

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.08.2017

DELIVERED ON : 02.03.2018

CORAM :

The Hon'ble Ms.INDIRA BANERJEE, CHIEF JUSTICE

AND

The Hon'ble Mr.JUSTICE M.SUNDAR

W.P. Nos.44126 and 44127 of 2016

and

W.M.P.Nos.37951 to 37956 of 2016, 5641, 6050 to 6052,
6054 to 6056 and 11131 of 2017

STAR India Private Limited,
15, Jaganathan Road,
Near Ganpat Hotel,
Nungambakkam,
Chennai, Tamil Nadu-600 034.

and having its registered office at
Star Houst, Urmi Estate,
95,Ganpatrao Kadam Marg,
Lower Parel (W),
Mumbai-400 013.

.. Petitioner in
W.P.No.44126 of 2016

Vijay Television Private Limited,
having its place of business at
15, Jaganathan Road,
Near Ganpat Hotel,
Nungambakkam,
Chennai, Tamil Nadu-600 034.

.. Petitioner in
W.P.No.44127 of 2016

Vs.

1.Department of Industrial Policy and Promotion,
Ministry of Commerce and industry,
Udyog Bhawan,
New Delhi-110 011.

2.Department of Telecommunications,
represented by its Secretary,
Ministry of Communications,
Sanchar Bhawan,
Ashoka Road,
New Delhi-110 001.

3.Ministry of Information and Broadcasting,
represented by its Secretary,
Room No.655, A Wing, Shastri Bhawan,
New Delhi-110 001.

4.Telecom Regulatory Authority of India,
Mahanagar Doorsanchar Bhawan,
Jawahar Lal Nehru Marg,
(Old Minto Road),
New Delhi-110 002.

.. Respondents in
both writ petitions

W.P.Nos.44126 and 44127 of 2016 filed under Article 226 of the Constitution of India praying for issue of Writ of Declaration, declaring that the provisions of the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017 notified on 03.03.2017 and the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017 notified on 03.03.2017 to the extent that they have the effect of regulating, determining or otherwise impacting content creation, generation, exploitation, licensing and terms and conditions for exploitation of content and broadcast reproduction rights and in particular,

I. Clauses 2(h), 2(j), 2(mm), 2(pp), 3 and 7 of the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017,

II. Clauses 2(f), 2(h), 2(zg), 2(zh) and 3 of the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017.

are unconstitutional and ultra vires the provisions of the TRAI Act, 1997 inasmuch as they are beyond the scope of the jurisdiction of TRAI conferred under the TRAI Act, 1997 and consequently quash the same.

For Petitioner

in W.P.No.44126 of 2016 : Mr.P.Chidambaram, Senior Counsel
Mr.Saikrishna Rajagopal
Ms.Ruby Singh Ahuja
Mr.Rahul Balaji
Mr.Sidharth Chopra
Mr.Rajnish Ranjan
Ms.Sneha Jain
Ms.Aakanksha Munjhal
Ms.Gitanjali Mathew
Mrs.Monisha Suri
Ms.Surasika Parthasarathy

For Petitioner

in W.P.No.44127 of 2016 : Dr.Abhishek Singhvi, Senior Counsel
Mr.P.S.Raman, Senior Counsel
Mr.Saikrishna Rajagopal
Ms.Ruby Singh Ahuja
Mr.Rahul Balaji
Mr.Sidharth Chopra
Mr.Rajnish Ranjan
Ms.Sneha Jain
Ms.Aakanksha Munjhal
Ms.Gitanjali Mathew
Mrs.Monisha Suri
Ms.Surasika Parthasarathy
Mr.Avishkar Singhvi

For Respondents

in W.P.No.44126 of 2016 : Mr.G.Rajagopalan,
Additional Solicitor General
assisted by Mr.Venkataswamy Babu
for RR1 to 3

Mr.P.Wilson, Senior Counsel
for M/s.P.Wilson Associates for R-4

Mr.R.Vijay Narayan, Senior Counsel,
for M/s.Joseph George Mayiladumpura
(Intervenor in WMP No.2779 of 2017)

Mr.Krishna Srinivasan
for M/s.S.Ramasubramanian Associates
(Intervenor in WMP No.5667 of 2017)

Mr.AR.L.Sundaresan, Senior Counsel
for M/s.S.Arjun Suresh
(Intervenor in WMP No.11131 of 2017)

For Respondents

in W.P.No.44127 of 2016 : Mr.G.Rajagopalan,
Additional Solicitor General
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(Intervenor in WMP No.1417 of 2017)

Mr.Sandeep S.Ladda for Mr.Jose John
for M/s.King & Patridge
(Intervenor in WMP No.2780 of 2017)

COMMON ORDER

M.SUNDAR, J.

We propose to dispose of both these writ petitions by this common order as they arise out of the same set of facts and prayers are also the same.

2 Bare minimum facts which are absolutely essential (sans unnecessary details and particulars) for appreciating this order are set out infra under the caption 'Facts in a Nutshell'.

3. Facts in a Nutshell :

3(a) For several years, outside the print media, Akashvani was the only source of news and entertainment. Thereafter, it was Akashvani and Doordarshan for some time. This business of news and entertainment has undergone enormous development and growth over a period of time and particularly in the last one score and half a decade. While this growth is 'visible and tangible' in every sense of the expression, there was also a simultaneous spurt in awareness and growth of another arena which was intangible and not so 'visible' in that sense of the term that is more appropriate in the context of this factual matrix. That arena is Intellectual Property Rights, which has now come to stay as a branch of law christened by an abbreviation, i.e., 'IPR', denoting 'Intellectual Property Rights'. This is before us, in our view is an offshoot of the aforesaid two simultaneous growth and development factors that have occurred in the last one score and half a decade.

3(b) Both writ petitioners before us are in the business of news, information, entertainment, etc., which is not print media, to put it compendiously and compactly 'visual media'. Both writ petitioners own Television networks with a wide portfolio of several television channels. One of the writ petitioners, i.e., writ petitioner in W.P.No.44126 of 2016, we are informed owns as many as 33 television channels in eight different languages.

3(c) The contents of the programmes which the writ petitioners broadcast are either created by the writ petitioners themselves or procured

from third parties with sole and exclusive rights to broadcast the same in their television channels in India and various other territories across the world.

3(d) It is the specific case of the writ petitioners that they operate, broadcast their television channels on the basis of necessary up-link and downlink permission from the Ministry of Information and Broadcasting, Government of India.

3(e) Telecom Regulatory Authority of India (hereinafter referred to as 'TRAI' for brevity), a statutory body created, established and incorporated in and by the Telecom Regulatory Authority of India Act, 1997 (24 of 1997) (hereinafter referred to as 'TRAI Act' for brevity), issued two consultation papers. One consultation paper is dated 10.10.2016 titled 'Consultation on the Draft Telecommunication (Broadcasting and Cable Services) (Eighth) (Addressable Systems) Tariff Order, 2016'. The other consultation paper is dated 14.10.2016 and is titled 'Consultation Paper on Draft Telecommunication (Broadcasting and Cable Services) Interconnection (Addressable Systems) Regulations, 2016'.

3(f) The aforesaid two consultation papers were (together) the first step towards bringing about a Tariff Order and certain regulations for fixing tariff and for regulating the industry of the writ petitioners. To be noted, these two consultation papers were (together) the first step in the birth of subordinate legislations that are subject matter of the instant writ petitions.

3(g) Claiming that the two consultation papers would directly affect their rights and inter-alia pleading that TRAI does not have statutory authority / legislative competence to embark upon such an exercise, the two writ

petitioners before us filed the aforesaid two writ petitions on 23.12.2016. To be noted, prayers in the two writ petitions were primarily to quash the aforesaid two consultation papers and to mandamus TRAI by forbearing them from in any manner notifying or giving effect to the intended tariff order or regulations. Such prayers were predicated on the premise that the intended tariff order and regulations would touch upon the contents of the broadcast of the writ petitioners which according to the writ petitioners is impermissible.

3(h) This being facts in a nutshell, suffice to say that pending writ petitions, consultation papers were carried to their logical end and notified on 03.03.2017. Therefore, the regulations and tariff order took birth as the 'Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017' and 'Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017' which are hereinafter referred to as 'said regulations' and 'said tariff order' for the sake of convenience and clarity.

3(i) This court in and by order dated 17.03.2017 vide W.M.P.No.6049 of 2017 in W.P.No.44126 of 2016 and W.M.P.No.6053 of 2017 in W.P.No.44127 of 2016 permitted writ petitioners to amend the prayers in the writ petitions. The prayers were amended, wherein and whereby six clauses of the said regulations and five clauses of the said tariff order were sought to be declared as unconstitutional and ultravires the provisions of TRAI Act.

3(j) To be noted, thereafter in the hearing, instead of / in place of six clauses of the said regulations and five clauses of the said tariff order (set out

in the prayer), seven different clauses of the said regulations and eleven different clauses of the said tariff order were sought to be impugned. We shall deal with this aspect of the matter in greater detail elsewhere infra in this judgment. Be it noted that the new set of seven clauses in the said regulations and eleven clauses of the said tariff order have now been put in issue in the instant writ petitions with the consent of all parties to this lis.

3(k) Before proceeding further with discussion of the rival submissions and the case laws pressed into service, we deem it appropriate to encapsulate the core issue, i.e., lis in the instant writ petitions under the caption 'Lis / issue in a nutshell', to facilitate better appreciation of our order.

4. Lis / Issue in a nutshell :

4(a) Broadly speaking, in and by the said regulations and the said tariff order, TRAI now has regulated the industry of writ petitioners by saying that channels when given in bouquets should not be a mix of pay channels and free to air channels. In other words, when channels are offered in a bouquet, one bouquet should either contain pay channels only or free to air channels only. One more restriction is when channels are offered in a bouquet, the high definition and standard definition formats of the same channel should not be in the same bouquet. Said regulations and said tariff order, particularly, impugned clauses further mandate that a bouquet (of pay channels, obviously) should not contain any pay channel where the Maximum Retail Price ('MRP' for brevity) is more than Rs.19/-. There are also other clauses which say that MRP of a bouquet should not be more than 85% of

the sum of a-la-carte MRP of pay channels constituting bouquet. There are some other caps which say that discounts of MRP of a bouquet should not exceed 15%. There are also certain restrictions on the distribution fee. The said regulations and the said tariff order also make it mandatory for the broadcasters to declare the MRPs. Besides all these, said regulations and said tariff order also mandate that an agreement should be entered into in this regard and there are certain regulations regarding territories of multi system operators (hereinafter referred to as 'MSOs' for brevity). To be noted, said regulations and said tariff order also mandate that MRPs of broadcasters should be uniform for all distribution platforms. In other words, MRPs should be non discriminatory.

4(b) For the purpose of effective understanding of the issue, we have broadly delineated supra the nature of regulatory regime that has been brought in by said regulations and said tariff order. However, it is crucial to note that writ petitioners have made it clear that their challenge to the impugned clauses in the said regulations and said tariff order is not a challenge on merits and that it is only a challenge to the jurisdiction of the TRAI to come up with said regulations and said tariff order.

4(c) Such a challenge to the jurisdiction of TRAI is predicated on one core issue and that one core issue is that the jurisdiction of TRAI to regulate and fix tariff is limited to carriage or 'means of transmission' and therefore it cannot be extended to 'content' which according to the writ petitioners is completely and comprehensively governed by the Copyright Act, 1957 (14 of 1957) as amended with effect from 21.6.2012, which is hereinafter referred to

as 'Copyright Act' for convenience and clarity.

4(d) To further simplify, it is the case of the writ petitioners that TRAI can regulate 'carriage', but not 'content'. Interestingly, it is the case of TRAI that it is regulating only carriage as television channel is a product by itself.

4(e) As we are setting out the core issue, it would be necessary to set out here that there are three intervenors, who are, All India Digital Cable Federation, Indian Broadcasting Foundation and Videocon d2h Limited. Two intervenors, namely, All India Digital Cable Federation and Videocon d2h Limited are supporting TRAI, whereas the third intervenor, namely, Indian Broadcasting Foundation, is supporting the writ petitioners.

4(f) Having set out the core issue in this lis in a nutshell, to be noted, a large number of case laws were pressed into service by the parties to the lis in the hearings spread over several dates. In our considered opinion, the large number of case laws placed before us can be classified into three categories. While some of the case laws are extremely pertinent and germane for deciding the core issue, some only provide some insight qua ancillary issues and some other case laws may not have any great relevance or bearing on deciding this lis. We shall deal with all these infra in this judgment. In this view of the matter, having set out the facts in a nutshell and core issue in this lis in simple terms, considering the large number of case laws placed before us, we deem it appropriate to give case laws pressed into service by parties concerned under a separate caption 'Case Laws' before setting out our discussion of the rival submissions.

5. Case Laws :

5(a) Case Laws pressed into service by writ petitioners together with the proposition for which they were pressed into service are as follows :

(i) Learned Senior counsel Mr.P.Chidambaram, relied on a decision of the Supreme Court in ***Bharat Sanchar Nigam Limited Vs. Telecom Regulatory Authority of India and others* (2014) 3 SCC 222**], for the proposition that in exercise of the power vested in it under Section 14(b) of the TRAI Act, TDSAT does not have the jurisdiction to entertain a challenge to regulations framed by TRAI under Section 36 of the TRAI Act and therefore, this Court alone can entertain such a challenge.

(ii) A decision of Hon'ble Supreme Court being ***Petroleum and Natural Gas Regulatory Board Vs. Indraprastha Gas Limited and others* [(2015) 9 SCC 209]**, for the principle that even a general power to make rules or regulations for carrying out or giving effect to an Act is strictly ancillary in nature and cannot enable the authority on whom the power is conferred to extend the scope of general operation of the Act and for the further principle that such a power will not support attempts to widen the purposes of a Act, to add new and different means of carrying them out and to depart from or vary its terms. To be noted, this judgment was relied on also to persuade the Court regarding difference between content and carriage.

(iii) ***ESPN Star Sports Vs. Global Broadcast News Ltd.* [2008 (38) PTC 477 (Del.)(DB)]** was pressed into service to say that the Delhi High Court held that the Legislature itself by terming broadcast rights as those akin to copyright clearly brought out the distinction between the nature of two rights.

It was further contended that this was a clear manifestation of the legislative intent to treat copyright and broadcasting reproduction rights as distinct and separate rights, and in a given case, there could be both copyright and broadcasting reproduction right which could separately co-exist. To be noted, this judgment was relied on by TRAI also and we shall refer to the same elsewhere in this judgment.

(iv)A decision of the Supreme Court in ***Cellular Operators Association of India and others Vs. Telecom Regulatory Authority of India and others [(2016) 7 SCC 703]***, which is now known in popular parlance as the Call drop case, was pressed into service to say that Section 11(4) of the Act requires that the Authority shall ensure transparency while exercising its powers and discharging its functions, that 'Transparency' has not been defined anywhere in the Act, however, it was noticed in call drop case that in a later parliamentary enactment, namely, the Airports Economic Regulatory Authority of India Act, 2008, Section 13 deals with the functions of the Airports Economic Regulatory Authority and in Section 13, among other functions, it is also stated that the Authority shall ensure transparency while exercising its powers and discharging its functions by making all decisions of the authority fully documented and explained.

This Call drop case was relied on for certain other aspects of the matter also and we shall deal with it infra elsewhere in this judgment at the appropriate place / places in the course of discussion for the purpose of convenience and for the purpose of making the narrative cogent.

(v) ***Mathura Prasad Bajoo Jaiswal and others Vs. Dossibai N.B.***

Jeejeebhoy [1970 (1) SCC 613] was pressed into service for the principle that a decision on an issue of law will be a res judicata in a subsequent proceeding between the same parties, if the cause of action of the subsequent proceeding be the same as in the previous proceeding, but not when the cause of action is different, the other exceptions being when the law has since the earlier decision been altered by a competent authority, when the decision relates to the jurisdiction of the Court to try the earlier proceeding and when the earlier decision declares valid a transaction which is prohibited by law.

(vi) ***Devilal Modi Vs. Sales Tax Officer, Ratlam and others [AIR 1965 SC 1150]*** was relied on for the proposition that constructive res judicata was an artificial form of res judicata enacted by Section 11 of the Code of Civil Procedure and it should not be generally applied to writ petitions filed under Article 32 or Article 226. To be noted, this judgment was relied on by both sides and we shall discuss the same infra.

(vii) Learned Senior Counsel has relied on a decision of Delhi High Court in ***Star India P. Ltd. Vs. Telecom Regulatory Authority of India [(2008) 146 DLR 455 (DB)]*** to trace what according to the writ petitioners is the history of this litigation. To be noted, it has not been cited as an authority for any proposition, but only for this limited purpose. It is articulated in paragraph 62 of the affidavit filed in support of W.P.No.44127 of 2016 and we refrain from extracting the same herein to avoid prolixity. However, we give this under the caption 'Case Laws' for convenience, more so, because TRAI

has placed this judgment before us in support of their plea of res judicata and we shall refer / discuss the same infra in this judgment.

(viii) ***Entertainment Network (India) Limited Vs. Super Cassette Industries Limited [(2008) 13 SCC 30]*** was relied on to say that the right to broadcast is an ephemeral right, it requires special treatment as it confers upon every person, who wishes to broadcast a work or the work recorded in a sound recording, right to do so either by entering into a voluntary agreement to obtain a licence on such terms which appear to be reasonable to him or when the term appears to be unreasonable to approach the Board.

(ix) ***Executive Engineer, Southern Electricity Supply Company of Orissa Limited (SOUTHCO) Vs. Sri Seetaram Rice Mill [(2012) 2 SCC 108]*** was cited to reiterate time honoured principles regarding interpretation of statutes.

(x) Learned Senior counsel Dr. Abhishek Singhvi appearing for the petitioner in W.P.No.44127 of 2016 relied on a decision of the Supreme Court in ***Synthetics and Chemicals Ltd and others Vs. State of U.P and others [(1990) 1 SCC 109]*** to say that the Supreme Court held that it is also necessary that in deciding whether any particular enactment is within the purview of one legislature or the other, it is the pith and substance of the legislation in question that has to be looked into, it is well settled that the various entries in the three lists of the Indian Constitution are not powers but fields of legislation, the power to legislate is given by Article 246 and other Articles of the Constitution, the three lists of the Seventh Schedule to the Constitution are legislative heads or fields of legislation, these demarcate the

area over which the Parliament and appropriate legislations can operate and it is well settled that widest amplitude should be given to the language of the entries in three Lists but some of these entries in different lists or in the same list may override and sometimes may appear to be in direct conflict with each other, then and then only comes the duty of the court to find the true intent and purpose and to examine the particular legislation in question.

(xi) Learned Senior counsel also relied on a decision of the Supreme Court in ***Union of India Vs. Hindalco Industries [(2003) 5 SCC 194]*** for jurisdictional issue and contended that when an authority has jurisdiction over one aspect, the very same authority cannot claim jurisdiction over a matter in which it does not have jurisdiction.

(xii) By relying on ***State of Madras Vs. Gannon Dunkerley & Co., (Madras) Ltd. [AIR 1958 SC 560]***, it was contended that the expression “sale of goods” in Entry 48 is a *nomen juris*, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement.

(xiii) ***Poppatlal Shah Vs. State of Madras [AIR 1953 SC 274]*** was cited to say that the expression “sale of goods” is a composite expression consisting of various ingredients or elements. Thus, there are the elements of a bargain or contract of sale, the payment or promise of payment of price, the delivery of goods and the actual passing of title and each one of them is essential to a transaction of sale. The sale is not completed or concluded unless the purchaser becomes the owner of the property.

(xiv) ***U.P. Cooperative Cane Unions Federations Vs. West U.P.***

Sugar Mills Association [(2004) 5 SCC 430] was pressed into service to say that in a matter relating to sale of movable property or goods, price is an essential element of the transaction.

(xv) In **Association of Leasing and Financial Service Companies Vs. Union of India [(2011) 2 SCC 352]**, the Supreme Court has held that the essential ingredients of “sale” are agreement to sell movables for a price and property passing therein pursuant to an agreement. Therefore, to allow subsequent exercise of legislative power to enlarge that power, would be to amend the entry relating to that power in the Constitution by an ordinary law, which is not permissible.

