacity as Licensor. The High Court held that TRAI does not possess the power to issue directions to the Government in latter's capacity as Licensor. The result of the above challenge was that no separate dispute settlement mechanism was available to adjudicate upon disputes between the Licensor and Licensee for quite some time.

The formation of Telecom Disputes Settlement and Appellate Tribunal (TDSAT) 2000

In order to bring in functional clarity and strengthen the regulatory framework and the disputes settlement mechanism in the telecommunication sector, the TRAI Act of 1997 was amended in the year 2000 and **TDSAT was set up to ADJUDICATE DISPUTES and DISPOSE OF APPEALS with a view to protect the interests of service providers and consumers of the telecom sector and to promote and ensure orderly growth of the telecom sector.** In January 2004, the Government included *broadcasting and cable services* also within the purview of TRAI Act.

In 2017-After coming into force of the relevant provisions of the Finance Act 2017, **the jurisdiction of TDSAT stands extended to matters that lay before the Cyber Appellate Tribunal** and also the Airport Economic Regulatory Authority Appellate Tribunal.

Composition of TDSAT

The Tribunal consists of a Chairperson and two Members(as on 2018-21) appointed by the Central Government. The **Chairperson** should be or should have been a **Judge of the Supreme Court or the Chief Justice of a High Court.**

A **Member** should have held the post of **Secretary** to the Government of India or any **equivalent** post in the Central Government or the State Government for a period of not less than two years or a person who is well versed in the field of technology, telecommunication, industry, commerce or administration.

Powers and Jurisdiction

The Tribunal exercises jurisdiction over Telecom, Broadcasting, IT and Airport tariff matters under the TRAI Act, 1997 (as amended), the Information Technology Act, 2008 and the Airport Economic Regulatory Authority of India Act, 2008.

In regard to Cyber matters : the Tribunal exercises **only the appellate jurisdiction.**

S. 52D. Decision by majority.—If the Members of a Bench consisting of two Members differ in opinion on any point, they shall state the point or points on which they differ, and make a reference to the Chairperson of the 2[Appellate Tribunal] who shall hear the point or points himself and such point or points shall be decided according to the opinion of the majority of the Members who have heard the case, including those who first heard it.]

III- S. 55. Orders constituting Appellate Tribunal to be final and not to invalidate its proceedings.

No order of the Central Government appointing any person as the 7[Chairperson or the Member] of a 2[Appellate Tribunal] shall be called in question in any manner and no act or proceeding before a 1[Appellate Tribunal] shall be called in question in any manner on the ground merely of any defect in the constitution of a [Appellate Tribunal].. (*Subs. by Act 7 of 2017, s, 169, for —Cyber Appellate Tribunal* (w.e.f. 26-5-2017)

(a) all proceedings before it shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860);

(b) shall be deemed to be a civil court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974);

1[(c) shall be deemed to be a civil court for purposes of Order XXI of the Civil Procedure Code, 1908 (5 of 1908).]

S, 56. [Staff of the Cyber Appellate Tribunal.] *Omitted by the Finance Act, 2017 s. 169 (w.e.f. 26-5-2017).*

IV-S. 57. Appeal to 1[Appellate Tribunal]⁵

The APPELLATE TRIBUNAL(or erstwhile CyAT) is a combined appellate body for **Cyber appeals and Telecome appeals**(amended by 2017 Finance Act). It has now the statutory authority to examine the correctness, legality or propriety of the decision or order passed by Controller of Certifying Authorities or the Adjudicating Officer under the IT Act.

(1) Save as provided in sub-section (2), any person aggrieved by an order made by **Controller or an Adjudicating Officer** under this Act may **prefer an appeal** to a 1[**Appellate Tribunal**] having jurisdiction in the matter.

(2) No appeal shall lie to the 1[Appellate Tribunal] from an order made by an adjudicating officer with the consent of the parties.