(xvi) Learned counsel for petitioners also relied on two foreign judgments. One being **John Hudson & Co. Ltd. Vs. Kirkness (Inspector of Taxes) [(1954) 1 W.L.R. 40](Court of Appeal)**, wherein it has been held that “By the common law a sale of personal property was usually termed a 'bargain and sale of goods.' It may be defined to be a transfer of the absolute or general property in a thing for a price in money. Hence it follows that, to constitute a valid sale, there must be concurrence of the following elements, viz: (1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer and (4) a price in money paid or promised.

(xvii) In **C.E.B. Draper & son Ltd. Vs. Edward Turner & Son Ltd. and others [(1965) 1 Q.B. 424]**, it has been held that “And when I say the “sale” must take place within the United Kingdom, I mean the sale itself and not the contract for sale. I know that often times a contract for sale is spoken

of as a sale. But the word “sale” properly connotes the transfer of the absolute or general property in a thing for a price in money (see Benjamin on Sale, 2nd ed. (1873), p.1, quoted in *Kirkness v. John Hudson & Co.*)”.

5(b) Case Laws pressed into service by TRAI together with the proposition for which they were pressed into service are as follows :

(i) A judgment of the Supreme Court in ***Dhartipakar Madan Lal Agarwal Vs. Rajiv Gandhi [1987 (Supp) SCC 93]*** was pressed into service in aid of the principle that the Court should not undertake to decide an issue unless it is a living issue between the parties and if an issue is purely academic in that its decision one way or the other would have no impact on the position of the parties, it would be waste of public time to engage itself in deciding it.

(ii) ***MD, U.P. Land Development Corporation and another Vs. Amar Singh and others [(2003) 5 SCC 388]*** was relied on to contend that internal notes and orders of the office are meant for official purposes and should not be produced before the court.

(iii) ***Revajeetu Builders and Developers Vs. Narayanaswamy and sons and others [(2009) 10 SCC 84]*** was relied on to say that the Supreme Court has laid down principles that have to be taken into consideration while allowing or rejecting an application for amendment.

(iv) ***State of West Bengal and another Vs. West Bengal Registration Copywriters Association and another [(2009) 14 SCC 132]***

was cited to say that even in its plenary jurisdiction, while moulding the relief, there must be a plea to support such a relief.

(v) **Rajasthan Pradesh Vaidya Samiti Vs. Union of India and others [(2010) 12 SCC 609]** was pressed into service to say that it is a settled proposition of law that a party has to plead the case and produce / adduce sufficient evidence to substantiate his submissions made in the petition and in case the pleadings are not complete, the court is under no obligation to entertain the pleas.

(vi) **Ranbir Singh Vs. Executive Engineer [(2011) 15 SCC 453]** was relied on to say that a party must be held to be bound by its pleadings and a prayer clause cannot be construed or dubbed as a technicality.

(vii) **Bharat Sanchar Nigam Limited Vs. Telecom Regulatory Authority of India and others [(2014) 3 SCC 222]** was relied on by TRAI also to advance the argument that the power vested in TRAI under Section 36(1) of TRAI Act to make regulations is wide and pervasive, the exercise of this power is only subject to the provisions of the TRAI Act and the rules framed under Section 35 thereof, there is no other limitation on the exercise of power by TRAI under Section 36(1) and that it is not controlled or limited even by Section 36(2) or Sections 11, 12 and 13. Further, it is settled law that if power is conferred upon an authority / body to make subordinate legislation in general terms, the particularisation of topics is merely illustrative and does not limit the scope of general power.

(viii) **Telephone Regulatory Authority of India Vs. SET Discovery P.**

Ltd. Etc., dated 28.2.2014 was relied on to highlight that the Supreme Court in

its order made in I.A.Nos.71-75 in Civil Appeal Nos.829-833 of 2009, had permitted the appellate authority to review the tariff ceiling to make adjustment for inflation and notify the same in exercise of its powers conferred under Section 11(2) of the TRAI Act, 1997.

(ix) A decision dated 10.02.2017 made in Civil Appeal Nos.2343-44 of 2017 [*M/s.Chakreshwari Construction Pvt. Ltd. Vs. Manohar Lal*] was relied on to say that the Supreme Court has reiterated the principles laid down in *Revajeetu Builders and Developers* case (supra) for deciding on application made for amendment in the pleadings.

(x) *Avishek Goenka Vs. Union of India and another* [(2012) 5 SCC 275] was cited for the proposition that in terms of Section 11 of TRAI Act, TRAI has to regulate the interest of telecom service providers and subscribers, the concept of 'regulatory regime' has to be understood and applied by courts within the framework of law and that the regulatory regime is expected to fully regulate and control activities in all spheres to which the particular law relates.

(xi) *Uttar Pradesh Power Corporation Limited Vs. National Thermal Power Corporation Limited and others* [(2011) 12 SCC 400] was pressed into service to advance the argument that the issues with regard to determination of tariff should be left to the expert body and ordinarily the High Court and even the Supreme Court should not interfere with the determination of tariff.

(xii) *Rohtas Industries Ltd. and others Vs. Chairman, Bihar State Electricity Board and others* [1984 (Supp) SCC 161] was relied in support

of the argument that the Court will be exceeding its jurisdiction if it is to embark upon a scrutiny of matters of price fixation policy which are essentially in the domain of the executive to determine, subject, of course, to the constitutional limitations.

(xiii) ***Transmission Corporation of Andhra Pradesh Limited and another Vs. Sai Renewable Power Private Limited and others [(2011) 11 SCC 34]*** was pressed into service for the principle that it would not be proper for the Court to examine the fixation of tariff rates or its revision as these matters are policy matters outside the purview of judicial intervention.

(xiv) ***Jak Communications Pvt. Ltd. Vs. Sun TV Network Limited*** reported in **2010-2-L.W. 936** was relied on for the proposition that both the Copyright Act as well as the TRAI Act operate in the respective fields, TRAI Act does not include the dispute relating to the infringement of copyright as well as piracy and further, there is no specific exclusion of this Act to invoke the provisions of Section 15 of TRAI Act to bar the civil court.

(xv) TRAI also relied on some decisions of the Hon'ble Supreme Court and Delhi High Court for the proposition that when an effective / efficacious alternative remedy is available, a writ petition under Article 226 of the COI is not maintainable. Such decisions are ***Commissioner of Income Tax and others Vs. Chhabil Dass Agarwal [(2014) 1 SCC 603]***; ***Nivedita Sharma Vs. Cellular Operators Association of India and others [(2011) 14 SCC 337]***; ***Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd and others [(1985) 1 SCC 260]*** and ***Star India Private Limited Vs. Noida Software Technology Park Limited [2016 SCC***

Online Del 427 : (2016) 227 DLT 472].

(xvi) ***Bhatia International Vs. Bulk Trading S.A. and another [(2002) 4 SCC 105]*** was relied on to reiterate time honoured principles regarding interpretation of statutes. In the said judgment, the Hon'ble Supreme Court held that the conventional way of interpreting a statute is to seek the intention of its makers. If a statutory provision is open to more than one interpretation then the court has to choose that interpretation which represents the true intention of the legislature.

(xvii) ***Girdhari Lal and sons Vs. Balbir Nath Mathur and others [(1986) 2 SCC 237]*** was also relied on to reiterate time honoured principles regarding interpretation of statutes, the Hon'ble Supreme Court held that Parliamentary intention may be gathered from several sources. First, of course, it must be gathered from the statute itself, next from the preamble to the statute, next from the Statement of Objects and Reasons and thereafter from parliamentary debates, report of committees and commissions which preceded the legislation and finally from all legitimate and admissible sources from where there may be light.

(xviii) ***KSL and Industries Limited Vs. Arihant Threads Limited and others [(2015) 1 SCC 166]*** was also relied on to reiterate time honoured principle regarding interpretation of statutes. It was reiterated that if the legislature confers a non obstante clause on a later enactment, it means that the legislature intends that the later enactment should prevail. Further, it is a settled rule of interpretation that if one construction leads to a conflict, whereas on another construction two Acts can be harmoniously construed,

then the latter must be adopted.

(xix) ***Municipal Corporation of Delhi Vs. Shiv Shanker [1971 (1) SCC 442]***, wherein the Supreme Court held that as the legislature must be presumed in deference to the rule of law to intend to enact consistent and harmonious body of laws, a subsequent legislation may not be too readily presumed to effectuate a repeal of existing statutory laws in the absence of express or at least clear and unambiguous indication to that effect, this is essential in the interest of certainty and consistency in the laws which the citizens are enjoined and expected to obey and that when there is no inconsistency between the general and the special statute the later may well be construed as supplementary was also relied on to reiterate time honoured principle regarding interpretation of statutes.

(xx) The Supreme Court in ***Kishorebhai Khamanchand Goyal Vs. State of Gujarat and another [(2003) 12 SCC 274]***, which was also relied on to reiterate time honoured principle regarding interpretation of statutes, has held that the Court leans against implying a repeal, “unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied, or that there is a necessary inconsistency in the two Acts standing together.”

(xxi) In ***Ajoy Kumar Banerjee and others Vs. Union of India and others [(1984) 3 SCC 127]***, the Supreme Court held that the duty of the Court in interpreting or construing a provision is to read the section, and understand its meaning in the context, interpretation of a provision or statute is not a mere exercise in semantics but an attempt to find out the meaning of

the legislation from the words used, understand the context and the purpose of the expressions used and then to construe the expressions sensibly. In case of any conflict between two statutes, the tests to be followed to determine as to which one would prevail has been laid down by the Hon'ble Supreme Court. The said case was also pressed into service to reiterate time honoured principle regarding interpretation of statutes.

(xxii) We deem it appropriate to also give in one paragraph all the judgments placed before us by TRAI with regard to principles of interpretation of statutes and they are : ***Bhatia International Vs. Bulk Trading S.A. and another* [(2002) 4 SCC 105]**; ***Girdhari Lal and sons Vs. Balbir Nath Mathur and others* [(1986) 2 SCC 237]**; ***KSL and Industries Limited Vs. Arihant Threads Limited and others* [(2015) 1 SCC 166]**; ***Municipal Corporation of Delhi Vs. Shiv Shanker* [1971 (1) SCC 442]**; ***Kishorebhai Khamanchand Goyal Vs. State of Gujarat and another* [(2003) 12 SCC 274]**; and ***Ajoy Kumar Banerjee and others Vs. Union of India and others* [(1984) 3 SCC 127]**.

(xxiii) ***Kusum Ingots & Alloys Ltd. Vs. Union of India and another* [(2004) 6 SCC 254]** was cited to say that the litigant has the right to go to a Court where part of his cause of action arises, the court will find out in each case whether the jurisdiction of the court is rightly attracted by the alleged cause of action, if a small part of cause of action arises within the territorial jurisdiction of the High Court itself may not be considered a determinative factor compelling the High Court to decide the matter on merit.

(xxiv) ***Oil and Natural Gas Commission Vs. Utpal Kumar Basu and***

others [(1994) 4 SCC 711], wherein Supreme Court has held that cause of action means bundle of facts which the petitioner must prove and that the question of territorial jurisdiction must be decided on the facts pleaded in the petition was relied on to highlight these principles.

(xxv) **Joint Action committee of Air Line Pilots' Association of India Vs. Director General of Civil Aviation and others [(2011) 5 SCC 435]**, wherein the Supreme Court held that a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had, taking inconsistent pleas by a party makes its conduct far from satisfactory and that the parties should not blow hot and cold by taking inconsistent stands and prolong proceedings unnecessarily. This judgment was pressed into service to reiterate these principles.

(xxvi) **Pashupati Trading Co. Pvt. Ltd. and another Vs. Electrical Inspector and others [1981 Mh.L.J. 747]** was relied on in support of the contention that words are there which convey an idea and in each enactment, the legislature uses those words or phrases with a specific thought or an idea and similar words in any other enactment may not convey the same thought or idea and cannot, therefore, be borrowed to interpret the meaning of the same phrase appearing in the enactment for the purposes of interpretation.

(xxvii) **State of Goa Vs. Western Builders [(2006) 6 SCC 239]** was cited to say that the Supreme Court has held that whenever two enactments are overlapping each other on the same area, then the courts should be cautious in interpreting those provisions. If two Acts can be read

harmoniously without doing violation to the words used therein, then there is no prohibition in doing so.

(xxviii) ***Cellular Operators Association of India Vs. Telecom Regulatory Authority of India [(2016) 7 SCC 703]***, which was known in popular parlance as call drop case, was relied on to contend that the power under TRAI Act is non delegable and legislative in nature. The product of consultation must be conscientiously taken into account when the ultimate decision is taken. The conclusion that service providers are alone to blame and are consequently deficient in service when it comes to call drops is not a conclusion which a reasonable person can reasonably arrive at. It has been held in the said judgment that it is beyond the scope of this judgment to deal with subordinate legislation generally in particular with statutes which provide for rule making and regulation making without any added requirement of transparency.

(xxix) ***Public Services Tribunal Bar Association Vs. State of U.P and another [(2003) 4 SCC 104]*** wherein Supreme court held that the constitutional validity of an Act can be challenged only on two grounds (i) lack of legislative competency and (ii) violation of any of the fundamental rights or of any other constitutional provisions, was pressed into service to reiterate these principles.

(xxx) ***Bhavesh D. Parish Vs. Union of India [(2000) 5 SCC 471]*** wherein Supreme Court has held that unless the impugned provision is manifestly unjust or glaringly unconstitutional, High Court should show judicial restraint in staying the applicability thereof, particularly in case of legislation

pertaining to economic reform or change, was relied on to buttress arguments of TRAI on these lines.

(xxxix)***Health for Millions Vs. Union of India [(2014) 14 SCC 496]*** was relied on to say that if courts find that statute is unconstitutional or rules framed thereunder are unconstitutional, then they can strike down such law or rules. But operation of any statute cannot be made ineffective by passing an interim order. If the court is convinced that impugned statute or rules are ex facie unconstitutional, then interim order can be passed by looking into factors such as balance of convenience, irreparable injury and public interest.

(xl)***Star India P. Ltd. Vs. Telecom Regulatory Authority of India and others [(2008) 146 DLT 455 (DB)]***, wherein it has been held by Delhi High Court that the economic strength of Western countries has an irresistible effect on changing the mindset of developing nations and these societies tend to ape, copy, imitate and replicate the economically advanced nations. Courts should be loath to permit such an assault and invasion by indiscriminately extending freedom of speech and expression under Article 19(1)(a) to persons who are not Indian citizens. To be noted, TRAI relied on this judgment to bolster its plea of res judicata against one of the writ petitioners, i.e., STAR India Private Limited, being writ petitioner in W.P.No.44126 of 2016.

(xli)***Devilal Modi Vs. Sales Tax Officer, Ratlam and others [AIR 1965 SC 1150]***, wherein the Supreme Court held that the rule of constructive res judicata postulates that if a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take

that plea against the same party in a subsequent proceeding which is based on the same cause of action, but basically, even this view is founded on the same considerations of public policy, because if the doctrine of constructive res judicata is not applied to writ proceedings, it would be open to the party to take one proceeding after another and urge new grounds every time; and that plainly is inconsistent with considerations of public policy to which we have just referred. This judgment was relied on by TRAI in support of constructive res judicata plea.

(xxxiv) ***Birla Corporation Limited Vs. Commissioner of Central Excise [(2005) 6 SCC 95]***, wherein the Supreme Court held that the party is not permitted to take the opposite stand than the one taken in the earlier proceedings, was relied on to bolster aforesaid pleas of res judicata and constructive res judicata against one of the writ petitioners, i.e., STAR India Private Limited, being writ petitioner in W.P.No.44126 of 2016.

(xxxv) ***Aasia Industrial Technologies Ltd. Vs. Ambience Space Sellers Ltd. [MANU/MH/0858/1997]*** was relied on to say that under Section 37 of the Copyright Act, every broadcasting organization has been given a broadcast reproduction right. The right conferred under Section 37 is available to all broadcasting organizations, wherever they are situated, so long as the broadcast is available in India for viewing.

(xxxvi) ***ESPN Star Sports Vs. Global Broadcast News Ltd. [MANU/DE/1442/2008 : 2008 (38) PTC 477 (Del.)(DB)]*** in RFA (OS)No.25/2008 dated 26.9.2008, was pressed into service by TRAI to contend that broadcast reproduction rights in respect of telecast of live event

like a cricket match are separate and distinct rights as from the copyright and as such, section 61 of the Copyright Act is not applicable to broadcast reproduction rights.

(xxxvii) **Star India Pvt. Ltd. Vs. Noida Software Technology Park Ltd.** (Civil Appeal No.1446 of 2016, dated 26.2.2016) was cited and submitted that the appeal filed by the Star India had been dismissed. This was pressed into service to buttress the contention of TRAI that STAR India Private Limited (petitioner in W.P.No.44126 of 2016) is re-litigating.

(xxxviii) Relying on **Star India Private Limited Vs. Bharat Sanchar Nigam Ltd.** (MA No.66 of 2010 in Petition No.172 of 2009, order made by TDSAT), it was contended that the Star claimed itself to be a service provider under TRAI. This judgment was referred to say that Star cannot now be heard to contend to the contrary.

(xxxix) **Reliance Natural Resources Limited Vs. Reliance Industries Limited [(2010) 7 SCC 1]**, wherein it has been held by the Supreme Court that Article 39(b) of the Constitution envisages that the State shall, in particular, direct its policy towards securing the ownership and control of material resources of the community as so distributed as best to subserve the common good, was cited in support of the contention of TRAI that airwaves are public property and impugned clauses are intended to serve larger public good.

(XL) **ESPN Software India Pvt. Ltd. Vs. Prasara Bharti [(2013) 204 DLT 339 (DB)]**, wherein it has been held that air waves and spectrums are

used while broadcasting events through a television network, the airwaves and spectrum are public property held in trust by the Government for the benefit of public good. This was also cited to support the same larger public good theory.

(XLI) **Secretary, Ministry of Information & Broadcasting, Government of India and others Vs. Cricket Association of Bengal and others [(1995) 2 SCC 161]** case was cited by TRAI to contend that airwaves constitute public property and must be utilised for advancing public good, that no individual has a right to utilise them at his choice and pleasure and for purposes of his choice including profit and that right of free speech guaranteed by Article 19(1)(a) does not include the right to use airwaves, which are public property.

(XLII) **N.K. Bajpai Vs. Union of India [(2012) 4 SCC 653]** was relied on to contend that the State could impose reasonable restrictions on the exercise of the rights conferred in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence and that such restrictions are within the scope of constitutionally permissible restrictions.

(XLIII) **Bachan Singh Vs. State of Punjab [(1980) 2 SCC 684]** was cited to say that the Supreme Court has held that the primary function of the courts is to interpret and apply the laws according to the will of those who made them and not to transgress into the legislative domain of policy-making.

(XLIV) ***Indo-China Steam Navigation Co. Ltd. Vs. Jasjit Singh, Additional Collector of Customs, Calcutta [AIR 1964 SC 1140]*** was cited to say that the Supreme Court held that certain rights guaranteed to the citizens of India under Article 19 are not available to foreigners.

(XLV) ***R.S.Rekhchand Mohota Spinning & Weaving Mills Ltd. Vs. state of Maharashtra [(1997) 6 SCC 12]***, wherein it has been held that in construing an entry in a list conferring legislative powers, the widest possible construction, according to their ordinary meaning, must be put upon the words used therein, the cardinal rule of interpretation, however, is that words should be given their ordinary, natural and grammatical meaning subject to the rider that in construing words in a constitutional enactment, conferring legislative power under Article 246, the most liberal construction should be put upon the words in the entries in the respective lists in the Seventh Schedule so that the same may have effect in their widest amplitude, was cited to reiterate these principles.

(XLVI) ***Akulate Internet Services Pvt. Ltd. Vs. Star India Pvt. Ltd. [2013 SCC Online Del 3344]*** dated 30.8.2013 was cited to contend that the scope of BRR rights cannot be stretched beyond Section 39A of Copyright Act.