(3) Every appeal under sub-section (1) **shall be filed within a period of forty-five (45) days** from the date on which a copy of the order made by the Controller or the adjudicating officer is received by the person aggrieved and it shall be in such form and be accompanied by such fee as may be prescribed:

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1. Subs. by Act 7 of 2017, s, 169, for —Cyber Appellate Tribunal (w.e.f. 26-5-2017)

Provided that the 1[Appellate Tribunal] may entertain an appeal after the expiry of the said period of **forty-five(45)** days if it is satisfied that there was sufficient cause for not filing it within that period.

(4) On receipt of an appeal under sub-section (1), the 1[Appellate Tribunal] may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The 1[Appellate Tribunal] shall send a copy of every order made by it to the parties to the appeal and to the concerned Controller or adjudicating officer.

(6) The appeal filed before the 1[Appellate Tribunal] under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal.

V- S. 58, Procedure and powers of the Appellate Tribunal.

(1) The 1[Appellate Tribunal] shall **not be bound by the procedure laid down by the Code of Civil Procedure, 1908** (5 of 1908) but shall be **guided by the principles of natural** justice and, subject to the other provisions of this Act and of any rules, the 1[Appellate Tribunal] shall have powers to regulate its own procedure including the place at which it shall have its sittings.

(2) The 1[Appellate Tribunal] shall have, for the purposes of discharging its functions under this Act, the same **powers as are vested in a civil court** under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents or other electronic records;
- (c) receiving evidence on affidavits;
- (d) issuing commissions for the examination of witnesses or documents;
- (e) reviewing its decisions;
- (f) dismissing an application for default or deciding it *ex parte*;
- (g) any other matter which may be prescribed.

(3) Every proceeding before the 1[Appellate Tribunal] shall be **deemed to be a judicial proceeding** within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code (45 of 1860) and the 1[Appellate Tribunal] shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

S. 59. Right to legal representation. The appellant may either appear in person or authorise one or more legal practitioners or any of its officers to present his or its case before the 1[Appellate Tribunal].

60. Limitation. The provisions of the **Limitation Act, 1963** (36 of 1963), shall, as far as may be, apply to an appeal made to the 1[Appellate Tribunal].

S. 61. Civil court not to have jurisdiction. No court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an adjudicating officer appointed under this Act or the 1[Appellate Tribunal] constituted under this Act is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

S.62. Appeal to High Court. Any person aggrieved by any decision or order of the 1[Appellate Tribunal] may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the 1[Appellate Tribunal] to him on any question of fact or law arising out of such order:

Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

The Supreme Court in **Cellular Operations Assoc. of India v. UOI, (2003)3 SCC 186** held that *“Within the scheme of the IT Act, the Cyber Appellate Tribunal (now APPELLATE TRIBUNAL) is the final fact finding authority. The IT Act provides a 2nd forum of appeal in the form of the High Court to any person aggrieved by any decision or order of the CyAT(now APPELLATE TRIBUNAL). An appeal is to be filed within 60 days from the date of communication of the decision/order of the APPELLATE TRIBUNAL to him on any question of law or fact arising out of such order. í if a jurisdictional question or the extent thereof is disputed before a tribunal, the tribunal must necessarily decide it unless the statute provides otherwiseí the HC or SC can exercise its power of judicial review.ö*

~~ND----- RED PORTION- Red portion Not Applicable now.----- --as amended by Finance Act of 2017~~
~~CYAT---~~ **This is learning experience for all students.**

NOTE: From here Not Applicable as CYAT has been replaced by APPELLATE TRIBUNAL(now single APPELLATE TRIBUNAL for Cyber Appeals from AOs orders , telecom disputes etc) ---SS-49-54 & 56 of IT Act OMMITTED by Finance Act 2017 &)

4.1 Cyber Appellate Tribunal now replaced by APPELLATE TRIBUNAL to hear appeals from different Adjudicatory Bodies. (by Finance Act 2017)

The Central Government by notification shall establish one or more appellate tribunals to be known as Cyber Appellate Tribunal (CYAT). The Central Government will also in such notification specify the matters and places in relation to which the CYAT may exercise jurisdiction (see sec 48).

Let us discuss briefly below the composition of CYAT, procedure followed in appointment of the Chairperson and Members of Cyber Appellate Tribunal, powers of the chair person of CAT and procedure and powers of CYAT.

4.2 Composition of Cyber Appellate Tribunal-

The Cyber Appellate Tribunal shall consist of a Chairperson and such number of other Members, as the Central Government may appoint by notification in the Official Gazette.

Provided that the person appointed as the Presiding Officer of the Cyber Appellate Tribunal under the provisions of this Act immediately before the commencement of the Information Technology (Amendment) Act, 2008 shall be deemed to have been appointed as the Chairperson of the said Cyber Appellate Tribunal under the provisions of this Act as amended by the Information Technology (Amendment) Act, 2008. (Sec 49(1))

The selection of Chairperson and Members of the Cyber Appellate Tribunal shall be made by the Central Government in consultation with the Chief Justice of India.(sec 49 (2)).

Further subject to the provisions of this Act--

- the jurisdiction, powers and authority of the Cyber Appellate Tribunal may be exercised by the Benches thereof;
- a Bench may be constituted by the Chairperson of the Cyber Appellate Tribunal with one or two Members of such Tribunal as the Chairperson may deem fit;
- the Benches of the Cyber Appellate Tribunal shall sit at New Delhi and at such other places as the Central Government may, in consultation with the Chairperson of the Cyber Appellate Tribunal, by notification in the Official Gazette, specify;
- the Central Government shall, by notification in the Official Gazette, specify the areas in relation to which each Bench of the Cyber Appellate Tribunal may exercise its jurisdiction.
- Notwithstanding anything contained in sub-section (3), the Chairperson of the Cyber Appellate Tribunal may transfer a Member of such Tribunal from one Bench to another Bench.
- If at any stage of the hearing of any case or matter it appears to the Chairperson or a Member of the Cyber Appellate Tribunal that the case or matter is of such a nature that it ought to be heard by a Bench consisting of more Members, the case or matter may be transferred by the Chairperson to such Bench as the Chairperson may deem fit.(see sec 49(3))

4.3 Appointment of Chairperson and Members of CYAT

In appointment of the Chairperson and Members of Cyber Appellate Tribunal, following rules have been followed.

- a person, shall be such person who has been, or is qualified to be, a Judge of a High Court(sec 50 (1).
- The Members of the Cyber Appellate Tribunal, except the Judicial Member to be appointed under sub-section (3) of sec 50, shall be appointed by the Central Government from amongst persons, having special knowledge of, and professional experience in, information technology, telecommunication, industry, management or consumer affairs. however, a person shall not be appointed as a Member, unless he is, or has been, in the service of the Central Government or a State Government, and has held the post of Additional Secretary to the Government of India or any equivalent post in the Central Government or State Government for a period of not less than one year or Joint Secretary to the Government of India or any equivalent post in the Central Government or State Government for a period of not less than seven years.(see sec 50(2) and the proviso).
- The Judicial Members of the Cyber Appellate Tribunal shall be appointed by the Central Government from amongst persons who is or has been a member of the Indian Legal Service and has held the post of Additional Secretary for a period of not less than one year or Grade I post of that Service for a period of not less than five years(sec 50(3))
- The Chairperson or Member of the Cyber Appellate Tribunal shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of sixty-five years, whichever is earlier.(sec 51(1)).
- Before appointing any person as the Chairperson or Member of the Cyber Appellate Tribunal, the Central Government shall satisfy itself that the person does not have any such financial or other interest as is likely to affect prejudicially his functions as such Chairperson or Member. (sec 51(2)).
- An officer of the Central Government or State Government on his selection as the Chairperson or Member of the Cyber Appellate Tribunal, as the case may be, shall have to retire from service before joining as such Chairperson or Member. (sec 51(3)).