(XLVII) ***Hotel & Restaurant Assn. and another Vs. Star India (P) Ltd. and others [(2006) 13 SCC 753]*** was cited to contend that TRAI exercises broad jurisdiction, its' jurisdiction is not only to fix tariff but also laying down terms and conditions for providing services and that prima facie, it can fix

norms and the mode and manner in which a consumer would get the services.

(XLVIII) A decision of a Division Bench of Andhra Pradesh High Court made in W.P.No.12781 of 2006 dated 28.09.2006 was relied on to say that TRAI is well within its power to make regulations as they did by framing the 2004 regulations to bring the cable services within the definition of the service provider for the purposes of regulating the activities of the cable operators though the definition 'service provider' under section 2(j) of the Act is restrictive in its scope.

(XLIX) ***Krishi Utpadan Mandi Samiti and another Vs. M/s.Shankar Industries and others [1993 Supp (3) SCC 361 (II)]*** was cited to say that the Supreme Court has held that it is well settled rule of interpretation that where the legislature uses the words 'means' and 'includes' such definition is to be given a wider meaning and is not exhaustive or restricted to the items contained or included in such definition.

(L) A decision of Delhi High Court made in CWP No.5676 of 2003 dated 4.12.2003 [***Jay Polychem India Ltd. Vs. Union of India***] was relied on by TRAI to say that the broadcasters and the content creators were whimsically levying exorbitant charges for programmes, channels and for bouquets, that arbitrary increases in subscription rates were creating a problem because cable operators were left with no option but to pass on this burden frequently to the subscribers and that the task force considered it desirable that the conditional access system should be introduced to provide the consumer choice of viewing and an option to pay for what he chooses to

watch. It was relied on also to contend that the consumer should also not be expected to pay unreasonably for the 'Free to Air' channels and must be able to receive the 'Free to Air' channels without any set top box (hereinafter referred to as 'STB' for brevity) or any need to change the existing receiver.

(LI) **Rajasthan State Electricity Board Vs. Mohan Lal and others** [AIR 1967 SC 1857] was relied on to say that the Supreme court has held that the ejusdem generis rule is one to be applied with caution and not pushed too far and that unless there is a genus or category, there is no room for application of ejusdem generis doctrine.

(LII) **Bharti Airtel Limited Vs. Union of India** [(2015) 12 SCC 1], wherein the Supreme Court held that a licence granted under Section 4 of the Telegraph Act is a contract between the Government of India and the licensees, was cited to say that it is a well settled principle of law that where there is a conflict between obligations flowing from a contract and those flowing from the law, the obligations flowing from the contract must necessarily yield to obligations flowing from the Constitution and laws.

(LIII) **Sri Tarkeshwar Sio Thakur Jiu Vs. Dar Dass Dey & Co.** [(1979) 3 SCC 106] was pressed into service to contend that it is well settled that in ascertaining the real character of a document, regard must be had to the substance of the transaction and not merely the words or the form in which it is dressed.

(LIV) **Smt. Rajbir Kaur and another Vs. M/s. S. Chokesiri and Co.** [(1989) 1 SCC 19] was relied on to contend that the import, significance and

conclusiveness of such documents making or evidencing, the grants, fall to be examined in two distinct contexts, viz., the dispute may arise between the very parties to the written instrument, where on the construction of the deed one party contends that the transaction is a “licence” and the other that it is a “lease” and the intention to be gathered from the document read as a whole has, quite obviously, a direct bearing. It was contended that at best, it is a piece of evidence, the weight to be accorded to which will necessarily depend upon all the other circumstances of the case and in such a case the realities and substance of the transaction and not merely the deed, become the basis for the determination of the legal nature of the relationship and that the deed is a mere piece of evidence.

(LV) ***State of M.P and others Vs. Nandlal Jaiswal and others [(1986) 4 SCC 566]*** was cited to highlight that it has been held that if the form of a licence is prescribed, then of course, such form has to be followed, but if no form is prescribed, the only consequence is that the licence to be granted by the authority need not conform to any particular form.

(LVI) ***Shree Sidhali Steels Limited Vs. State of Uttar Pradesh [(2011) 3 SCC 193]*** was pressed into service to say that it has been held that a company not being a citizen has no fundamental right under Article 19 of the Constitution.

(LVII) ***Jamal Uddin Ahmad Vs. Abu Saleh Najmuddin and another [(2003) 4 SCC 257]*** was relied on to say that the Supreme Court held that every court is the guardian of its own records and the mater of its own practice and where a practice existed, it is convenient, except in cases of

extreme urgency and necessity, to adhere to it, because it is the practice, even though no reason can be assigned for it; for an inveterate practice in law generally stands upon principles that are founded in justice and convenience.

(LVIII) ***People's Union for Civil Liberties and another Vs. Union of India and others [(2004) 2 SCC 476]***, wherein the Supreme Court held that the court will not normally exercise its power of judicial review in such matters unless it is found that formation of belief by the statutory authority suffers from mala fides, dishonesty or corrupt practice, was pressed into service.

(LIX) ***State of Uttar Pradesh and others Vs. Rakesh Kumar Keshari and another [(2011) 5 SCC 341]*** was relied on to say that the Supreme Court has held that courts while exercising the power of judicial review do not sit in an appeal over the decisions of the administrative bodies and the court shall not ordinarily interfere with a policy decision of the State.

(LX) ***Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and others [AIR 1955 SC 233]*** was cited to emphasize principles touching upon when a writ of certiorari could be issued.

(LXI) ***Municipal Corporation of the City of Ahmedabad and others Vs. Jan Mohammed Usmanbhai and another [(1986) 3 SCC 20]*** was pressed into service to say that the Supreme Court held that there is always a presumption in favour of constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear violation of the constitutional principles, the courts must presume that the legislature understands and correctly appreciates the needs of its own people, that its

laws are directed against problems made manifest by experience and that its discriminations are based on adequate grounds.

(LXII) **Ajay Hasia and others Vs. Khalid Mujib Sehravardi and others [(1981) 1 SCC 722]** was cited to say that the Supreme court has held that the doctrine of classification which is evolved by the courts is not paraphrase of Article 14 nor is it the objective at the end of that Article, it is a merely a judicial formula for determining whether a legislative or executive action in question is arbitrary and therefore constituting denial of equality.

(LXIII) **Maneklal Chhotalal and others Vs. M.G. Makwana and others [AIR 1967 SC 1373]** wherein Supreme court said that the principles to be borne in mind in applying Articles 14 and 19 of the Constitution are now well settled, was also cited.

(LXIV) TRAI relied on a decision of the Supreme Court in **Union of India Vs. Tata Teleservices (Maharashtra) Ltd. [(2007) 7 SCC 517]** to say that even a person with a 'LOI' is considered licensee.

(LXV) **Deena alias Deen Dayal and others Vs. Union of India and others [(1983) 4 SCC 645]** case has been relied on by TRAI, wherein it has been held by the Supreme Court that Article 14, though apparently absolute in its terms, permits the State to pass a law which makes a classification, so long as the classification is based on intelligible differentia having a real nexus with the object which is sought to be achieved by the law. In the generality of cases under Article 14, the challenge is based on the allegation that the impugned provision is discriminatory since it singles out the petitioner for hostile treatment, from amongst persons who, being situated similarly,

belong to the same class as the petitioner. It is plain that in matters of this nature, the petitioner has to plead and prove that there are others who are situated similarly as him and that he is singled out and subjected to unfavourable treatment.

(LXVI) ***Vijay Narayan Thatte and others Vs. State of Maharashtra and others [(2009) 9 SCC 92]*** was pressed into service to contend that there can be no estoppel against a statute.

(LXVII) ***Shiv Chander More and others Vs. Lieutenant Governor and others [(2014) 11 SCC 744]*** was cited in support of res judicata plea.

(LXVIII) ***Indian Express Newspapers (Bombay) Private Ltd. And others Vs. Union of India and others [(1985) 1 SCC 641]*** was relied on to contend that subordinate legislation may be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary.

5(c) Case Laws pressed into service by Union of India together with proposition for which they were pressed into service are as follows :

(i) Learned Additional Solicitor General appearing for the Union of India relied on a decision of the Supreme Court in ***Hotel & Restaurant Assn. Vs. Star India (P) Ltd. [(2006) 13 SCC 753]*** to contend that TRAI exercises a broad jurisdiction. Its jurisdiction is not only to fix tariff but also laying down terms and conditions for providing services. He would further contend that a regulation may provide for cost, supply of service on non discriminatory basis, the mode and manner of supply making provisions for fair competition

providing for a level playing field, protection of consumers' interest, prevention of monopoly. Further, the interest of one of the players in the field would not be taken into consideration throwing the interest of others to the wind.

5(d) Case Laws pressed into service by intervenors together with proposition for which they were pressed into service are as follows :

Case Laws cited by the intervenor (All India Digital Cable Federation) :

(i) Learned Senior counsel appearing for the intervenor (All India Digital Cable Federation), who is supporting TRAI has also relied on the decision of the Supreme Court in ***Secretary, Ministry of Information & Broadcasting, Government of India and others Vs. Cricket Association of Bengal and others [(1995) 2 SCC 161]*** for the same proposition that airwaves are public property.

(ii) ***Hotel & Restaurant Assn. and another Vs. Star India (P) Ltd. and others*** reported in (2006) 13 SCC 753, wherein the Supreme Court held that TRAI exercises broad jurisdiction and it can fix norms and the mode and manner in which a consumer would get the services, was also pressed into service.

(iii) Learned senior counsel for the said intervenor relied on a decision of the Delhi High Court in ***Star India P. Ltd. Vs. Telecom Regulatory Authority of India and others [(2008) 146 DLT 455 (DB)]*** to contend that fixation of tariff by the authority is within their competence even in regard to broadcasters.

(iv) ***Bharat Sanchar Nigam Limited Vs. Telecom Regulatory***

Authority of India and others [(2014) 3 SCC 222] case was relied on by the learned Senior counsel to contend that the power vested in TRAI under Section 36(1) to make regulations is wide and pervasive.

(v) Learned senior counsel has relied on a decision of the Supreme Court in **Cellular Operators Association of India and others Vs. Union of India and others [(2003) 3 SCC 186]**, wherein it has been held that while the power of the Supreme Court as also of the High Court although is of wide amplitude, certain restrictions by way of self-discipline are imposed. Ordinarily, the power of judicial review can be exercised only when illegality, irrationality or impropriety is found in the decision-making process of the authority, is the further say in this regard.

(vi) Learned Senior counsel has relied on some judgments with regard to balance of convenience. They are : **Bhavesh D. Parish and others Vs. Union of India and another [(2000) 5 SCC 471]**; **Union of India Vs. Government of Tamil Nadu [(2013) 4 MLJ 721]** and **Madras Steel Re-rollers Association Vs. Union of India [2001 (129) ELT 316 (Mad.)]**.

Case Laws cited by the intervenor (Videocon d2h Limited) :

(vii) Learned Senior counsel for the intervenor relied on decisions of the Supreme Court in **Union of India Vs. Adani Exports Ltd. [(2002) 1 SCC 567]**; **Hasham Abbas Sayyad Vs. Usman Abbas Sayyad and others [(2007) 2 SCC 355]**; **Alchemist Ltd. and another Vs. State Bank of Sikkim and others [(2007) 11 SCC 335]**; **Nawal Kishore Sharma Vs. Union of India and others [(2014) 9 SCC 329]**; and **Indian Performing Rights**

Society Limited Vs. Sanjay Dalia and another [(2015) 10 SCC 161] with regard to territorial jurisdiction.

6. Summary of rival submissions :

6(a) Before embarking on a discussion of rival submissions, it is absolutely essential to have complete clarity about the prayer in the two writ petitions.

6(b) As would be evident from our narrative supra in this judgment, the prayer in the writ petitions has undergone change not once, but twice. Therefore, we deem it appropriate to set out the prayers ad verbatim. To be noted, prayers in two writ petitions are ad verbatim same. When writ petitions were filed on 23.12.2016, the prayer read as follows :

“Issue a Writ of Certiorarified mandamus or any other order writ or direction in the nature of a Writ of Certiorarified Mandamus calling for the records of Respondent No.4 in pertaining to the impugned consultation paper dated 10.10.2016, titled “Consultation on the draft Telecommunication (Broadcasting and Cable Services) (Eighth) (Addressable Systems) Tariff Order, 2016” and the consequential “Consultation Paper on the Draft Telecommunications (Broadcasting and Cable Services) Interconnection (Addressable Systems) Regulations 2016” dated 14.10.2016, and all proceedings connected therewith and set aside the same as being one without jurisdiction and ultra vires its powers under the Tariff Regulatory Authority of India Act, 1997 and consequently forbear them from in any manner notifying or giving effect to any regulation or tariff order which has the effect of regulating, determining or otherwise impacting content creation, generation, exploitation, licensing and terms and conditions for

exploitation of content and broadcast reproduction rights which are exclusively covered within the ambit, scope, jurisdiction, power and authority under the Copyright Act 1957 and pass such other writ, order or direction as the court may deem fit in the interest of justice.”

6(c) Thereafter, as set out by us in the narrative supra, the prayer was amended pursuant to the orders of this court dated 17.03.2017 in the amendment petitions. The amended prayer read as follows :

“to issue of Writ of Declaration or any other Writ, order or direction in the nature of a Writ of Declaration holding and declaring that the Provisions of the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017 notified on 03.03.2017 and the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017 notified on 03.03.2017 to the extent that they have the effect of regulating, determining or otherwise impacting content creation, generation, exploitation, licensing and terms and conditions for exploitation of content and broadcast reproduction rights and in particular,

I. Clauses 2(h), 2(j), 2(mm), 2(pp), 3 and 7 of the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017,

II. Clauses 2(f), 2(h), 2(zg), 2(zh) and 3 of the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017.

are unconstitutional and ultra vires the provisions of the TRAI Act, 1997 inasmuch as they are beyond the scope of the jurisdiction of TRAI conferred under the TRAI Act, 1997 and consequently quash the same and pass such other Writ, order or direction as the Court may deem fit in the interest of justice in the circumstances of the case....”

6(d) In the course of the hearing, we pointed out that it is not for the court to examine said regulations and said tariff order, identify the clauses which (according to the writ petitioners) have the effect of regulating, determining or otherwise impacting content creation, generation, exploitation, licensing and terms and conditions for exploitation of content and broadcast reproduction rights. We further pointed out that it is for the writ petitioners to set out the clauses which according to them impact the aforesaid aspects and advance their case on that basis. We had to necessarily point out this owing to the language in which the amended prayer supra was couched. We also pointed out that we can at best examine the constitutional validity and vires of the six clauses in said regulations and five clauses in said tariff order which have been specifically mentioned in the amended prayer. We also pointed out that many of the (6 + 5) 11 clauses are definition clauses. Faced with this situation, the writ petitioners sought time to examine this aspect of the matter.

6(e) Thereafter, Mr.P.Chidambaram, learned Senior Counsel leading the counsel on record for one of the writ petitioners placed before us a list of seven clauses in said regulations and eleven clauses in said tariff order. Learned Senior Counsel submitted that it would be appropriate to examine the constitutional validity and vires of these 7 and 11, 18 clauses in all. It is the further submission of learned Senior Counsel that 18 clauses pointed out by him are those which have the effect of regulating, determining or otherwise impacting content creation, generation, exploitation, licensing and terms and

conditions for exploitation of content and broadcast reproduction rights. Mr.P.Chidambaram, learned Senior counsel gave the aforesaid seven clauses in said regulations and eleven clauses in said tariff order (18 clauses in all) in the form of two separate tabular columns / tables and we deem it appropriate to reproduce the same :

Provisions of the Interconnection Regulation which Regulate content

<i>Sl.No.</i>	<i>Provision</i>	<i>Ground</i>
1.	6(1) All channels (pay channels and free-to-air channels) to be offered on a-la-carte basis.	Impinges upon broadcaster's ability to package a TV channel. No such restriction on broadcaster under Copyright Act.
2.	Second proviso to 6(1) - Bouquet of pay channels shall not have free-to-air channels. - HD and SD variant of same channel cannot be in same bouquet.	Impinges upon broadcaster's ability to package a TV channel. No such restriction on broadcaster under Copyright Act.
3.	Proviso to 7(2) – Bundling of third party channels prohibited.	Impinges upon broadcaster's ability to package a TV channel. No sch restriction on broadcaster under Copyright Act.
4.	7(4) – Broadcaster can offer discounts to distributor not exceeding 15% of MRP.	Directly regulates the pricing of a TV channel, thereby also regulating pricing of individual programmes.
5.	First proviso to 7(4) – Sum of discount under 7(4) and distribution fee under 7(3) shall not exceed 35% of MRP.	Directly regulates the pricing of a TV channel, thereby also regulating pricing of individual programmes.
6.	10(3) r/w 6(1) – Mandatory to enter into agreement with DPO on an a-la-carte basis for pay channels.	Impinges upon broadcaster's freedom to offer pay channels only as a part of bouquet and not as a-la-carte. No such restriction on broadcaster under Copyright Act.
7.	11(2) – Deemed extension of geographical territory.	Directly impinges the broadcaster's right under 19(2) to designate the geographical territory of exploitation.

Provisions of the Tariff Order which regulate content

<i>Sl.No.</i>	<i>Provision</i>	<i>Ground</i>
1.	3(1) – All channels to be offered on a-la-carte basis	Impinges upon broadcaster's ability to package a TV channel. No such restriction on broadcaster under Copyright Act.
2.	3(2)(b) – Declaration of MRP of a-la-carte channel	Impinges upon broadcaster's freedom to offer pay channels only as a part of bouquet and not as a-la-carte. No such restriction on broadcaster under Copyright Act.
3.	Second proviso to 3(2)(b) – MRP of all pay channels to be uniform across distribution platforms.	Under Section 33A read with Rule 56 of the Copyright Rules, 2013, broadcaster has the right to decide separate MRP for different category of audience.
4.	First proviso to 3(3) – Bundling of third party channels prohibited.	Impinges upon broadcaster's ability to package a TV channel. For example, third party channels cannot be part of the same bouquet. No such restriction on broadcaster under Copyright Act.
5.	Second proviso to 3(3) – MRP of pay channel in bouquet not to exceed INR 19/-	Directly regulates the pricing of a TV channel, thereby also regulating pricing of individual programmes.
6.	Third proviso to 3(3) – Bouquet price shall not be less than 85% of the sum of a-la-carte prices of individual channels in the bouquet.	Directly regulates the pricing of a TV channel, thereby also regulating pricing of individual programmes.
7.	Fourth proviso to 3(3) – MRP of all bouquets to be uniform across distribution platforms.	Under Rule 56 of the Copyright Rules, 2013, broadcaster has the right to decide separate MRP for different category of audience.
8.	Fifth proviso to 3(3) – Bouquet of pay channels shall not have free-to-air channels.	Impinges upon broadcaster's ability to package a TV channel. No such restriction on broadcaster under Copyright Act.
9.	Sixth proviso to 3(3) – HD and SD variant of same channel cannot be in same bouquet.	Impinges upon broadcaster's ability to package a TV channel. No such restriction on broadcaster under Copyright Act.
10.	3(4) – Restriction on promotion of bouquets, restriction on time, restriction on frequency.	All these restrictions impinge broadcaster's ability to commercially monetize his content.
11.	4(2) – Distributor to offer all channels on a-la-carte basis.	Indirectly impinges upon the broadcaster's right to offer his channels to the customers only as a bouquet and not as a-la-carte.

6(f) Learned Senior Counsel Mr.P.Chidambaram referred to the same as 'exemplified list of clauses in said regulations and said tariff order' as settled by him.