4.4. Powers of the Chairperson of CYAT

- The Chairperson of the Cyber Appellate Tribunal shall have powers of general superintendence and directions in the conduct of the affairs of that Tribunal and he shall, in addition to presiding over the meetings of the Tribunal, exercise and discharge such powers and functions of the Tribunal as may be prescribed(sec 52A.).
- Where Benches are constituted, the Chairperson of the Cyber Appellate Tribunal may, by order, distribute the business of that Tribunal amongst the Benches and also the matters to be dealt with by each Bench (sec 52B).
- On the application of any of the parties and after notice to the parties, and after hearing such of them as he may deem proper to be heard, or suo motu without such notice, the Chairperson of the Cyber Appellate Tribunal may transfer any case pending before one Bench, for disposal to any other Bench.(sec 52C).
- If the Members of a Bench consisting of two Members differ in opinion on any point, they shall state the point or points on which they differ, and make a reference to the Chairperson of the Cyber Appellate Tribunal who shall hear the point or points himself and such point or points shall be decided according to the opinion of the majority of the Members who have heard the case, including those who first heard" it."(sec 52D.)

3.4.4 Appeal to CYAT

Section 57 of the Act provides for appeal to the CAT. Sub-section (1) provides that any person who is aggrieved by the order of the Controller or an adjudicating officer, has the right to appeal under this Act to CAT having jurisdiction in the matter. However, this right is subject to the provisions of sub-section (2) which prohibits any appeal against any order of an adjudicating officer made with the consent of the parties. Further the appeal under this section has to be filed within forty five days from date of order of the Controller or an adjudicating officer, CAT can entertain the appeal after the expiry of the period if satisfied that there was sufficient cause for not filing appeal within the prescribed period(see sec 57(3) and proviso).

3.4.5 Procedure and Powers of the CYAT

The appeal filed before CAT shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal(S. 57(6) of the IT Act).

However the Act provides that CAT is not bound by the procedure laid down by the Code of Civil Procedure, 1908. However, it shall be guided by the principles of natural justice Section 58(1). But the CAT has the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (sec 58(2)).

Section 61 of the Act bars the jurisdiction of all other courts to entertain any suit or proceeding in respect of any matter which an adjudicating officer or the CAT is empowered under this Act to determine. The section further provides that no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred under this Act. But this bar of jurisdiction is not applicable for disputes involving claims more than five crores rupees (read sec 61 with sec 46(LA) of the IT act As amended, 2008).

High Court is the court for an appeal against the order of the CAT (Section 62). The appeal can be made on any question of fact or law arising out of the order appealed against.

The Central Government in exercise of its rule-making power under section 87 of the Act framed the Cyber Regulations Appellate Tribunal (Procedure) Rules, 2000 *Vide* G.S.R. 791 (E), dated 17.10.2000 for regulating the procedure to be followed in applications made to the CRAT.

-----upto this Not Applicable-----

Start from here again:

VII- JURISDICTION OF APPELLATE TRIBUNAL :

Appeals against the orders/awards of Adjudicating Officer passed u/ SS : 43-45: Penalties, Compensation and Offences (CHAPTER IX & XI)

Chapter IX, which lays down for adjudication as discussed in **LESSON 3**, it also enumerates the various penalties and compensation and the entailing civil consequences. Chapter XI deals exclusively with offences.

Penalties and compensation : Three kinds of contraventions have been listed out in the Act providing for civil liability which we have discussed in detail in PREVIOUS LESSON NO.3 and they Ist come under the domain of ADJUDICATIONG OFFICER at the initial stage.

- Firstly, SECTION 43 ó dealing with Penalty And Compensation for damage to computer, computer system, and computer network or computer resources under s.43 of IT Act.---8 Causes⁶ identified under S,43 for which a complaint can be filed before AO.,

S.43 : Compensation for damage to computer, computer system, and computer network or computer resources

The following acts, if carried out by any person without the permission of the owner or any other person who is in charge of a computer, computer system or computer network, would lead to the contravention of the act causing such person shall be liable to pay damages by way of compensation to the person so affected (section 43).

- ii. Secondly SECTION 44 - penalty for failure to furnish information, returns, etc.,&
- iii. 3rdly SECTION 45 contains the residuary penalty.