6(g) A perusal of the amended prayer extracted supra and the two tables will reveal that specific clauses referred to in the amended prayer and in what has been referred to as exemplified list by the learned Senior Counsel are vastly different. In the normal course, we would not have permitted the exemplified list to be treated as prayer in two writ petitions. However, in the instant case, we decided to do so for three reasons. One reason is that amended prayer assails said regulations and said tariff order to the extent that they have the effect of regulating, determining or otherwise impacting the content creation, generation, exploitation, licensing and terms and conditions for exploitation of content and broadcast reproduction rights. Now, as set out supra, learned Senior Counsel submitted that the aforesaid 18 clauses as contained in two tables alone are clauses which have the effect of regulating, determining or otherwise impacting the content creation, generation, exploitation, licensing and terms and conditions for exploitation of content and broadcast reproduction rights. The second reason is Hon'ble Supreme Court in and by its order dated 08.05.2017 made in S.L.P.(C) Nos.14336 of 2017 and 14464 of 2017 inter-alia requested us to hear the matter on a day to day basis and expedite delivery of judgment. Further procedural delays in such a scenario had to be avoided. The third reason is all parties to the lis agreed to the aforesaid 18 clauses being treated as impugned clauses and all parties agreed that the scope of the writ petitions shall be to test the constitutional

validity and vires qua TRAI Act of the aforesaid 18 clauses contained in two tables.

6(h) To be noted, Dr. Abhishek Singhvi, learned Senior counsel leading the counsel on record for the other writ petitioner also submitted that the aforesaid 18 clauses in said regulations and said tariff order and challenge to their constitutional validity and vires qua TRAI Act shall be the scope of the writ petition, in his matter too.

6(i) Submissions of writ petitioners can be broadly summarised in simplified terms as follows :

(a) Writ petitioners are not assailing the impugned clauses on merits (to be noted, aforesaid seven clauses in said regulations and eleven clauses in said tariff order, totaling 18 clauses in all, are collectively referred to as 'impugned clauses' for the sake of convenience and clarity). Qua impugned clauses, writ petitioners do not seek adjudication on merits.

(b) As a corollary to the aforesaid point, it is the specific case of writ petitioners that TRAI exercising powers under Sections 11 and 36 of TRAI Act can regulate only carriage or means of transmission, but cannot regulate content. It is the specific case of the writ petitioners that impugned clauses regulate content which according to the writ petitioners is impermissible.

(c) It is the case of the writ petitioners that the content of their programmes / broadcast is covered and controlled solely by the Copyright Act, which recognised two distinct rights, one being copyright and the other being broadcast reproduction right ('BRR' for brevity). To make it a little more

specific, we refer to writ petitioners' submissions on Copyright Act and Copyright Rules, 2013 thereunder. Writ petitioners make a specific reference to amendments to Copyright Act on and with effect from 21.6.2012. Based on 21.6.2012 amendments to the Copyright Act, it is the say of the writ petitioners that when section 33-A of the Copyright Act and Rule 56 of the Copyright Rules are extended and applied to BRR with necessary modifications and adaptations, it becomes clear that the scheme to prescribe tariff for BRR is now specifically provided under the Copyright Act and that the authority in this regard is the Copyright Board under the Copyright Act. In this regard, it is to be noted that according to the writ petitioners, television channel itself is BRR.

(d) Writ petitioners emphatically assert that Copyright Act and TRAI Act operate in two entirely different realms and the respective realms are clear watertight compartments. According to the writ petitioners, while Copyright Act deals with content and substantive right related thereto, TRAI Act deals with carriage of such content through various network and infrastructure, i.e., means of transmission.

(e) It is not the case of the writ petitioners that TRAI has no power to regulate at all. It is the say of writ petitioners that broadcasting services are no doubt 'telecommunication service' within the meaning of Section 2(1)(k) of TRAI Act. In other words, TRAI is empowered to regulate the means of transmission.

(f) As a corollary to realms in which TRAI Act and Copyright Act operate being watertight compartments, plea of the writ petitioners in this regard is

that while TRAI Act has been enacted under Entry 31 of List I of Seventh Schedule of the Constitution of India (hereinafter referred to as 'COI' for brevity), Copyright Act has been enacted under Entry 49 of the same list of COI and therefore, BRR which is akin to Copyright Act is also recognised under the Copyright Act which is traceable to powers under Entry 49.

6(j) Mr.P.Wilson, learned Senior counsel and Mr.Saket Singh, learned counsel have made submissions for TRAI and their submissions in simplified terms can be summarised as follows:

(a) This Court, i.e., Madras High Court does not have territorial jurisdiction to entertain the instant writ petitions as according to TRAI, no part of cause of action has arisen within the territorial jurisdiction of this Court.

(b) Writ petitioners being foreign companies cannot maintain the instant writ petitions particularly when constitutional validity of certain clauses in a subordinate legislation are assailed inter-alia by taking recourse to Article 19 of COI.

(c) Writ petition of Star India, i.e., W.P.No.44126 of 2016 is hit by res judicata in the light of the reported judgment dated 09.07.2007 in **Star India P. Ltd. Vs. Telecom Regulatory Authority of India and others [(2008) 146 DLT 455 (DB)]** wherein a Division Bench of Delhi High Court held that fixation of tariff by TRAI for broadcasters is valid. There is no dispute that this judgment has attained finality.

(d) According to TRAI, writ petitions are hit by the doctrine of constructive res judicata too in the light of the ratio laid down in the judgment

of TDSAT in **Noida Software Technology Park Ltd. Vs. Media Pro Enterprise India Pvt. Ltd.**, being Petition No.295(C) of 2014, dated 07.12.2015, wherein BRR vis-a-viz regulations / tariff orders notified by TRAI were dealt with.

(e)As the writ petitioners have an efficacious alternate remedy of approaching the Telecom Disputes Settlement and Appellate Tribunal ('TDSAT' for brevity), the instant writ petitions under Article 226 of the COI are not maintainable in this court.

(f)Writ petitioners having participated in the consultation process and having requested TRAI to undertake the exercise qua said regulations and said tariff order cannot now be heard to contend that they assail certain clauses of the same as according to TRAI, writ petitions are hit by the doctrine of acquiescence.

(g)Writ petitioners are guilty of suppression as they have not disclosed the order suffered by them in the NSTPL case before TDSAT.

(h)There is no cause of action for the writ petitioners as according to TRAI, there is no pleading in the affidavits with regard to how the impugned clauses of said regulations and said tariff order have prejudiced, affected / infringed the rights of writ petitioners.

(i)Impugned clauses do not regulate the content as television channels are separate products by themselves. The activities (line of business activities) of writ petitioners in the light of uplinking and downlinking are pursuant to permission given by Government of India, which is traceable to Section 4(1) of the Indian Telegraph Act, 1885 and having obtained a license

under the Telegraph Act, which stipulates that writ petitioners are bound by regulations of TRAI, writ petitioners cannot assail clauses in said regulations and said tariff order.

(j) Said regulations and said tariff order have been made in public interest keeping in mind the larger public interest and therefore, is protected by the public trust doctrine. In other words, it is the say of TRAI that airwaves / spectrum being public resources have to be uniformly distributed and that regulation of manner of carriage of electromagnetic waves of television channel and fixing of tariff for such offering is clearly protected by the public trust doctrine.

(k) Mr. P. Wilson, learned senior counsel also referred to the license agreement under Section 4 of the Indian Telegraph Act, 1885 and took us through various provisions of the same, particularly provisions which say that broadcasters are bound by the regulatory authority, its regulations and orders.

6(k) Submissions of learned Additional Solicitor General of India Mr. G. Rajagopalan representing official respondents 1 to 3 (Union of India) is to the effect that TRAI is a specialized statutory body created under the statute and when it has come up with said regulations and said tariff order after detailed consultation and when TRAI emphatically says that said regulations and said tariff order have been made in public interest, the same should not be allowed to be assailed in writ petitions impelled by business interest of writ petitioners.

6(l) Mr.Vijay Narayan, learned Senior Counsel for Mr.Joseph George Mayiladumpara of M/s.King and Partridge appearing for one of the intervenors being Videocon d2h Limited made submissions supporting TRAI and impugned clauses. Those submissions can be broadly summarised as follows :

(i)This Court lacks territorial jurisdiction. Writ petitioners have laid the instant writ petitions on the assumption that said regulations and said tariff order are intrinsically interlinked which is incorrect and therefore, the writ petitions must fail.

(ii)Notifications being S.O.44(E) and S.O.45(E) dealing with broadcasting services being brought under telecommunication services definition under the TRAI Act and amplifying of powers of TRAI qua Section 11 by empowering TRAI to make regulations with regard to broadcasting services and cable services also ought to have been challenged. In the absence of challenge to S.O.44(E) and S.O.45(E), writ petitioners cannot be heard to contend and assail the impugned clauses.

(iii)The impugned clauses do not overlap with BRR under the Copyright Act as BRR comes into play only when the signal reaches the end users or at least to STB of the end users.

(iv)The rights under the Copyright Act are subject to all other laws in force and therefore, rights, if any under the Copyright Act, are subject to TRAI Act.

(v) Section 33-A of the Copyright Act is only intended to bring in transparency and writ petitioners cannot press into service the provision, i.e., Section 33-A of the Copyright Act for assailing impugned clauses.

6(m) Mr.A.R.L.Sundaresan, learned Senior Counsel appearing for M/s.Dua Associates being counsel on record for All India Digital Cable Federation, another intervenor, supported the submissions of TRAI. Learned Senior Counsel submitted that the Federation he represents is an association of MSOs, which are distribution platforms. Besides supporting the submissions made by TRAI, crux of the argument of the learned Senior Counsel was that the Copyright Board and Copyright society under the Copyright Act are not competent authorities to regulate or to fix the tariff in the broadcasting and cable sector notwithstanding the 21.6.2012 amendment to the Copyright Act. It was asserted that the impugned clauses seek to regulate only the transmission and not the content.

6(n) Learned counsel Mr.Krishna Srinivasan of M/s.S.Ramasubramaniam and Associates represented another intervenor which goes by name Indian Broadcasting Foundation ('IBF' for brevity). It was submitted by Mr.Krishna Srinivasan that IBF has in its fold members numbering 56, all of whom are broadcasters and that these members own 377 television channels amongst them. It was submitted that all the members of IBF are united in their opposition of the impugned clauses in which said regulations and said tariff order and that the submissions made by two

learned Senior counsel on behalf of two writ petitioners are reiterated and supported.

DISCUSSION :

7(a) With regard to the technical objection of TRAI and one of the intervenors (Videocon d2h) that this Court does not have territorial jurisdiction to entertain the instant writ petitions, we overrule the same for two simple reasons. One reason is that the impugned clauses are part of subordinate legislations made by a statutory body in exercise of its subordinate legislation making power under a Central Act, namely, TRAI Act. In the light of Article 226 of COI as it originally existed in the COI and the constitutional amendment it went through over a period in time, it does not need much discussion to say that territorial jurisdiction will not come in the way whenever constitutional validity and vires of Central enactments (in this case, it is subordinate legislations under a Central enactment) are assailed. The other reason for us to overrule this technical objection is that this objection is preliminary in nature. We are not at Rule Nisi stage. Pleadings are complete and these writ petitions have been taken up for final disposal. Most importantly, both these writ petitions have been taken up for final disposal pursuant to orders of the Hon'ble Supreme Court dated 08.05.2017 made in S.L.P(C) Nos.14336 of 2017 and 14464 of 2017. Therefore, even a plea to examine issues of territorial jurisdiction at this stage is undoubtedly untenable.

7(b) With regard to the objection to the instant writ petitions on the

ground of alternate remedy (an appeal to TDSAT) which according to TRAI is efficacious, we overrule that preliminary objection also for the same set of reasons which have impelled us to overrule the territorial jurisdiction plea. We have articulated the same supra.

7(c) With regard to the plea that the instant writ petitions are liable to be dismissed as being hit by res judicata and constructive res judicata, particularly in the light of judgment of a Division Bench of the Delhi High Court in **Star India P. Ltd. Vs. Telecom Regulatory Authority of India and others [(2008) 146 DLT 455 (DB)]**, we notice that this plea has been made on the basis that fixation of tariff by TRAI for broadcasters was upheld by a Division Bench of the Delhi High Court in the said **Star India** judgment, wherein one of the writ petitioners, i.e., STAR India Private Limited (writ petitioner in W.P.No.44126 of 2016) was the petitioner.

7(d) In the celebrated **Devilal Modi Vs. Sales Tax Officer, Ratlam and others [AIR 1965 SC 1150]** case, Hon'ble Mr. Justice Gajendragadkar, as His Lordship then was, speaking for the Constitution Bench of the Supreme Court of India, held that assessment orders passed under the Sales Tax Act for successive assessment years can be assailed on new points, though all assessment orders are passed under the same provision of law. In this very judgment, the Constitution Bench of Hon'ble Supreme Court also held that in cases of this nature, doctrine of res judicata and constructive res judicata are not to be applied strictly to proceedings under Articles 226 and 32 of the COI.

7(e) To be noted, this very judgment, i.e., **Devilal Modi** case was relied on by TRAI too to say that res judicata postulates that if a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding which is based on the same cause of action. The fact situation in **Devilal Modi's** case was challenge to an assessment order made under an indirect taxation Statute. In other words, the matter is under fiscal law where the principle of construing certain provisions are slightly different. Be that as it may, notwithstanding the position that the instant case is not under fiscal law and the instant case is a challenge to the vires of subordinate legislation, we deem it appropriate to see the constitutional determination in **Devilal Modi** case as it is a Constitution Bench judgment. In our understanding, the constitutional determinants is doctrine of res judicata and constructive res judicata are not to be applied strictly to proceedings under Articles 226 and 32 of the COI. Therefore, we are taking the view that res judicata will not come in the way, keeping in mind the peculiar facts and circumstances of this case, as this matter relates to challenge to provisions in subordinate legislations under a Central statute, wherein Supreme Court has requested us to hear the matter as set out supra when an order in interlocutory proceedings in this very writ petitions was carried to Supreme Court.

7(f) Challenge to a provision of law (in the instant case, the provisions of subordinate legislations under a Central statute) itself is pivoted

on public law principle. If a litigant had missed that there is infraction of some of the provisions of Part III of the COI or any other provisions of COI in its first attempt of a challenge to the legislation, it may be too harsh (in the light of public law principle) to say that the same litigant cannot bring it to the notice of the Court that it does infract certain provisions of COI and principles enshrined in COI, particularly when such a plea is predicated on the basis that it is owing to subsequent amendment to a Statute, i.e., Copyright Act in this case. This principle applies to lack of legislative competence too. In any event, in the instant case, the petitioners' plea, as alluded to supra is that the present grounds of challenge were not available to them earlier as it was prior to amendment to Copyright Act and we find the same tenable enough for dislodging the res judicata and constructive res judicata plea.

7(g) In this regard, we have noticed that the aforesaid judgment of the Division Bench of Delhi High Court, i.e., ***Star India P. Ltd. Vs. Telecom Regulatory Authority of India and others* [(2008) 146 DLT 455 (DB)]**, is dated 9.7.2007, whereas the Copyright Act was amended on and with effect from 21.6.2012. Many of the submissions, in fact, sheet anchor submissions on behalf of writ petitioners were made on the basis of amendments that were brought into the Copyright Act on and with effect from 21.6.2012. Obviously, these points were not available for the writ petitioner before the Division Bench of Delhi High Court. Therefore, without delving more into the judgment of the Division Bench of Delhi High Court, we overrule this objection inter-alia on the ground that several new points and pleas have now been raised in the wake of amendments to Copyright Act on 21.6.2012.

7(h) As would be evident from our narrative supra, the instant writ petitions were originally filed, assailing the consultation papers. Thereafter, pending writ petitions, consultation papers were carried to their logical end and were ultimately notified on 03.03.2017. This Court permitted the writ petitioners to amend the prayer and assail said regulations and said tariff order. This order of this court permitting writ petitioners to amend the prayer has been given legal quietus. Therefore, the plea of doctrines of acquiescence and estoppel coming in the way of writ petitioners does not carry much weight and we overrule the same.

7(i) As would be evident from the case laws cited by parties to the lis enumeration of which have been made supra, TRAI did make an attempt to say that the amendment to the prayers are impermissible. As would be further evident from our narrative supra, the amendment to the prayers was allowed by a Division Bench of this Court by way of a judicial order in W.M.P.No.6049 of 2017 in W.P.No.44126 of 2016 and W.M.P.No.6053 of 2017 in W.P.No.44127 of 2016 on 17.03.2017 and this has been given complete quietus. After giving legal quietus to this judicial order, the main matter has been heard for final disposal. Therefore, we are of the considered view that TRAI cannot now be heard to contend that prayer for amendment to the prayers ought not to have been acceded to.

7(j) Considering the fact that these are writ petitions assailing certain clauses in subordinate legislations made under regulation making

powers under a Central Act, that too on grounds of jurisdiction (not even on merits), the plea of suppression cannot be propelled to the extent of seeking dismissal of writ petitions and therefore, we overrule that objection too.

7(k) Writ petitioners are broadcasters owning several television channels in as many as eight languages which are indisputably being beamed within the territorial jurisdiction of this court also. Writ petitioners have specifically pleaded that impugned clauses in said regulations and said tariff order impact their content creation, generation, exploitation of content, licensing terms and broadcast reproduction rights. In fact, this is articulated in the amended prayer which has taken final shape as alluded to supra. Therefore, the plea that writ petitions have to be dismissed on the ground of lack of cause of action does not merit any consideration and we have no hesitation in overruling the same.

7(l) Learned Senior counsel appearing for TRAI relied on **Bachan Singh** case (supra) to say that the primary function of the courts is to interpret and apply laws according to the will of those who made them. In the said judgment itself, it has been further held that even where the burden is on the State to show that the restriction imposed by the impugned statute is reasonable and in public interest, the extent and the manner of discharge of the burden necessarily depends on the subject-matter of the legislation, the nature of inquiry, scope and limits of judicial review.

7(m) In ***People's Union for Civil Liberties*** (supra) with regard to the power of the Court to set aside an order, it has been held that the order can be set aside if it is held to be beyond the limits for which the power has been conferred upon the authorities by the legislature or is based on grounds extraneous to the legislation and if there are no grounds at all for passing it or if the grounds are such that no one can reasonably arrive at the opinion or satisfaction required thereunder.

7(n) With regard to reasonable restrictions, the Supreme Court in ***Maneklal Chhotalal*** (supra) held that a fundamental right to acquire, hold and dispose of the property can be controlled by the State only by making a law imposing, in the interest of the general public, reasonable restrictions on the exercise of the said right, the reasonableness of restriction shall be tested both from substantive and procedural aspects, if an uncontrolled or unguided power is conferred and without any reasonable and proper standards or limits being laid down in the enactment, the statute may be challenged as discriminatory.

7(o) With regard to principles governing interpretation of statutes, TRAI has placed before us various judgments enumeration of which have been done by us in the dedicated individual paragraphs supra. These principles are well settled over a period of time and considering the issues in the instant case, it does not call for any detailed discussion in this regard.

7(p) This takes us to the core / sheet anchor contention that the impugned clauses regulate content, while TRAI exercising power under the TRAI Act has powers only to regulate carriage or means of transmission. The legal basis for this submission of writ petitioners (which according to us is the bedrock of this lis) is that programmes aired / beamed in their television channels have content which is either created by writ petitioners themselves or procured from third parties at a huge cost and such content is governed solely by the Copyright Act. As a sequitur, writ petitioners contend that the content in their programmes is outside the ambit of TRAI Act and that it is completely / comprehensively governed by the Copyright Act.

7(q) To examine the aforesaid aspect of the matter, it is to be noticed that content is 'work' within the meaning of Section 2(y) of the Copyright Act and that broadcast of the same is broadcast reproduction right as contained in Section 37 of the Copyright Act. We notice that said regulations and said tariff order have been made by TRAI in exercise of powers under Sections 11 and 36 of TRAI Act. Therefore, we set out to examine whether said regulations and said tariff order actually regulate content and as to whether Sections 11 and 36 of TRAI Act empower TRAI to make said regulations and said tariff order at all.

7(r) Statement of Objects and Reasons ('SOR' for brevity) of TRAI Act reads as follows :

“Statement of Objects and Reasons.- In the context of the National Telecom Policy, 1994, which amongst other things,

stresses on achieving the universal service, bringing the quality of telecom services to world standards, provisions of wide range of services to meet the customers' demand at reasonable price, and participation of the companies registered in India in the area of basic as well as value added telecom services as also making arrangements for protection and promotion of consumer interest and ensuring fair competition, there is a felt need to separate regulatory functions from service providing functions which will be in keeping with the general trend in the world. In the multi-operator situation arising out of opening of basic as well as value added services in which private operator will be competing with Government operators, there is a pressing need for an independent telecom regulatory body for regulation of telecom services for orderly and healthy growth of telecommunication infrastructure apart from protection of consumer interest.

2. In view of above, it was proposed to set up an independent Telecom Regulatory Authority as a non-statutory body and for that purpose the Indian Telegraph (Amendment) Bill, 1995 was introduced and then passed by Lok Sabha on 6th August, 1995. At the time of consideration of the aforesaid Bill in Rajya Sabha, having regard to the sentiments expressed by the Members of Rajya Sabha and of the views of the Standing Committee on Communication which expressed a hope that steps will be taken to set up a Statutory Authority, it is proposed to set up the Telecom Regulatory Authority of India as a statutory authority.

3. The proposed Authority will consist of a Chairperson and minimum two and maximum four members. A person who is or has been a Judge of the Supreme Court or Chief Justice of a High Court will be eligible to be appointed as a Chairperson of the authority. A member shall be a person who has held the post of Secretary or Additional Secretary to the Government of India or any equivalent post in the Central Government or the State Government for a minimum period of three years.

4.The powers and functions of the Authority, *inter alia*, are---

(i)ensuring technical compatibility and effective inter-relationship between different service providers;

(ii)regulation of arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;

(iii)ensuring compliance of license conditions by all service providers;

(iv)protection of the interest of the consumers of telecommunication service;

(v)settlement of disputes between service providers;

(vi)fixation of rates for providing telecommunication service within India and outside India;

(vii)ensuring effective compliance of universal service obligations.

5.The Authority shall have an inbuilt dispute settlement mechanism including procedure to be followed in this regard as well as a scheme of punishment in the event of non-compliance of its order.

6.The Authority will have to maintain transparency while exercising its powers and functions. The powers and functions would enable the Authority to perform a role of watchdog for the telecom sector in an effective manner.

7.In order that the Authority functions in a truly independent manner and discharges its assigned responsibilities effectively, it is proposed to vest the Authority with a statutory status.

8.As the Parliament was not in session, the President promulgated the Telecom Regulatory Authority of India Ordinance, 1996 on th 27th January, 1996 for the aforesaid purpose.

9.The Bill seeks to replace the said Ordinance.”

7(s) Section 11 of TRAI Act which deals with functions of TRAI reads as follows :

“11.Functions of Authority.-- [(1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to -

(a) make recommendations, either *suo motu* or on a request from the licensor, on the following matters, namely:-

(i) need and timing for introduction of new service provider;

(ii) terms and conditions of license to a service provider;

(iii) revocation of license for non-compliance of terms and conditions of license;

(iv) measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;

(v) technological improvements in the services provided by the service providers;

(vi) type of equipment to be used by the service providers after inspection of equipment used in the network;

(vii) measures for the development of telecommunication technology and any other matter relatable to telecommunication industry in general;

(viii) efficient management of available spectrum;

(b) discharge the following functions, namely: -

(i) ensure compliance of terms and conditions of license;

(ii) notwithstanding anything contained in the terms and conditions the license granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, fix the terms and conditions of inter-connectivity between the service providers;

(iii) ensure technical compatibility and effective inter-connection between different service providers;

(iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;

(v) lay down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service;

(vi) lay down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;

(vii) maintain register of inter-connect agreements and of all such other matters as may be provided in the regulations;

(viii) keep register maintained under clause (vii) open for inspection to any member of public on payment of such fee and compliance of such other requirement as may be provided in the regulations;

(ix) ensure effective compliance of universal service obligations;

(c) levy fees and other charges at such rates and in respect of such services as may be determined by regulations;

(d) perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act:

Provided that the recommendations of the Authority specified in clause (a) of this sub-section shall not be binding upon the Central Government:

Provided further that the Central Government shall seek the recommendations of the Authority in respect of matters specified in sub-clauses (i) and (ii) of clause (a) of this sub-section in respect of new license to be issued to a service

provider and the Authority shall forward its recommendations within a period of sixty days from the date on which that Government sought the recommendations:

Provided also that the Authority may request the Central Government to furnish such information or documents as may be necessary for the purpose of making recommendations under sub-clauses (i) and (ii) of clause (a) of this sub-section and that Government shall supply such information within a period of seven days from receipt of such request:

Provided also that the Central Government may issue a license to a service provider if no recommendations are received from the Authority within the period specified in the second proviso or within such period as may be mutually agreed upon between the Central Government and the Authority:

Provided also that if the Central Government, having considered that recommendation of the Authority, comes to a *prima facie* conclusion that such recommendation cannot be accepted or needs modifications, it shall refer the recommendation back to the Authority for its reconsideration, and the Authority may, within fifteen days from the date of receipt of such reference, forward to the Central Government its recommendation after considering the reference made by that Government. After receipt of further recommendation if any, the Central Government shall take a final decision.]

(2) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the Authority may, from time to time, by order, notify in the Official Gazette the rates at which the telecommunication services within India and outside India shall be provided under this Act including the rates at which messages shall be transmitted to any country outside India:

Provided that the Authority may notify different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid the Authority shall record the reasons therefor.

(3) While discharging its functions [under sub-section (1)

or sub-section (2)], the Authority shall not act against the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.

(4) The Authority shall ensure transparency while exercising its powers and discharging its functions.”

7(t) Section 36 of TRAI Act which is regulation making power of TRAI reads as follows :

“36.Power to make regulations.-- (1)The Authority may, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the purposes of this Act.

(2)In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:-

(a)the times and places of meetings of the Authority and the procedure to be followed at such meetings under sub-section (1) of section 8, including quorum necessary for the transaction of business;

(b)the transaction of business at the meetings of the Authority under sub-section (4) of section 8;

(c)[x x x]

(d)matters in respect of which register is to be maintained by the Authority [under sub-clause (vii) of clause (b)] of sub-section (1) of section 11;

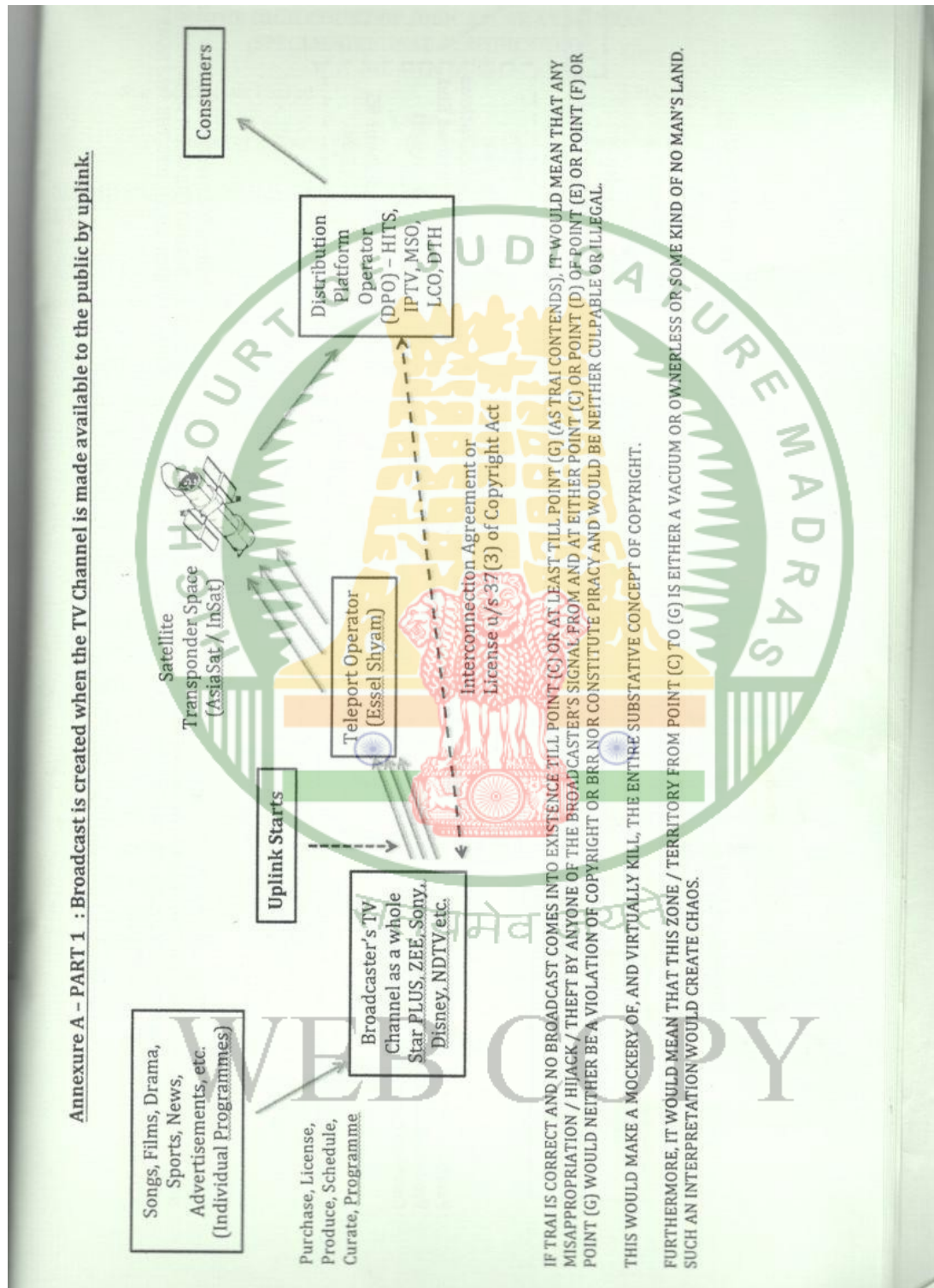
(e)levy of fee and lay down such other requirements on fulfilment of which a copy of register may be obtained [under sub-clause (viii) of clause (b)] of sub-section (1) of section 11;

(f)levy of fees and other charges [Under clause (c)] of sub-section (1) of section 11.”

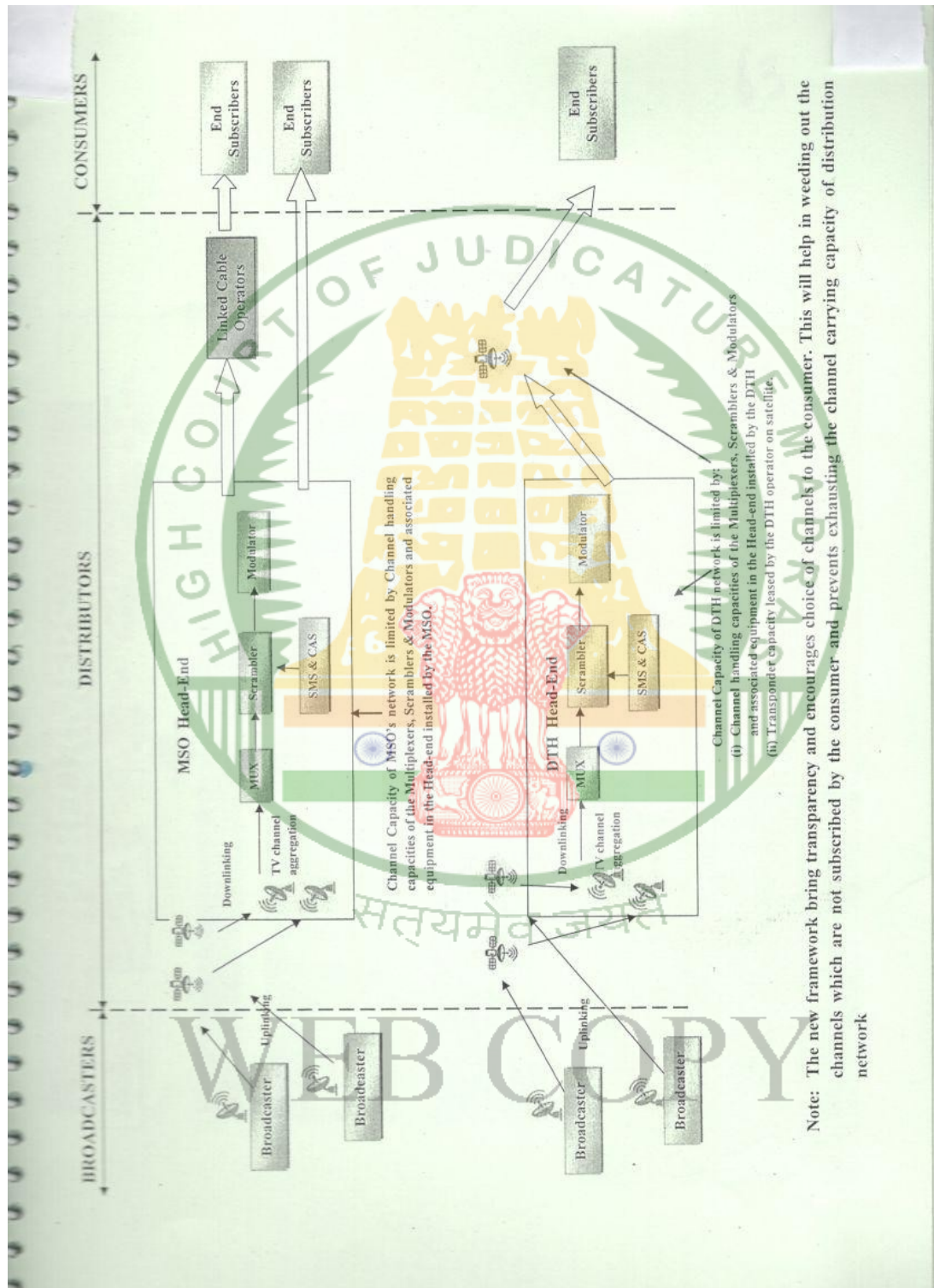
7(u) Normally, when such provisions of law pertaining to Rule / regulation making power are made, sub-section (1) is generally to the effect that the authority has powers to do all that is necessary to further and implement the SOR. Sub-section (2) will give various heads under which such powers can be exercised. The law is well settled that in cases of this nature, various heads adumbrated / enumerated in sub-section (2) are illustrative and if a given function does not fit into any one of the heads, recourse can always be taken to sub-section (1). Therefore, a conjoint reading of SOR with Sections 11 and 36 of TRAI Act puts it beyond any pale of doubt that TRAI does have power to regulate television channels qua their transmission.

7(v) TRAI in its pleadings, i.e., in its counter affidavit has interestingly pleaded that it is not regulating content, that content no doubt is covered by the Copyright Act, that TRAI is pricing and regulating television channels only and that regulations do not infringe upon the copyright or BRR of writ petitioners. In other words, the stated position of TRAI is that the writ petitioners qua their television channels have copyright and BRR, but vide said regulations and said tariff order, TRAI is not regulating the copyright or BRR, but is regulating only means of transmission, i.e., carriage. However, it is the specific case of the writ petitioners that said regulations and said tariff order in fact infringe upon copyright and BRR of writ petitioners. In support of their respective stated positions, writ petitioners and TRAI have placed before us charts regarding technical aspects of beaming sequence and distribution.

7(w) Chart as placed before us by writ petitioners is as follows :



7(x) Chart as placed before us by TRAI is as follows :



7(y) Adverting to the chart, writ petitioners contend that the content of their programmes are produced at huge costs or are acquired at huge cost and they submit that unless they are permitted to price their television channels depending on the content, it would not be viable and they may not be able to survive in the industry. Per contra, relying on the chart placed before us, TRAI contends that BRR comes into existence only when signal beamed by broadcasters (writ petitioners in the instant case) reaches the STBs of the end users and there is no BRR prior to that.

7(z) We also examined the impugned clauses in the said regulations and said tariff order closely. One thing that emerged / came out very clearly from a close examination of impugned clauses in said regulations and said tariff order was that TRAI has not fixed any upper limit or cap for the writ petitioners in pricing their channels. Further more, TRAI has left it to the discretion of writ petitioners or similarly placed broadcasters to declare any particular channel as a pay channel. In other words, it is open to writ petitioners and other similarly placed broadcasters to declare any of their channels either as pay channel or as free to air (FTA) channel and only when the particular pay channel is put in a bouquet, it cannot be priced at more than Rs.19/- per month per subscriber.

7(aa) There is no compulsion that pay channels should be offered only in bouquets. Therefore, if the cost of the content of a particular channel is very high and if the content is so exclusive and exquisite, nothing prevents the writ petitioners from declaring the particular channel as pay channel and pricing the same at whatever price that is deemed viable and profitable for

writ petitioners. To this, Mr.P.Chidambaram, learned senior counsel appearing for one of the writ petitioners, drew our attention to the consultation paper / explanatory memorandum of TRAI and said that the indisputable position qua the market, even according to TRAI is that it is driven by bouquets.

7(ab) Be that as it may, writ petitioners relied heavily on the judgment of Hon'ble Supreme Court of India in ***Cellular Operators Association of India and others Vs. Telecom Regulatory Authority of India and others*** reported in (2016) 7 SCC 703, which has now come to be known in popular parlance as 'Call drop case'. Writ petitioners drew our attention to paragraphs 80 and 92 of the said case and we deem it appropriate to extract the same as under :

“80. Section 11(4) of the Act requires that the Authority shall ensure transparency while exercising its powers and discharging its functions. “Transparency” has not been defined anywhere in the Act. However, we find, in a later parliamentary enactment, namely, the Airports Economic Regulatory Authority of India Act, 2008, that Section 13 deals with the functions of the Airports Economic Regulatory Authority (which is an Authority which has legislative and administrative functions). “Transparency” is defined, by sub-section (4), as follows:

The Airports Economic Regulatory Authority of India Act, 2008

“13. **Functions of Authority.**—(1)-(3) * * *

(4) The Authority shall ensure transparency while exercising its powers and discharging its functions, inter alia—

(a) by holding due consultations with all stakeholders with the airport;

- (b) by allowing all stakeholders to make their submissions to the authority; and
- (c) by making all decisions of the authority fully documented and explained.”

X X X X X X X X X

92. We find that, subject to certain well-defined exceptions, it would be a healthy functioning of our democracy if all subordinate legislation were to be “transparent” in the manner pointed out above. Since it is beyond the scope of this judgment to deal with subordinate legislation generally, and in particular with statutes which provide for rule making and regulation making without any added requirement of transparency, we would exhort Parliament to take up this issue and frame a legislation along the lines of the US Administrative Procedure Act (with certain well-defined exceptions) by which all subordinate legislation is subject to a transparent process by which due consultations with all stakeholders are held, and the rule or regulation-making power is exercised after due consideration of all stakeholders’ submissions, together with an explanatory memorandum which broadly takes into account what they have said and the reasons for agreeing or disagreeing with them. Not only would such legislation reduce arbitrariness in subordinate legislation-making, but it would also conduce to openness in governance. It would also ensure the redressal, partial or otherwise, of grievances of the stakeholders concerned *prior* to the making of subordinate legislation. This would obviate, in many cases, the need for persons to approach courts to strike down subordinate legislation on the ground of such legislation being manifestly arbitrary or unreasonable.”

7(ac) TRAI submitted that the Call drop case cannot be pressed into service by writ petitioners in the instant writ petitions, as according to TRAI, it

is clearly distinguishable on facts. Learned senior counsel for TRAI would point out that Call drop case is one where, on facts, it was conceded that customers are responsible for Call drops inasmuch as 36.9% of the call drops were owing to customers and therefore it would not be appropriate to penalise the operators for call drops. While this reference to the factual matrix is correct, we are unable to agree that principles qua subordinate legislation making powers and subordinate legislation making itself eloquently elucidated and elegantly articulated by Hon'ble Supreme Court inter-alia by referring to various sources, such as *corpus juris secundum* cannot be looked into for the purpose of deciding this case. These are extremely salient and sanctus principles elucidated by the Hon'ble Supreme Court qua subordinate legislation making powers and exercise of the same by a regulatory authority. Therefore, we deem it appropriate to apply the principles to the instant case, more so as Supreme Court was dealing with this very regulation making power and functions of this very Regulating Authority, i.e., TRAI under this very statute, i.e, TRAI Act. We shall do so infra in this judgment.