Two(2) types of appeals :

1)Against AOs orders (Adjudication side) , & 2) against Controllers orders(Administrative side) under SS.43-45 & 3) U/SS 71 , 72 & 76

1) In all the above Sections 43, 43A, 44,45 , any person can file complaint before Adjudicating officer(AO) , the AO can award damages, impose penalty or as prescribed and as discussed in Lesson 3. If the opposite party is not satisfied with the award , decision or order of AO, OP can file appeal before APPELLATE TRIBUNAL against such AOs order.

2) Similarly if a party is not satisfied with the orders of prescribed authority i.e., CONTROLLER or (CAA), he can file appeal against the CAAs orders before APPELLATE TRIBUNAL

3) U/SS 71 , 72 & 76(penalty+imprisonment)—initially to competent court & appeal to Appellate court/HC as per jurisdiction

- i. **Section 71- Penalty for misrepresentation or suppression of material facts and breach of confidentiality and privacy relating to electronics records:** Section 71 provides for penalty for misrepresentation or suppression of material facts from controller or certifying authorities.

- a) Accesses or secures access to a computer, computer system or computer network or computer resource. This refers to unauthorised entering to the system i.e hacking.
- b) Downloads, copies or extracts any data, computer database or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium. This provides for penalty for data theft, infringement of copyright.
- c) Introduces or causes to be introduced any computer contaminant or computer virus into any computer, computer system or computer network.
- d) Damages or causes to be damage any computer, computer system or computer network, data, computer database or any other programmes residing in such computer, computer system or computer network.
- e) Disrupts or causes disruption of any computer, computer system or computer network.
- f) Denies or causes the denial of access to any person authorized to access any computer, computer system or computer network by any means;
- g) Provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulations made there under;
- h) Charges the services availed of by a person to the account of another person by tampering with or manipulation any computer, computer system or computer network. This refers to theft of Internet hours;
- i) destroys, deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means;
- j) steal, conceals, destroys or alters or causes any person to steal, conceal, destroy or alter any computer source code used for a computer resource with an intention to cause damage.

- i. **Penalty for misrepresentation or suppression of material facts and breach of confidentiality and privacy relating to electronics records:** Section 71 provides for penalty for misrepresentation or suppression of material facts from controller or certifying authorities. Section 72 lays down penalty for breach of confidentiality and privacy relating to electronics records. In both cases imprisonment for two years or fine of rupees one lakh or both can be imposed.
- ii. **Contravention of the provisions of the Act :**Section 76 provides for Confiscation of computer, computer system, floppies, compact disks, tape drives or any other accessories in respect of which any provision of this Act, rules, orders or regulations has been or is being contravened.

Section 72 lays down **penalty for breach of confidentiality and privacy** relating to electronics records. In both cases imprisonment for two years or fine of rupees one lakh or both can be imposed.

- ii. **Contravention of the provisions of the Act** :Section 76 provides for Confiscation of computer, computer system, floppies, compact disks, tape drives or any other accessories in respect of which any provision of this Act, rules, orders or regulations has been or is being contravened.

Penalties, Damages/Compensation& Adjudication Authority is given under ITA as follows

Contraventions under IT Act	Penalty Amount
S,43: Penalty for damage to Computer, Computer System, Computer Network	Not exceeding 1.00(one) Crore (See Schedule of offences & penalties)
S.44: Penalty for failure to Furnish Information, Return etc a) Subscribers, Auditors, I/C Computer Resources etc (Authority -inf to be given to Cont or CA) b) Subscribers, Auditors, I/C Computer Resources , Certifying Authority (CA),, etc (Authority -inf to be given to Contrller or Govt Agency or Statutory Authority)) c) I/C Computer Resources , Certifying Authority (CA),, etc (Authority -inf to be given to Cont or Govt Agency or Statutory Authority))	a) Not exceeding Rs. 1,50,000 (1.50 Lacs) for each such failure b)Not exceeding Rs.5000 (Rs. 5 thousands) for everyday during which such failure continues c) Not exceeding Rs.10,000 (Rs.10 thousands) for everyday during which failure continues
S.45: Residuary Panelty (Authority-AO)	Not exceeding Rs.25,000 (Rs.25 thousands)

VIII- The Cases related to Privacy

This is a brief review of some of the cases related to **PRIVACY** filed under section 46 of the IT Act, 2000, seeking adjudication for alleged contraventions of the Act in the State of Maharashtra.

In the State of Maharashtra, there have been a total of 47 cases filed under section 46 of the Act. Of these, 33 cases have been disposed of by the Adjudicating Officer and 14 are currently pending disposal. At least three of these cases before the Adjudicating Officer deal with issues related to **privacy of communications and personal data**. In all three cases the Adjudicating Officer was called upon to determine and penalize unauthorized access to personal data of the complainants.

1 Vinod Kaushik v. Madhvika joshi case(2011),

The **complainants' emails and chat sessions** were accessed, copied and made available to the police for legal proceedings without the permission of the complainants.

The complaint was filed in 2010 **for privacy violations**, against the complainant's daughter-in-law / respondent, who was separated from her husband, the complainant's son.

The respondent/daughter-in-law, had independent of the proceedings before the Adjudicating Officer, also instituted criminal proceedings alleging cruelty and dowry-related harassment against her estranged husband and the complainant.

To support some of the claims made in the criminal proceedings, **the respondent accessed the e-mail accounts of her estranged husband and the complainant** and printed copies of certain communications, both emails and chat transcripts.

The present complaint to the Adjudicating Officer was made in relation to these emails and chat transcripts that were obtained without the consent and knowledge of the complainant and his son. In 2010, the then Adjudicating Officer **dismissed the complaint** after finding that, owing to the marriage, there was a relation of mutual trust between them (husband & wife) that resulted in the complainant and his son *consensually sharing their email account passwords* with the respondent.

This ruling was appealed to the Cyber Appellate Tribunal ("CyAT") which, in a decision of 2011, *found irregularities in the complainant's son's privity to the proceedings and remanded the complaint to the Adjudicating Officer for re-adjudication*. The re-adjudication, which was conducted by Adjudicating Officer, resulted in a final order in 2011 that is the subject of this analysis.

In the re-adjudication, the new Adjudicating Officer correctly noted that the respondent wife could have chosen to approach the police or a court to follow the proper investigative procedure for accessing emails and other private communications of another person and that her unauthorised use of the complainant's passwords amounted to a violation of their privacy

The final order found that the respondent had violated the privacy of the complainant and his son by her unauthorised access of their email accounts and sharing of their private communications. However, the Adjudicating Officer found that the intent of the unauthorised access – to obtain evidence to support a criminal proceeding – was mitigatory and hence ordered the respondent to pay only a small token amount in compensation, not to the complainants but instead to the State Treasury. The Delhi High Court, which was moved in appeal because the CyAT was non-functional, upheld the final order in its decision of 2012.

2 Amit Patwardhan v. Rud India Chains(2013) & *Nirmalkumar Bagherwal v. Minal Bagherwal (2013)* cases, the complainants' financial information in the form of bank account statements were obtained from their respective banks without their consent and **used against them in legal proceedings**.

FACTS: The *Amit Patwardhan*, complaint was filed against the complainant's ex-employer (the respondent) for illegally obtaining copies of the complainant's bank account statement. The complainant had left the employment of the respondent to work with a competing business company but not before colluding (get-together) with the competing business company and diverting the respondent's customers to them. The respondent/ex-employer filed **suit for a decree of compensation** and lead the **complainant's bank statements in evidence** to prove **unlawful gratification**.

ISSUE: Since the bank statements were obtained electronically by the respondent without the complainant's consent, the jurisdiction of the Adjudicating Officer was invoked. In his order, the Adjudicating Officer, found that the respondent had, by unlawfully obtaining the complainant's bank account statements which **constitute sensitive personal data, violated the complainant's privacy**. *The Adjudicating Officer judiciously applied the equitable doctrine of clean hands to deny compensation to the complainant; however, because the complainant's bank was not a party to the*

complaint, the Adjudicating Officer was unable to make a ruling on the lack of action by the bank to protect the sensitive personal data of its depositors.