7(ad) What we have said of the Call drop case applies in equal force without any exception to ***Bharat Sanchar Nigam Limited Vs. Telecom Regulatory Authority of India and others*** reported in (2014) 3 SCC 222 and ***Petroleum and Natural Gas Regulatory Board Vs. Indraprastha Gas Limited and others*** being the case reported in (2015) 9 SCC 209. The principle of precedents which we have said of Call drop case applies to these two cases too. This principle of precedents needs no qualification and admits no exception. In ***Indraprastha Gas Limited*** case, the Supreme Court in

paragraphs 22 to 24 and paragraphs 37 to 39 articulated the scope of regulation making power of a regulatory authority and gave its conclusion in paragraph 44 of the said judgment. We deem it appropriate to reproduce the said paragraph along with paragraphs 4, 8.1 and 53. In other words, paragraphs 4, 8.1, 22 to 24, 37 to 39, 44 and 53 of **Indraprastha Gas Limited** need to be extracted and we do so infra.

“4. The High Court observed that the question for adjudication was basically whether the Act authorises the Board to pass such an order and whether the intention of the legislature is to confer the power of price fixation on the Board. The High Court referred to Section 11 of the Act and came to hold that: (*Indraprastha Gas Ltd. Case* [2012 SCC OnLine Del 3215] , SCC OnLine Del para 27)

“27. We thus conclude that the PNGRB Act does not confer any power on the Board to fix/regulate price of gas as has been done vide the impugned order dated 9-4-2012. Having held so, we do not deem it necessary to deal with the other Regulations impugned in the writ petition and suffice it is to state that any provision therein having the effect of empowering the Board to fix the price or the network tariff or compression charges for CNG, as long as not transportation rate, is beyond the competence of the Board and ultra vires the PNGRB Act and of no avail.”

“30. We thus allow this writ petition to the extent of holding that the Petroleum and Natural Gas Regulatory Board is not empowered to fix or regulate the maximum retail price at which gas is to be sold by entities as the petitioner, to the consumers. We further hold that the Board is also not empowered to fix any component of network tariff or

compression charge for an entity such as the petitioner having its own distribution network. The provisions of the Regulations insofar as construed by the Board to be so empowering it are held to be bad/illegal. Accordingly, the order dated 9-4-2012 to the extent so fixing the maximum retail price or requiring the petitioner to disclose the network tariff and compression charges to its consumers is struck down/quashed."

8.1. There is no legislative intent for allowing the Board to determine the pricing of gas i.e. the price which the entity charges from the ultimate customers. The Act, while protecting the interests of the consumers, has not empowered the Board to fix the price at which the entities will sell the petroleum products or natural gas to the consumers, for the MRP is to be fixed by the entity.

22. The question that arises for consideration is whether reading of the aforesaid provisions, namely, Sections 20 to 22 of the Act, it can be construed that they confer any power on the Board to fix the transportation tariff of a consumer of natural gas. We have also referred to sub-section (4) of Section 20 which confers the power on the Board to decide the period of exclusivity and the network of a common/contract carrier. Section 21, as indicated earlier, deals with the right of first use. The transportation tariff, which finds place in Section 22(1), commences with the words "subject to the provisions of this Act". The said provision confers power on the Board to lay down, by regulation, the transportation tariff for common carriers or contract carriers or city or local natural gas distribution network and the manner of determination of such tariffs.

23. At this stage, it is necessary to appositely understand the said expression. In *CWT v. Trustees of H.E.H. Nizam's Family* [(1977) 3 SCC 362 : 1977 SCC (Tax) 457] this Court was dealing with the expression "subject to" in the context of the Wealth Tax Act, 1957. Section 3 of the said Act imposed the charge of wealth tax subject to other provisions of the Act. In that context, the Court

opined that Section 3 has to be made expressly subject to Section 21 and it must yield to that section insofar as the latter makes a special provision for assessment of a trustee of a trust. In *Ashok Leyland Ltd. v. State of T.N.* [(2004) 3 SCC 1] , it has been held that “subject to” is an expression whereby limitation is expressed. In *K.R.C.S. Balakrishna Chetty and Sons & Co. v. State of Madras* [AIR 1961 SC 1152] , this Court was interpreting Section 5 of the Madras General Sales Tax Act, 1939 wherein the legislature had appended the expression “subject to” and while interpreting the said words, the Court ruled that they are meant to effectuate the intention of law and the correct meaning of the expression is “conditional one”.

24. In *South India Corpn. (P) Ltd. v. Board of Revenue* [AIR 1964 SC 207] , the Constitution Bench has ruled that the expression “subject to” in the context convey the idea of a provision yielding place to another provision or other provision to which it was made subject to. In *B.S. Vadera v. Union of India* [AIR 1969 SC 118] , this Court while dealing with the expression “any rule so made shall have effect, subject to provisions of any Act occurring in the proviso to Article 309” ruled that: (*B.S. Vadera case* [AIR 1969 SC 118] , AIR p. 124, para 24)

“24. It is also significant to note that the proviso to Article 309, clearly lays down that ‘any rules so made shall have effect, subject to the provisions of any such Act’. The clear and unambiguous expressions, used in the Constitution, must be given their full and unrestricted meaning, unless hedged in, by any limitations. The rules, which have to be ‘subject to the provisions of the Constitution, shall have effect, ‘subject to the provisions of any such Act’. That is, if the appropriate legislature has passed an Act, under Article 309, the rules, framed under the proviso, will have effect, subject to that Act; but, in the absence of any Act, of the appropriate legislature, on the matter, ‘in our opinion, the rules, made by the President, or by such person as he may direct, are to have full effect, both prospectively and retrospectively. Apart from

the limitations, pointed out above, there is none other, imposed by the proviso to Article 309, regarding the ambit of the operation of such rules.”

37. We have referred to the aforesaid passage as the Constitution Bench [(2014) 2 SCC 62 : (2014) 1 SCC (Cri) 721] has given emphasis on primary purpose of construction of statute to ascertain the intention of the legislature, harmonious construction of the various provisions of CrPC and for ensuring that the interpretation does not lead to any absurdity. That apart, the Court has also categorically observed that it is not a case where it can be said that the legislature has kept a lacuna which the Court is trying to fill up by judicial interpretative process so as to encroach upon the domain of the legislature. In the case at hand, in the schematic context of the Act and upon reading the legislative intention and applying the principle of harmonious construction, we do not perceive inclusion of the entities which are not “common carriers” or “contract carriers” would be permissible. They have deliberately not been included under Section 11 of the Act by the legislature and the said non-inclusion does not lead to any absurdity and, therefore, there is no necessity to think of any adventure.

38. We must take note of certain situations where the Court in order to reconcile the relevant provision has supplied words and the exercise has been done to advance the remedy intended by the statute. In *Surjit Singh Kalra v. Union of India* [(1991) 2 SCC 87] , a three-Judge Bench perceiving the anomaly, held: (SCC p. 98, para 19)

“19. True it is not permissible to read words in a statute which are not there, but ‘where the alternative lies between either supplying by implication words which appear to have been accidentally omitted, or adopting a construction which deprives certain existing words of all meaning, it is permissible to supply the words’ (Craies *Statute Law*, 7th Edn., p. 109). Similar are the observations in *Hameedia Hardware Stores v.*

B. Mohan Lal Sowcar [(1988) 2 SCC 513 at pp. 524-25] where it was observed that the court construing a provision should not easily read into it words which have not been expressly enacted but having regard to the context in which a provision appears and the object of the statute in which the said provision is enacted the court should construe it in a harmonious way to make it meaningful. An attempt must always be made so to reconcile the relevant provisions as to advance the remedy intended by the statute. (See *Siraj-ul-Haq Khan v. Sunni Central Board of Waqf* [AIR 1959 SC 198 : 1959 SCR 1287] .)”

39. We have referred to the aforesaid authority as Mr Datar has respectfully urged that omission in Section 11 is accidental. The test that has been laid down in *Surjit Singh Kalra* [(1991) 2 SCC 87] and other decisions of this Court, we are afraid, do not really support the submission of Mr Datar. By no stretch of imagination, we can conceive that non-conferment of power on the Board, in particular regard, is accidental. The legislative intention is absolutely clear and simple and, in fact, does not call for adoption of any other construction to confer any meaning to the existing words. Thus, the said submission leaves us unimpressed.

44. We have already dealt with the purport of Section 11, adverted to the facet how the words “subject to” have to be interpreted, functions of the Board, and provisions relating to exclusivity, definitions of “common carrier” and the “contract carrier”. Section 61 is a provision that enables the Board to frame Regulations. If on reading of the statute in entirety, such a power does not flow, a delegated authority cannot frame a regulation as that would not be in accord with the statutory provisions nor would it be for the purpose of carrying on the provisions of the Act.

53. In the case at hand, the Board has not been conferred such a power as per Section 11 of the Act. That is the legislative intent. Section 61 enables the Board to frame Regulations to carry out the purposes of the Act and certain specific aspects have been

mentioned therein. Section 61 has to be read in the context of the statutory scheme. The regulatory provisions, needless to say, are to be read and applied keeping in view the nature and textual context of the enactment as that is the source of power. On a scanning of the entire Act and applying various principles, we find that the Act does not confer any such power on the Board and the expression "subject to" used in Section 22 makes it a conditional one. It has to yield to other provisions of the Act. The power to fix the tariff has not been given to the Board. In view of that the Board cannot frame a Regulation which will cover the area pertaining to determination of network tariff for city or local gas distribution network and compression charge for CNG. As the entire Regulation centres around the said subject, the said Regulation deserves to be declared ultra vires, and we do so."

7(ae) In our narrative supra, we have already noticed that TRAI has taken a stand that it is not regulating content. To be noted, it is the stated position of TRAI that it is not regulating content and that it is regulating carriage only. It is, therefore, axiomatic and follows as a corollary that TRAI admits the position that it cannot regulate content. In this view of the matter, if we examine the pleadings of TRAI, it has been pleaded by TRAI that a television channel is constituted / comprised of different copyrights. TRAI has also pleaded that television channels cannot be priced in the absence of price of individual works ('work' within the meaning of Copyright Act). These pleadings of TRAI are found in paragraph 57 of the counter affidavit of TRAI and we deem it appropriate to reproduce the same. Said paragraph 57 reads as follows:

"57.I submit that as stated above, the Copyright Act, 1957 and the TRAI Act operate in two different fields altogether. Hence,

there is no question either of an overlap or a conflict as is being made out by the petitioner. Whereas the Copyright Act, 1957 deals with "content" and the rights emanating from and associated with the same, the TRAI Act and the powers conferred on the TRAI there under operate in a completely distinct field inasmuch as by the regulatory measures, the TRAI regulates the manner in which services are provided by the various entities in this sector and that ultimately must be for the benefit of the subscriber and growth of the industry. The most crucial factor in the regulation of broadcasting services is the transparent declaration of rates of television channels and manner in which such services are made available to the end subscriber/viewer. Manner of offering of pay channels is, therefore, central to effective and meaningful regulation of the Broadcasting Services. The TRAI is conscious, however, of the scope and ambit of its regulatory power is in relation to channel pricing (a-la-carte and bouquet pricing) and the correlation between pay channels being offered as a-la-carte and bouquet in order to ensure transparent and meaningful and not a forced or truncated choice to the end users / subscribers. The TRAI does not, therefore, enter upon the domain of pricing individual components of content that comprise a pay channel, such individual components being the domain of content producers (including broadcasters) who may exploit their works under the Copyright Law, whether in the form of Broadcast Reproduction Rights or any other right. For example, TRAI's intention is to regulate the price at which a particular channel (let us take the example of Star Movies) is offered as a-la-carte when compared to it being offered in a bouquet (with other channels) but the regulation does not concern itself with what kind of movies is shown on Star Movies. It may be the latest movie or an old movie from the '70s. Therefore, the impugned regulation do not impinge in any way on the commercial exploitation of content."

(Underlining in above extracts has been made by court for highlighting and supplying emphasis)

7(af) Therefore, scope of this lis / issue in the instant case, narrows down to whether impugned provisions in said regulations and said tariff order in fact regulate and fix tariff for content of television channel.

7(ag) In this regard, Dr. Singhvi escalated the proposition advanced by him to a higher pitch and submitted that even while regulating carriage, TRAI cannot touch content either directly or indirectly. Dr. Singhvi submitted that if an authority has jurisdiction with regard to one aspect and while exercising such powers, has made an intrusion into a matter in respect of which it had no jurisdiction, then merely because the authority had jurisdiction with regard to one aspect of the matter, the court should not ignore the lack of jurisdiction of the authority with regard to other aspect. In support of this proposition, Dr. Singhvi pressed into service a judgment of Hon'ble Supreme Court of India in **Union of India Vs. Hindalco Industries** reported in **(2003) 5 SCC 194**. Though **Hindalco** case arose under the Central Excise Act and though it pertains to a show cause notice, the principle that the authority which has jurisdiction with regard to one aspect, cannot, while exercising its jurisdiction embark upon another aspect of the same matter qua which it lacks jurisdiction, has been lucidly laid down by the Hon'ble Supreme Court and we respectfully follow this proposition.

7(ah) In this regard, we also notice the submissions on behalf of writ petitioners that while carriage is traceable to Entry 31 of List I of Seventh Schedule of COI, content is traceable to Entry 49 of the same list of COI. It is also to be noted that this position is not disputed by TRAI. In fact, it is

admitted in no uncertain terms by TRAI and it has been explicitly so stated by TRAI in its counter affidavit, particularly in paragraph 54 of its counter affidavit which reads as follows :

“54.I submit that broadcasting is a central subject as enumerated in Entry no.31 in the List I (Union List) of the VIth Schedule of the Constitution of India which refers to “Posts and Telegraphs, Telephones, Wireless, Broadcasting and other like forms of communication” and thus only the Central Government is competent under Article 246 of the Constitution to legislate on matters relatable to the aforesaid entry. While copy right is also a List I subject, however, the same is relatable only to entry 49. Thus, both the subjects are distinct and different in the field they occupy.....“

7(ai) In this regard, Dr.Singhvi relied upon a larger Constitution Bench (seven member Bench) judgment of Hon'ble Supreme Court in ***Synthetics and Chemicals Ltd. and others Vs. State of U.P. and others*** reported in (1990) 1 SCC 109. In this celebrated judgment, Hon'ble Supreme Court, after laying down that various entries in the three lists of the Seventh Schedule to COI are legislative heads / fields of legislation and not sources of powers held that owing to this principle, widest amplitude should be given to the language of the entries in the three aforesaid lists. Most importantly, it follows that it is the duty of the court to find out the true intent / purpose of a legislation and examining a particular legislation in this regard will arise when entries in these three lists run into each other, override or come into direct conflict with each other.

7(aj) In the instant case, that TRAI Act is in the realm of Entry 31,

that Copyright Act is in the realm of Entry 49 are very clear. They are distinct and demarcated. Therefore, content of broadcasters, i.e., writ petitioners and other similarly placed broadcasters has to necessarily be regulated and fixation of tariff for the same has to necessarily be under Copyright Act. In this regard, we also deem it appropriate to notice two specific submissions made by writ petitioners and TRAI. Writ petitioners categorically submitted that it is not their case that their content should not be regulated at all or should not be scrutinized at all. They say that it can be done under Copyright Act by the appropriate authority and in any event, their content qua public morality is now being scrutinized by the Ministry of Information and Broadcasting. Equally, TRAI has made it clear that it is its stated position that they are not concerned with what the channel carry, i.e., 'content' and that they are concerned only with how they carry, i.e., 'carriage'. In this regard, we also deem it appropriate to refer to a judgment of a Division Bench of Delhi High Court being a judgment in **ESPN Star Sports Vs. Global Broadcast News Ltd. & ors.** reported in **2008 (38) PTC 477 (Del.) (DB)**. It was pressed into service by learned Senior counsel Mr.P.Chidambaram to say that even broadcasting of a cricket match for which rights were purchased at a huge cost by broadcasters was held to be a Copyright and that unauthorised broadcasting of such cricket match was held to be an infringement of BRR of broadcaster. To drive home this aspect of the matter, learned senior counsel Mr.P.Chidambaram took us through paragraphs 9,10,14 to 17, 19 and 20 of the said judgment. Considering the enormous significance of copyright / content and carriage in the instant case, we deem it appropriate to reproduce

the said paragraphs which read as follows :

“9. While submitting the first of his three fold argument, the learned senior counsel for the appellant raised the following contentions:

(A) Status of Broadcasters before the 1994 amendment of the Copyright Act and after the amendment.

(a) Before the 1994 amendment of the Copyright Act, the only broadcaster in India was Doordarshan (DD) which used to telecast free to air channels that could be captured by an antenna installed on rooftops and was connected to the television sets by a wire. With the opening of the Indian markets in 1991, several players involved in broadcasting came into India.

(b) The process of relay of Programs by way of cables is a complex relay of feeds. The feed is first uplinked from the venue of the event (for a live event) or a studio which can be located anywhere in the world. The feed is then down linked in the concerned territory by cable operators. Such cable operators then transmit the feed to cable homes by way of network of cables. As a natural consequence it was considered necessary to protect broadcasters from against unauthorized receipt by the cable operators of their services without a contract permitting such receipt.

(c) Since existing definition of the copyright in the statute of most countries did not provide any protection to the broadcasters on the basis that there was no copyright in their broadcast of a live event or, studio shows and the like, the need to protect the broadcasters from unauthorized reception of their feed by cable operators was felt globally. This issue was discussed during the Uruguay round of the WTO Agreement of Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement) in 1994. Recognizing the need to protect the rights in broadcasts, Article 14(3) was incorporated into the TRIPS Agreement. It reads as under:

Article

Protection of Performers, Producers of Phonograms
(Sound recordings) and Broadcasting organizations.

3. Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971)

(d) India being the signatory to the TRIPS Agreement accordingly amended the Copyright Act in 1994 so as to incorporate Section 37. The amendment came into effect from May 10, 1995.

(e) He contended that it is important to note that even after the aforesaid amendment of the Copyright Act, the definition of 'copyright' under Section 14 was not amended to include 'Broadcast reproduction right', as has been the case in some countries such as the United States of America, United Kingdom and New Zealand, where Broadcast reproduction right had been specifically included within the meaning of copyright. Some countries such as France, Germany and India have given a special right known as 'Broadcasting Reproduction Right' which is a related right and is different from copyright.

(B) Copyright versus Broadcast Reproduction Rights' under the Copyright Act 1957 - Applicability of Section 61.

(a) From the reading of Section 37 of the Copyright Act as well as the Statement of Object and Reasons, it is evident that the definition of 'copyright' under Section 14 of the Copyright Act did not provide any protection to the

broadcasters. The statement of Object and Reasons itself provides that "Certain Rights akin to copyright are conferred on the broadcasting authorities in respect of programs broadcast by them." This sufficiently brings out the difference between the two rights in Indian Copyright Act, 1957. The amendment Act of 1994 extended such rights to all Broadcasting Organizations apart from more clearly crystallizing the nature of such rights.

(b) The fact that such a distinction exists is demonstrated by Section 51 of the Copyright Act which deals with acts constituting infringement of a copyright, whereas there is a separate section, i.e., Section 37(3) that deals with acts constituting infringement of broadcast reproduction rights. From the above mentioned references it is clear that the idea of the legislature was to provide a separate and distinct right to the broadcasting organizations to help them protect their rights in their broadcasts against third parties.

(c) Satellite broadcasting rights are treated as separate rights and the said rights are recognized throughout the world as independent rights as held in *Raj Video Vision v. M/s Sun TV*, 1994 (2), *Madras Law Weekly* 158 which has also been approved in *AA Associates versus Prem Goel* AIR 2002 Del 142. A similar view has been taken in *M/s.Video Master v. M/s.Nishi Productions*, 1998 (18) PTC 117.

(d) Thus, section 13 and 14 of the Copyright Act, makes it clear that copyright will subsist only in work. 'Work' does not include 'broadcast'. As a result there will only be a broadcasters right in the telecast of live events communicated to the public as provided under Section 37 of the Copyright Act, which as explained above, is separate and distinct from copyright. Therefore, what emerges from the above is that the Broadcast Reproduction Right, which is different from Copyright, is with the Broadcasting Organization which is causing the Broadcast to be communicated to the public under their Logo by any means

of wireless diffusion or by wire, i.e., the Appellants in the present case, as per the Definition of Broadcast under Section 2(dd) and the definition of the Communication to Public under Section 2(ff) of the Act. As such Section 61 is not applicable in a proceeding for infringement of Broadcasting Reproduction Right as that provision is only limited to the cases where an exclusive licensee of a copyright institutes a suit or proceeding for infringement of copyright.