3. *Nirmalkumar Bagherwal v. Minal Bagherwal (2013)* The complaint bears a few similarities to the preceding two cases. Like the *Vinod Kaushik* matter, the issue concerned the manner in which a wife, estranged but still legally married, *accessed e- records of personal data of the complainants;* and, like the *Amit Patwardhan* matter, the object of the *privacy violation was the bank account statements of the complainants* that *constitute sensitive personal data.*

FACTS: The respondent was the estranged wife of one of the complainants who, along with his complainant father, managed the third complainant company. The respondent, filed a case for maintenance against the complainant and his family in an independent legal proceeding,

ISSUE: In support of her claim for maintenance, she(respondent 1) **obtained certain bank account statements** of the complainants without their consent and, possibly, with the involvement of the **respondent(no.2) bank.**

DECISION: After reviewing relevant law from the European Union and the United States, and observant of relevant sectoral regulations applicable in India including the relevant Master Circular of the Reserve Bank of India, and **further noting preceding Cnsumer Case Law on the subject,** the Adjudicating Officer issued an order in 2013.

“It was found that the complainant’s right to privacy was violated by both the respondents but, while determining the quantum of compensation, distinguished between the respondents in respect of the degree of liability; the respondent wife was ordered to pay a token compensation amount, while the respondent bank was ordered to pay higher compensation to each of the three complainants individually.”

4. *Rupa Mahajan Pahwa,(2008) st. Consumer protection Commission Delhi*

However, the reliance placed on the decision of the Delhi State Consumer Protection Commission in the matter of Rupa Mahajan Pahwa,(2008), where the Commission found that unauthorised access to a bank pass book by an estranged husband violated the privacy of the wife, would suggest that judges clothe financial information with a standard of privacy higher than that given to e-mails.

4 PUCL case (Supreme Court of India, 1996)SCC)--e-mails are a form of electronic communication while it did not explicitly deal with the standard of protection accorded to emails, held that personal communications were protected by an **individual right to privacy** that emanated from the **protection of personal liberty guaranteed under Article 21** of the Constitution of India. Following the *Maneka Gandhi case (SCC, 1978)*

IX- RIGHT TO PRIVACY INCLUDED IN ART-21 SUBJECT TO REASONABLE PROCEDURE

It is settled that persons may be deprived of their personal liberty only by a just, fair and reasonable procedure established by law. As a result, interceptions of private communications that are protected by Article 21 may only be conducted in pursuance of such a procedure. This procedure exists in the form of the Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009 (**"the Interception Rules"**). The Interception Rules set out a regime for accessing private e-mails in certain conditions U/S 91 of ("CrPC") to obtain data at rest, such as emails stored in an inbox or sent-mail folder.

Right to n Privacy vs Rt to Speech ----Sec. 66A & Supreme Court

Section 66A has been struck down by Supreme Court's Order dated 24th March, 2015 in *the Shreya Singhal vs. Union of India, AIR 2015 SC. 1523*.

“strict scrutiny of standards for freedom of expression was equally applicable over the internet...”

[66A⁷. Punishment for sending offensive messages through communication service, etc. Any person who sends, by means of a computer resource or a communication device, (a) any information that is grossly offensive or has menacing character; or (b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; (c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine. *Explanation.*—For the purposes of this section, terms —electronic mail and —electronic mail message means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message.] **(now struck down by SC in Shreya Singhal case, 2015)**

Article- latest of 2020, retrieved by me on 10/5/21

Background

Section 66A of the Information Technology Act, 2000 was struck down as unconstitutional in *Shreya Singhal v. Union of India, (2015) 5 SCC 1*. The provision ***criminalized speech over computers or communication devices*** if such a communication was: (a) “grossly offensive or menacing”; (b) where the author knows the information “to be false and meant for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will” or “meant to deceive or mislead the recipient about the origin of such messages, etc, shall be punishable with imprisonment up to three years and with fine.”