10. The learned counsel for the appellant further contended as follows:

A. Cinematographic copyright vests in the recording of the event in a cricket match. As per the Agreement dated 26.7.2002, the C.A which was hosting the cricket match permitted ESS the appellant to :

a. Receive the live feed from the Host Broadcaster (Channel 9) and to broadcast such feed after making their own additions/alternations etc.

b. In order to do so ESS has the following: OB Vans, Studio, their own Cameras, Hawkeye Cameras, Satellite equipment etc on the ground.

B. Thereafter, what ESS did was the following:

1. Pre-match coverage.
2. Live match coverage.
3. Change of innings show.
4. Post Match show.

C. From the above it can be seen that the recording of the final mix as telecast would have given rise to an independent copyright to ESS in such a final recording. This copyright is separate and distinct from the satellite broadcast made of the mix by the ESS which would give rise to a broadcast reproduction right. By the very definition of cinematograph under Section 2(f), the satellite broadcasting per se would not

amount to a cinematography, which necessarily requires recording of the same. Therefore, the broadcast through a satellite, of a live coverage of a match would give rise to a broadcast reproduction right but not necessarily a cinematographic right, since the latter would arise only if there is an actual recording of what has been broadcast and not when it has been merely broadcast through satellite without also recording the same.

D. This distinction is being brought out only to show that even if it is claimed that what is broadcast also amounts to a copyright in a cinematography, the owner of such cinematography copyright would only be ESS. This is an alternate argument taken since the primary contention of ESS is that their broadcast reproduction right is an independent right which is being infringed. He further contended that assuming it is held that Section 61 is applicable as broadcasting right fall within copyright there is also an infringement of a copyright in the cinematography work, i.e., the recorded form of the broadcast as:

(a) These are two separate, distinct rights giving rise to two distinct causes of action.

(b) Even otherwise the copyright in the cinematograph work in this case would belong to ESS who would be the owner thereof and therefore, ESS would not be an exclusive licensee of the copyright in terms of Section 61.

(c) ESS would be the owner of the copyright in the recorded material of what is broadcast by them even assuming a substantial portion of it may be the live feed received from from channel 9.

14. In our view, the conclusion of the learned Single Judge pertaining to Section 61(1) to the effect that non-compliance of the Section made the suit not maintainable cannot be sustained in view of the fact that the rights of the broadcasting organization

and its performers which figure in Chapter VIII of the Act are not covered by the conditions imposed by virtue of Section 61 which is found in Chapter XII providing for civil remedies. Section 61 of the Act reads as follows:

Section 61- Owner of copyright to be party to the proceeding

- (1) In every civil suit or other proceedings regarding infringement of copyright instituted by an exclusive licensee, the owner of the copyright shall, unless the court otherwise directs, be made a defendant and where such owner is made a defendant, he shall have the right to dispute the claim of the exclusive licensee.

(2) Where any civil suit or other proceedings regarding infringement of copyright instituted by an exclusive licensee is successful, no fresh suit or other proceeding in respect of the same cause of action shall lie at the instance of the owner of the copyright."

15. It is to be noted that before the 1994 amendment of the Copyright Act, the only broadcaster in India was Doordarshan (DD) and Chapter VIII of the Act only afforded protection of the broadcasting reproduction rights to the Government and the broadcasting authority. The objects and reasons of the Copyright Act has recognized such a right as a right akin to a copyright. The Uruguay round of the WTO Agreement of 1994 and the relevant portion of the said Agreement reads as follows:-

"3. Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971)." (emphasis supplied)

Consequent to the agreement, the Copyright Act, 1957 was amended in 1994 so as to incorporate definitions under Sections 2(dd) and 2(ff) and the relevant provisions relating to Broadcasting Reproduction right in Section 37, Section 39 and Section 39 (A) in Chapter VIII. The definition of Broadcast under Section 2(dd) reads as follows:

"[2(dd) "broadcast" means communication to the public -

(i) by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images; or

(ii) by wire, and includes a re-broadcast;]"

The definition of the "Communication to the Public" under Section 2(ff) of the Act reads as follows :

2(ff) "communication to the public" means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available."

Section 37 of the Act reads as follows:

"Section 37- Broadcast reproduction right - (1) Every broadcasting organization shall have a special right to be known as "broadcast reproduction right" in respect of its broadcasts.

(2) The broadcast reproduction right shall subsist until twenty-five years from the beginning of the Calendar year next following the year in which the broadcast is made.

(3) During the continuance of a broadcast reproduction right in relation to any broadcast, any person who, without the license of the owner of the right does any of the following acts of the broadcast or any substantial part thereof-

(a)re-broadcasts the broadcast; or

(b)causes the broadcast to be heard or seen by the public on payment of any charges; or

(c)makes any sound recording or visual recording of the broadcasting; or

(d) makes any reproduction of such sound recording or visual recording where such initial recording was done without license or, where it was licensed, for any purpose not envisaged by such license; or

(e)sells or hires to the public or offers for such sale or hire, any such sound recording or visual recording referred to in clause (c) or clause (d), shall, subject to the provisions of section 39, be deemed to have infringed the broadcast reproduction right.

Section 39 of the Act reads as follows:

Section 39 - Acts not infringing broadcast reproduction right or performer's rights - No broadcast reproduction right or performer's right shall be deemed to be infringed by -

(a)The making of any sound recording or visual recording for the private use of the person making such recording, or solely for purposes of bona fide teaching or research; or

(b) the use, consistent with fair dealing, of excerpts of a performance or review, teaching or research; or

(c) such other acts, with any necessary adaptations and modifications, which do not constitute infringement of copyright under section 52."

Section 39-A of the Act reads as follows:

"Other provisions applying to broadcast reproduction right and performer's right – Sections 18,19,30,53,55,58,64,65 and 66 shall, with any necessary

adaptations and modifications, apply in relation to the broadcast reproduction right in any broadcast and the performer's right in any performance as they apply in relation to copyright in a work:

Provided that where copyright or performer's right subsists in respect of any work or performance that has been broadcast, on license to reproduce such broadcast shall take effect without the consent of the owner of rights or performer, as the case may be, or both of them."

16. It is to be seen that the genesis of the broadcasting reproduction right lies in the Statement of Objects and Reasons of the original 1957 Act which clearly stated as follows:-

"(11) Certain rights akin to copyright are conferred on Broadcasting authorities in respect of programmes broadcast by them."

Thus, the Legislature itself by terming broadcast rights as those akin to copyright clearly brought out the distinction between the nature of two rights in Indian Copyright Act, 1957. This was a clear manifestation of the legislative intent to treat copyright and broadcasting reproduction rights as distinct and separate rights. Further, it is to be seen that the Amendment Act of 1994 while amending the Act not only extended such rights to all Broadcasting Organizations, but also clearly crystallized the nature of such rights. Hence, in our view, the contention of the respondent that the broadcast reproduction right as a special right, does not stand de hors copyright and that the two rights are not mutually exclusive, cannot be sustained as it is clearly seen from the legislative intent that the two rights though akin are nevertheless separate and distinct.

17. Furthermore, under Section 37 of the Act, broadcast reproduction right has been defined as a special right available to every broadcasting organization qua its broadcasts. The term "broadcast" has been separately defined under Section 2(dd), as a

communication to the public. It is thus evident that there could be both copyright and broadcasting reproduction right which could separately co-exist. As an example the copyright of cinematography film being broadcast on a satellite channel vests with the producer of the film whereas the broadcast reproduction right for the same vests with the broadcaster channel itself. The recording of such movie and unauthorized re-telecast by cable operators could thus result in violation of two separate rights. The first being the copyright which vests with the producer and second the broadcast reproduction right which vests with the broadcaster channel. These rights may vest with two different persons or even with the single person which is evident from the Act. Section 51 of the Copyright Act deals with acts constituting infringement of a copyright and Section 37(3) separately deals with acts constituting infringement of broadcast reproduction rights. Emphasis have been placed upon Section 39-A which provides that Sections 18,19,30,53,55,58,64,65 and 66 shall with any necessary adaptations and modifications apply in relation to the Broadcast reproduction right in any broadcast. This clearly showed the legislative intent as to which provision of the Act would apply to both copyright and also broadcast reproduction right and by necessary implication Sections not so specifically provided would not ipso facto apply to the broadcast reproduction right. Sections 13 and 14 of the Copyright Act make it clear that copyright will subsist only in 'work' and that does not include 'broadcast'. This clearly demonstrates that the broadcast rights particularly in respect of telecast of live events are separate and distinct from copyright available in Chapter XII of the Act. The definition of 'broadcast' under Section 2(dd) and the definition of 'communication to the public' under Section 2(ff) of the Act further emphasize the fact that Section 61 is not applicable to the proceeding for infringement of Broadcasting Reproduction Right and that application of Section 61 is limited to the cases where an exclusive licensee of a copyright institutes a suit or proceeding for infringement of copyright.

19. Thus, in our view the above distinction clearly indicates that the Parliament clearly intended to provide separate and distinct rights to the broadcasting organisations to protect their rights against third parties. Satellite broadcasting rights are treated as separate rights and the said rights are recognized throughout the world as independent rights. This is also entirely in keeping with several radical technological advances in the field of telecommunications which could not have been contemplated when the 1957 Act was enacted.

20. The following position of law laid down in following judgments strengthen the above conclusions:-

(a) In the case of **Raj Video vision v. M/s Sun TV, 1994 (2) Madras Law Weekly 158** it was held as follows:

"12. The copyright for broadcasting or telecasting the film through satellite, cable, wire wireless or through any other system or any other form, means and modes other than through Doordarshan terrestrial Primary Channel without restriction of geographical area is a separate right. Satellite right is new, separate and distinct specie or right hitherto not visualized and this cannot be said to be included under the agreements relied upon by the plaintiff's in any event. In fact cassettes are used for home TV, whereas 'U' tapes are used for Satellite Transmission.

13. On a careful consideration of the arguments advanced by the learned counsel appearing on either side, I am of the view that the Satellite television broadcasting right is an independent right for which the plaintiff cannot claim any copyright.

.....

15. Thus, looked at from any angle, satellite TV broadcasting rights are independent rights and the same have to be assigned specifically and so far as such rights have not been assigned in favour of the applicant/plaintiff specifically, the plaintiffs cannot claim any copyright in the same or seek any order of injunction on the ground of alleged infringement by the

defendant. The plaintiff/applicant therefore, in my opinion have no prime facie case."

(b) In **A.A. Associates v. Prem Goel, AIR 2002 DEL 142 : 2002 (24) PTC 369**, this Court held as follows:

18.Reference in this connection can well be made to the decision from the Madras High Court in **Raj Video Vision v. M/s Sun TV, 1994-2- LW.158**. Somewhat a similar question came up for consideration in that court. It was held that intention of the parties have to be determined to find out as to whether it included all other rights or it was confined to features or television or satellite. The Madras High Court held that Satellite television broadcasting right is an independent right for which a copyright could not have claimed.

19.The attention of the court has also been drawn towards the decision of the Bombay High Court in the case of Video Master v. Nishi Productions 1998, PTC (18) 117. The Bombay High Court referred to the differences and clauses/species of the communication and held that theatrical rights include the right to exhibit the cinematograph film in theatres, terrestrial rights is the right to exhibit the film on Doordarshan and satellite broadcasting rights is the right to exhibit/communicate the film by satellite signals to public with or without cable and through the satellite medium. While the cable TV right is right to exhibit a film by cable originated programme.

20.One finds itself in respectful agreement of these pleas as projected by the defendants." (emphasis supplied)

(c)In **M/s.Video Master v. M/s.Nishi Productions, 1998 (18) PTC 117 @ 123** it was held as follows:

"The satellite rights involve preparation of Umatic tapes and exclusive rights for Satellite TV broadcast is entirely different from Cable TV rights. The Satellite television

differs from ordinary Terrestrial Television (TV). Thus, as per learned Judge of Madras High Court satellite broadcasting rights are different rights. In the present case, there is no dispute before me that satellite broadcasting rights are independent rights. There is also ample material brought on record by defendants, which clearly indicates that satellite broadcasting rights must be treated and are treated as separate rights and the said rights are recognized throughout the world as independent rights."

(Underlining in above extract has been made by court for supplying emphasis and highlighting)

7(ak) Per contra, Mr.P.Wilson, learned Senior Advocate appearing for TRAI relied heavily on a judgment of Hon'ble Supreme Court of India in ***Hotel & Restaurant Assn. and another Vs. Star India (P) Ltd. and others*** reported in (2006) 13 SCC 753 to buttress his submission that TRAI exercises broad jurisdiction and that while making regulations, several factors are required to be taken into account. It was submitted by Mr.P.Wilson, learned senior counsel that interest of one of the players in the field cannot be taken into account ignoring the interest of other stakeholders. Learned counsel for TRAI took us through paragraphs 55 and 56 of the said judgment which read as follows :

55.TRAI exercises a broad jurisdiction. Its jurisdiction is not only to fix tariff but also laying down terms and conditions for providing services. Prima facie, it can fix norms and the mode and manner in which a consumer would get the services.

56.The role of a regulator may be varied. A regulation may provide for cost, supply of service on non-discriminatory basis, the mode and manner of supply making provisions for fair competition

providing for a level playing field, protection of consumers' interest, prevention of monopoly. The services to be provided for through the cable operators are also recognised. While making the regulations, several factors are, thus required to be taken into account. The interest of one of the players in the field would not be taken into consideration throwing the interest of others to the wind."

7(al)The **Hotel & Restaurant Assn.** case was one where an association of Hoteliers sought intervention of TRAI complaining of purported arbitrary increase in the rates of supply of feed by television channel broadcasters. Notwithstanding the fact that hotels are consumers and they supply feed taken by them to their guests and customers in various rooms, it was held that hotels will not come within the purview of distribution platform akin to MSOs. While there can be no quarrel over this proposition, this principle does not help TRAI in any manner in the instant case as the entire gamut of **Hotel & Restaurant Assn.** case is regarding carriage and it has nothing to do with content.

7(am) To be noted, as alluded to supra, very strong reliance on the principles qua subordinate legislation that have been laid down by the Supreme Court of India in aforesaid Call drop case was placed. Call drop case deals with subordinate legislation made by TRAI in exercise of its powers under the TRAI Act. Principles laid down by Hon'ble Supreme Court in the celebrated **P.Krishnamurthy's case**, i.e., **State of T.N. Vs. P.Krishnamurthy [(2006) 4 SCC 517]** holds the field with regard to grounds available for any one to challenge a piece of subordinate legislation or some

provisions therein. Referring to P.Krishnamurthy's case, in Call drop case, the grounds available for challenging subordinate legislation have been restated. As it has been restated in Call drop case, it can be safely inferred that these are grounds available for challenging subordinate legislation in the form of rules or regulations made by TRAI in exercise of its rule / regulation making power under the TRAI Act. This has been elucidated by the Supreme Court in Call drop case in paragraph 34 and we deem it appropriate to extract the same, which reads as follows :

“34. In *State of T.N. v. P. Krishnamurthy* [*State of T.N. v. P. Krishnamurthy*, (2006) 4 SCC 517] , this Court after adverting to the relevant case law on the subject, laid down the parameters of judicial review of subordinate legislation generally thus: (SCC pp. 528-29, paras 15-16)

“15. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognised that a subordinate legislation can be challenged under any of the following grounds:

- (a) Lack of legislative competence to make the subordinate legislation.
- (b) Violation of fundamental rights guaranteed under the Constitution of India.
- (c) Violation of any provision of the Constitution of India.
- (d) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.
- (e) Repugnancy to the laws of the land, that is, any enactment.
- (f) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules).

16. The court considering the validity of a subordinate legislation, will have to consider the nature, object and scheme of the enabling

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

7(an) Jurisprudence pertaining to subordinate legislation making has undergone huge and vast development over a period of time particularly in recent times. This jurisprudential aspect of the matter has been elucidated inter-alia by referring to March 2016 Update of *Corpus Juris Secundum* by the Supreme Court in paragraphs 91 and 92 of the Call drop case and we deem it appropriate to extract paragraph 91 of the Call drop case which reads as follows :

“91. In *Corpus Juris Secundum* (March 2016 Update) it is stated:

“Under the informal rule-making requirements of the Federal Administrative Procedure Act, after a federal administrative agency considers the relevant matter presented, it must incorporate in the rules adopted a concise general statement of their basis and purpose. The purpose of the requirement is to enable courts, which have the duty to exercise review, to be aware of the legal and factual framework underlying the agency's actions. *The requirement is a means of holding an agency accountable for administering the laws in a responsible manner, free from arbitrary conduct. The statement is not intended to be an abstract explanation addressed to an imaginary complaint but is intended, rather, to respond in a reasoned manner to the comments received,*

to explain how the agency resolved the significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule. The statement must identify what major issues of policy were ventilated and why the agency reacted to them as it did and should enable a reviewing court to ascertain such matters. The statement must respond to the major comments received, explain how they affected the regulation, and, where an old regulation is being replaced, explain why the old regulation is no longer desirable.

Agencies have a good deal of discretion in expressing the basis of a rule. The requirement is not to be interpreted over literally, but it should not be stretched into a mandate to refer to all specific issues raised in the comments on the proposed regulations. Although an agency must genuinely consider comments it receives from interested parties, there is no requirement that an agency discuss in great detail all comments, especially those which are frivolous or repetitive. *Although the agency need not address every comment received, it must respond in a reasoned manner to those that raise significant problems, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule.* Conclusory statements will not fulfil the administrative agency's duty to incorporate in adopted rules a concise general statement of their basis and purpose. *The agency must articulate a satisfactory explanation for its action, including a rational connection between the facts it found and the choices it made.* Under some circumstance, agencies must identify specific studies or data that they rely upon in arriving at their decision to adopt a rule.

Regulations which lack a statement of basis and purpose may be upheld if the basis and purpose are obvious. Moreover, the failure of an agency to incorporate the statement does not

render a rule ineffective as to parties to litigation who had knowledge of the rule.

Despite the statutory language mandating that the statement of basis of purposes be 'incorporate[d] in the rules adopted,' the statement of basis and purpose does not have to be published at precisely the same moment as the rules. Rather, the rules and statement need only be published close enough together in time so that there is no doubt that the statement accompanies, rather than rationalizes, the rules."

(emphasis supplied)

To be noted, paragraph 92 of call drop case has already been extracted supra in this judgment while dealing with transparency aspect of subordinate legislation making.

7(ao) We have already set out supra in this judgment that a large number of case laws placed before us fall in three categories, i.e., some of the case laws are extremely pertinent and germane for deciding the core issue, some only provide some insight qua ancillary and even tertiary issues and some other case laws may not have any great relevance or bearing for deciding this lis. We have set out all the case laws that were cited before us at the Bar in the hearings that were spread over several days only for the purpose of capturing the drift of the hearing with exactitude, with limitations of expression and articulation in any language, particularly written languages being the only exception. Therefore, in the discussion in this judgment, we have referred to case laws which according to us are most germane and relevant for deciding the issues before us. We have not embarked upon discussion of case laws which we thought are not very germane or were mere

reiteration of well settled principles as that would have only made this judgment verbose. In other words, that would have burdened this judgment with verbosity and voluminity which would have caused distraction and diagression from core issue leading this judgment in a trajectory that would have been tangential qua core issue. Judgments / citations providing insight into ancillary aspects have been discussed wherever deemed necessary by us.

7(ap) Great reliance was placed on the license given to writ petitioners under Section 4(1) of the Telegraph Act, 1885 which has been described as a statute of vintage origin by the Supreme Court in the Call drop case. Thrust of the reliance placed on this license is that one of the conditions of license is to the effect that the licensee should adhere to the regulations made by TRAI. Therefore, licensees (who are writ petitioners before us in the instant case) have to adhere to the regulations made by TRAI. There can be no two opinions about this, but that cannot be interpreted to mean that writ petitioners cannot assail regulations made by TRAI or some provisions of regulations made by TRAI if in their opinion, they find the same to be ultra vires the parent Act / plenary statute and / or unconstitutional. Merely because there is a clause in the license and merely because that clause assumes the status of a covenant in a contract between the parties, it would not take away the right of the writ petitioners to assail the validity and vires of some regulations made by TRAI.