On 24th March, 2015, the Supreme Court of India struck down Section 66A of the Information Technology Act, 2000 as unconstitutional, in Shreya Singhal v. Union of India. Widely celebrated as a landmark judgment on free speech, the decision adopted progressive international standards of free speech and ensured that the strict scrutiny of standards for freedom of expression was equally applicable over the internet.

In February 2019, almost four years later when the case came up for hearing on 07.01.2019, the Supreme Court grappled (struggle) with this provision's continued existence- a litigation that highlights key questions about the gap between judicial decisions and real-life outcomes;

⁷ Section 66A has been struck down by Supreme Court's Order dated 24th March, 2015 in *the Shreya Singhal vs. Union of India, AIR 2015 SC. 1523*.

Imp.. Operative part Of Judgment : “The wide powers of the section were frequently used to stifle political dissent. The Supreme Court considered the provision vague and overbroad, such that it also penalized speech that was constitutionally protected. The Court placed reliance on international and domestic standards and found that the provision arbitrarily and disproportionately affected the right to free speech. Significantly, the Court found that the provision was not ‘severable’ and no part of the provision could be saved by reading it down. Therefore, the provision in its entirety was found to violate Articles 19(1)(a) and 21 of the Indian Constitution. This would have meant that the provision, being enacted after the Constitution, was ‘still-born’ or was deemed to never have existed on the statute books.”

- **Violation of privacy** (Section 66E.)-- Whoever, intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished with imprisonment which may extend to three years or with fine not exceeding two lakh rupees, or with both.

63. COMPOUNDING OF CONTRAVENTIONS. (1) Any contravention under this [Act] may, either before or after the institution of adjudication proceedings, be compounded by the Controller or such other officer as may be specially authorised by him in this behalf or by the adjudicating officer, as the case may be, subject to such conditions as the Controller or such other officer or the adjudicating officer may specify:

Provided that such sum shall not, in any case, exceed the maximum amount of the penalty which may be imposed under this Act for the contravention so compounded.

(2) Nothing in sub-section (1) shall apply to a person who commits the same or similar contravention within a period of three years from the date on which the first contravention, committed by him, was compounded.

Explanation. For the purposes of this sub-section, any second or subsequent contravention committed after the expiry of a period of three years from the date on which the contravention was previously compounded shall be deemed to be a first contravention.

(3) Where any contravention has been compounded under sub-section (1), no proceeding or further proceeding, as the case may be, shall be taken against the person guilty of such contravention in respect of the contravention so compounded.

64. Recovery of [penalty or compensation]. 4[penalty imposed or compensation awarded] under this Act, if it is not paid, shall be recovered as an arrear of land revenue and the licence or the 5[electronic signature] Certificate, as the case may be, shall be suspended till the penalty is paid.

Investigation of Offences

Section 78 of the Act gives the powers of investigation to a police officer not below the rank of Inspector. Section 80 confers the powers to police officers and other officers of central and state government to enter and search premises.

XI- Criticism to non-judicial AOs:

- Since CyAT has been now abolished and **the Telecom Disputes Settlement and Appellate Tribunal** has been now created as APPELLATE TRIBUNAL by virtue of Finance Act 2017 to act as multiple appellate authority, it would have been an effective body if constituted as a Commission or an expert body with members having varying qualifications & vast experience in legal, technical and socio-economic fields at the 1st appellate stage.
- **Lack of judicial experience:** The high quality of each of the three orders bears specific mention. Despite the excellent quality of the judgments of the Indian higher judiciary in the decades after independence, **the overall quality of judgment-writing appears to have declined.** Judgements by non-judicial Adjudicators appears to be not well delivered, not well-reasoned, vague/unclear orders incompatible of legal issues. Hence AOs must have the experience of BOTH LAW & IT-neither Law only, nor IT only.
- The Adjudicating Officer has indicated that the institutions that hold sensitive personal data, such as financial information, are subject to a ***higher duty of care in relation of it.***
- But, most importantly, the act of imposing monetary compensation of privacy violations is a step forward because, for the first time in India, ***it recognises that privacy violations are civil wrongs or injuries that demand compensation.***