7(aq) In this case, TRAI in its counter affidavit has clearly admitted

that it is not regulating content and that it is regulating only carriage. We are fully conscious of the legal position that concession made by a party is of no great significance in a matter where there is challenge to vires and validity of some provisions in subordinate legislations. With absolute clarity in this regard in our mind, we looked at the stated position of TRAI as articulated in no uncertain terms by TRAI in its counter affidavit. TRAI is very clear and unambiguous that it does not want to regulate content. In fact, it is the say of TRAI in the hearing that they are not concerned with content of the channels and that they are concerned only with carriage. Therefore, the intention and objective behind the regulation of TRAI which are subject matter of this writ petition is to regulate carriage only. In other words, it follows as a necessary corollary that the intention is not to regulate content.

7(ar) In the light of the aforesaid unambiguous stated position of TRAI, we have also noticed Section 37 of TRAI Act which makes it mandatory that any subordinate legislation made by TRAI should be placed and passed by both houses of Parliament. In this case, there is no dispute that said regulations which are subject matter of writ petitions have been placed before both houses of Parliament and have been duly passed. We also put it to all learned counsel and senior counsel as to whether there were any debates in the two houses of Parliament and we made it clear that we would like to look at the same. All the learned counsel and senior counsel took time to get instructions on the same and reverted to this court after getting instructions and said that there were no debates when said regulations which are subject

matter of instant lis was passed by both houses of Parliament. Therefore, the law making arm of the democracy, namely, Parliament, in its wisdom has also approved of TRAI's intention to regulate carriage only and not content. In the absence of any contra indications, complete absence of debate in both Houses of Parliament is being construed as complete and comprehensive unanimity in Parliamentary wisdom.

7(as) Therefore, we have examined the provisions / clauses of subordinate legislations called in question before us in the light of whether they have the impact of regulating content.

7(at) A bouquet of roses was taken as illustration in the hearing before us. If we consider a bouquet of roses consisting of Red, White, Yellow, Purple, Blue roses and compare each of the shades to one channel of broadcasters, the cost of each shade of rose will be different from the other shades. Assuming that the costs of Red, White, Yellow and Purple roses vary between Re.1.00 and Rs.18.00 per rose, Blue roses may be so exquisite and expensive that it costs Rs.100.00 per rose. In effect, impugned regulations compel TRAI to sell this exquisite, exclusive and highly expensive Blue rose also for Rs.19.00 in the bouquet. As alluded to supra in this judgment, we also put it to learned Senior Counsel Mr.P.Chidambaram that there is no compulsion for the broadcasters to give such an expensive channel in a bouquet and it is open to a broadcaster to declare such an expensive channel as a pay channel and give it a-la-carte. To be noted, if such a (blue rose) channel is given a-la-carte, there is no cap and broadcaster can price it at even Rs.100/- per month per subscriber. To this, it was pointed out that the

impugned regulations are based on the fundamental assumption (as is evident from the consultation paper / explanatory memorandum) that the market is driven by bouquets. Therefore, by the impugned regulations, TRAI is compelling the broadcasters to sell a channel which costs Rs.100.00 at Rs.19.00 was the response of the learned Senior Counsel. The bouquet of roses analogy appeals to us and it is not unacceptable.

7(a) With regard to **Gannon Dunkerley & Co. (Madras) Ltd., Poppatlal Shah, U.P. Cooperative Cane Unions Federations, Association of Leasing and Financial Service Companies, John Hudson & Co. Ltd. and C.E.B.Draper & Son Ltd.** cases, they were all placed before the Court by the writ petitioner in W.P.No.44127 of 2016 by way of a compilation of judgments dated 30th June, 2017. Suffice to say that these judgments were pressed into service to highlight the essential ingredients, determinants and constituents of 'sale'. All the essential ingredients, determinants and constituents of sale and effort in this regard on the part of the writ petitioners was to highlight that 'price' is a very important determinant / constituent in any 'sale'. In other words, petitioners pressed into service these judgments in an attempt to buttress their submission regarding price qua content and make it very emphatic. There can be no two ways about the time honoured and well concluded principles governing determinants of sale. To be noted, all these judgments pertain to sale of immovable property, whereas here we are concerned with content, which is intangible and abstract. Whether that changes the scenario much is a question which may not require debate in the instant case as these judgments have been pressed into service only to

emphasis and buttress the proposition which the petitioners are advancing. However, as the emphasis and buttressing is more in the nature of supporting principles and submissions, suffice to say that this court has taken note of this time honoured principle.

7(av) It is common knowledge that the cost of production or cost of procuring various programmes will vary depending on artist, producer, nature of production and many other determinants. Therefore, TRAI while in one breath says that they are not regulating content, in the same breath compels the broadcaster to sell a channel at a particular price in a bouquet and is placing a cap on the price knowing fully well that the cost of content in many cases can be very high and far above the cap fixed by TRAI. Therefore, inter-alia, by this very simple illustration and analogy of bouquet of roses, we have no hesitation in coming to the conclusion that the impugned provisions of regulations before us have the effect of impacting and regulating content of broadcasters and as alluded to supra, it is the stated position of TRAI that they do not intend to and cannot regulate content.

7(aw) In this context, we also put it to learned Senior Counsel for the petitioners Dr.Singhvi as to whether it is their submission that content will remain unregulated. To this, it was very fairly submitted by learned Senior counsel for petitioners that the content of their channels is clearly open to and subject to regulations by Information and Broadcasting Ministry of Union of India qua various aspects such as public morality and decency. Therefore, the larger public interest and larger public good is taken care of.

7(ax) The content of a programme is governed by the Copyright Act, more so, after the amendment to the Copyright Act on 21.06.2012, wherein and whereby Section 33-A was introduced in the statute, i.e., Copyright Act.

7(ay) The value of a programme in terms of its content can be determined only by the Copyright Board. The intention of the Parliament is clear and parliamentary wisdom in this regard is evident from the fact that barely a few weeks prior to the amendment to Copyright Act on 21.06.2012, the rules under the Cable Television Networks (Regulation) Act, 1995 (7 of 1995) were completely overhauled. We have no reason to believe that Parliament would not have noticed / taken into account overhauling of aforesaid Rules, while amending the Copyright Act. When these two are read in juxtaposition, it is very clear that while content of a programme and its value is governed by the Copyright Act and more particularly regulated by the Copyright Board under the Act, carriage or in other words, 'means of transmission' is governed by TRAI Act and is regulated by TRAI.

7(az) Another feature which has to be noted in this entire lis, which emerges very clearly from the pictorial depiction of both TRAI and the writ petitioners which have been extracted supra elsewhere in this judgment is that broadcasters alone procure or create content, whereas all other players / stakeholders, i.e., MSOs, DTHs and others in the distribution platform and the local cable operators (LCOs) have nothing to do with content. To be noted,

learned Senior Counsel Dr.Singhvi took us through the chart of the writ petitioners (scanned and made part of this order along with TRAI's chart), elaborated on this aspect with an illustration, emphatically articulating industry dimensions and market dynamics. We find no reason to disagree with his submissions. We find it unnecessary to delve more into this, in the light of the verdict we are returning on the core issue. Therefore, the phenomenon of two intervenors, who form part of the distribution platform supporting TRAI and the other intervenor which is constituted by broadcasters supporting writ petitioners in opposing the impugned provisions is not surprising at all. In this view of the matter, suffice to say that we have taken into consideration the supporting submissions of all the intervenors.

7(ba) For the purpose of absolute clarity, we deem it appropriate to extract the relevant paragraphs in the counter affidavit of TRAI. To be noted, a portion / part of paragraph 54 of counter affidavit of TRAI has been extracted supra in this judgment (paragraph 7(ah) to be precise) in some other context. In this context, as the entire paragraph 54 along with paragraphs 55 to 57 became relevant, we deem it appropriate to extract the four paragraphs, i.e., paragraphs 54 to 57, which read as follows:

“54.I submit that broadcasting is a central subject as enumerated in Entry no.31 in the List I (Union List) of the VIth Schedule of the Constitution of India which refers to “Posts and Telegraphs, Telephones, Wireless, Broadcasting and other like forms of communication” and thus only the Central Government is competent under Article 246 of the Constitution to legislate

on matters relatable to the aforesaid entry. While copy right is also a List I subject, however, the same is relatable only to entry 49. Thus, both the subjects are distinct and different in the field they occupy. The Ministry of Information and Broadcasting has been responsible as the nodal ministry since independence to bring in legislation pertaining to broadcasting in the country. During the late 90's, distribution of private TV channels that were uplinked from abroad was started by the local cable operators for distribution to the public. Prior to this, no private TV channels were available for distribution to the public who had access to only DD (Doordarshan) channels transmitted terrestrially. In 1995, the Cable Television Act was enacted by Parliament wherein provisions for regulating the content of TV channels in the form of content code were prescribed for such private TV channels which were being distributed to public through cable TV networks. Thereafter in 2001, the Ministry of I&B issued uplinking guidelines for TV channels for regulating the distribution of such TV channels within the country. The entities (broadcasters) who wanted to distribute their TV channels to the public were required to seek permission from Ministry of I&B under the uplinking guidelines and comply with the provisions as stipulated therein. Thereafter, downlinking guidelines were issued by the Ministry of I&B in 2005 to enable the distribution of TV channels which originated or were being uplinked from abroad to be distributed to the public in the country. The entities (broadcasters) who wished to distribute such channels were required to seek permission from Ministry of I&B complying with the provisions therein, for distribution for such channels to public. It is pertinent to mention here that TV channels being distributed to the public through broadcasting services and cable services are governed by the Uplinking/Downlinking guidelines issued by the Ministry of Information and Broadcasting. It is therefore evident that distribution of TV channels to public has been regulated by Ministry of I&B. In this context it is pertinent to mention that the

entities (broadcasters), can provide their TV channels to the public through various distributors such as Direct to Home (DTH), Head in the Sky (HITS), Multisystem Operators (MSO) or Local able Operators (LCO). This requires interconnection arrangements amongst the various entities (Broadcasters) and the distributors to enable them to execute commercial agreements.

55.I submit that TRAI Act, as originally enacted, did not include "Broadcasting Services" within its ambit. However, the Parliament realising the importance and the need to regulate this industry in the interest of the public amended the TRAI Act and included the proviso to section 2(1)(k) that enabled the Central Government to notify "Broadcasting Services" as a "telecommunication service". Pursuant to the said amendment, the Central government issued two Notifications both dated 09.01.2004 that, among other things, notified "Broadcasting Services and Cable Services" as telecommunication service and vested the jurisdiction of the TRAI to regulate the said sector with regard to certain matters in addition to the powers available to it in terms of the TRAI Act. Moreover, S.O. 45 (E) issued as part of the Notification No.39 dated 09.01.2004, in express terms, entrusted the additional function to TRAI of specifying standard norms for and periodicity of revision of rates of pay channels including interim measures. The main functions entrusted to TRAI under the section 11 of TRAI Act r/w section 36 are to regulate tariff, interconnection and quality of service of broadcasting services. The power to frame Regulations of this nature has been explained by the Hon'ble Supreme Court of India in *BSNL v. TRAI* (cited supra). The Hon'ble Supreme Court has held that the power of TRAI to frame Regulations is wide and pervasive.

56.I submit that TRAI formulates tariff orders, interconnection regulations and Quality of Service (QoS) regulations as necessary instruments of regulation. This regulatory framework ensures that TV channels are made

available to the distributors in a fair and non discriminatory manner for distribution to the public while protecting consumer interests viz. rights for access to information and choice at a reasonable price. This also prevents the consumers from being commercially exploited by the broadcasters and it prevents the broadcasters from forcing channels on the consumers. It is thus evident that TRAI is well within its powers to regulate the TV channels provided by broadcasters. It is further submitted that TRAI Act and Copyright Act are legislations that act in two distinct and separate spheres. The Copyright Act covers a wide array of works including literary, music, videograph, computer programs etc. whereas the TRAI Act is a sector specific Act. As regards the regulation of broadcasting and cable services sector there is no conflict between the regulations framed under TRAI Act and the provisions of Copyright Act since TRAI is only regulating the service provided by the broadcasters and not the content.

57.I submit that as stated above, the Copyright Act, 1957 and the TRAI Act operate in two different fields altogether. Hence, there is no question either of an overlap or a conflict as is being made out by the petitioner. Whereas the Copyright Act, 1957 deals with "content" and the rights emanating from and associated with the same, the TRAI Act and the powers conferred on the TRAI there under operate in a completely distinct field inasmuch as by the regulatory measures, the TRAI regulates the manner in which services are provided by the various entities in this sector and that ultimately must be for the benefit of the subscriber and growth of the industry. The most crucial factor in the regulation of broadcasting services is the transparent declaration of rates of television channels and manner in which such services are made available to the end subscriber / viewer. Manner of offering of pay channels is, therefore, central to effective and meaningful regulation of the Broadcasting Services. The TRAI is conscious, however, of the scope and ambit of its regulatory

power is in relation to channel pricing (a-la-carte and bouquet pricing) and the correlation between pay channels being offered as a-la-carte and bouquet in order to ensure transparent and meaningful and not a forced or truncated choice to the end users / subscribers. The TRAI does not, therefore, enter upon the domain of pricing individual components of content that comprise a pay channel, such individual components being the domain of content producers (including broadcasters) who may exploit their works under the Copyright Law, whether in the form of Broadcast Reproduction Rights or any other right. For example, TRAI's intention is to regulate the price at which a particular channel (let us take the example of Star Movies) is offered as a-la-carte when compared to it being offered in a bouquet (with other channels) but the regulation does not concern itself with what kind of movies is shown on Star Movies. It may be the latest movie or an old movie from the '70s. Therefore, the impugned regulation do not impinge in any way on the commercial exploitation of content.”

7(bb) As already discussed and alluded to elsewhere supra in this judgment, as it is the stated position of TRAI that it is regulating only carriage and not content, we deem it appropriate not to delve further into the aspect of content valuation. Before parting with the case, we also deem it appropriate to notice that public interest point / public trust doctrine does not get washed away owing to challenge to the impugned clauses here being sustained. It is always open to the Parliament to ensure that the content and its valuation is controlled under the appropriate statute, i.e., Copyright Act, in such a manner that it is dovetailed with broadcasters, i.e., this industry which is subject matter of these writ petitions, if the Parliament in its wisdom finds that there is exploitation of end users by broadcasters. We are inclined to say this,

because a comprehensive reading of the consultation papers and the explanatory memorandum preceding the regulations in which certain clauses have been assailed in the instant writ petitions, would reveal that one of the important stakeholders, namely, end user / general public who can be termed as subscribers, have not objected or complained anywhere that they are being exploited. In the consultation paper and explanatory memorandum though the stakeholder who actually raised a particular issue is not mentioned by name, we put it to all the counsel as to if any stakeholder has complained anywhere about exploitation of subscriber / end user qua high pricing and the answer was in the negative. Though end users / subscribers are not before us, we have noticed this in the light of the fact that they are major stakeholders and larger public interest is paramount. This has also weighed in our mind while dealing with the larger public interest / public trust doctrine as one of the points raised by TRAI in resisting the challenge to the impugned clauses.

CONCLUSION :

8(a) Owing to the narrative, discussion and all that have been set out supra, those of the impugned provisions in the said regulations and said tariff order which touch upon content of the programmes of broadcasters are liable to be struck down as not in conformity with the parent Act / plenary Act. Therefore, clauses 6(1), second proviso to 6(1), proviso to 7(2), 7(4), first proviso to 7(4) and 10(3) of the said Regulations and clauses 3(1), 3(2)(b), second proviso to 3(2)(b), first proviso to 3(3), second proviso to 3(3), third proviso to 3(3), fourth proviso to 3(3), fifth proviso to 3(3), sixth proviso to 3(3)

and 3(4) of the said tariff order are struck down as not in conformity with the parent act, i.e., TRAI Act.

8(b) With regard to the other two impugned provisions, as we were given to understand in the course of the hearing that they are relevant and necessary for some other clauses also other than those which have been put in issue in the instant writ petitions, they deserve to be saved to the extent they survive and serve the purpose other than serving implementation or any other purpose of the provisions which we have struck down. Therefore, the other impugned provisions, i.e., clause 11(2) in the said Regulations as also clause 4(2) in the said tariff order will continue to be in the books, but cannot be pressed into service for anything to do with the provisions which we have struck down supra. In other words, these provisions, i.e., clause 11(2) in the said Regulations as also clause 4(2) in the said tariff order can be operated if it can be operated for other provisions of the said Regulations and said tariff order, other than those which we have struck down.

DECISION :

9 Both writ petitions are allowed to the extent indicated in 'Conclusion' supra. Considering the nature of the matter and trajectory of the litigation, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

(I.B., C.J.) (M.S., J.)
02.03.2018

Index : Yes/No

To

1. Department of Industrial Policy and Promotion,
Ministry of Commerce and industry,
Udyog Bhawan,
New Delhi-110 011.

2. The Secretary,
Department of Telecommunications,
Ministry of Communications,
Sanchar Bhawan,
Ashoka Road,
New Delhi-110 001.

3. The Secretary,
Ministry of Information and Broadcasting,
Room No.655, A Wing, Shastri Bhawan,
New Delhi-110 001.

4. Telecom Regulatory Authority of India,
Mahanagar Doorsanchar Bhawan,
Jawahar Lal Nehru Marg,
(Old Minto Road),
New Delhi-110 002.



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W.P.Nos.44126 and 44127 of 2016

Ms.INDIRA BANERJEE, CHIEF JUSTICE

In these writ petitions, the writ petitioners have challenged the vires of the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017, hereinafter referred to as "the impugned Tariff Order", and the consequential Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017, hereinafter referred to as "the impugned Regulations".

2. As the relevant facts and the arguments advanced by the respective parties have been narrated in the elaborate, detailed judgment of M.Sundar,J., the same are not reiterated to avoid prolixity.

3. The question raised in these writ petitions is whether the Telecom Regulatory Authority of India, hereinafter referred to as "the TRAI", constituted under the Telecom Regulatory Authority of India Act, 1997, hereinafter referred to as "the TRAI Act" has jurisdiction to issue the impugned Tariff Order and the impugned Regulations.

4. The TRAI Act has been enacted to provide for the establishment of the TRAI to regulate the telecom services and for matters connected with or incidental thereto.

5. The Statement of Objects and Reasons for the TRAI Act are as follows:

"In the context of the National Telecom Policy, 1994, which amongst other things, stresses on achieving the universal service, bringing the quality of telecom services to world standards, provisions of wide range of services to meet the customers' demand at reasonable price, and participation of the companies registered in India in the area of basic as well as value-added telecom services as also making arrangements for protection and promotion of consumer interest and ensuring fair competition, there is a felt need to separate regulatory functions from service providing functions which will be in keeping with the general trend in the world. In the multi-operator situation arising out of opening of basic as well as value-added services in which private operator will be competing with government operators, there is a pressing need for an independent telecom regulatory body for regulation of telecom services for orderly and healthy growth of telecommunication

infrastructure apart from protection of consumer interest."

6. The relevant provisions of the TRAI Act, being Sections 11, 36, 37 and 38, have been set out in the judgment of Sundar,J. The definitions in Section 2(1)(i), (j) and (k), which are also relevant are set out hereunder:

*"Section 2. Definitions.- (1) In this Act, unless the context otherwise requires
.....*

(i) "regulations" means regulations made by the Authority under this Act;

(j) "service provider" means the government as a service provider and includes a licensee;

(k) "telecommunication service" means service of any description (including electronic mail, voice mail, data services, audio tex services, video tex services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electro-magnetic means but shall not include broadcasting services:

PROVIDED that the Central Government may notify other service to be telecommunication service including broadcasting services."

7. After the amendment of the TRAI Act by the Amendment Act 2 of 2000 by incorporation of the proviso to Section 2(1)(k), the Central Government was empowered to notify broadcasting services as a telecommunication service. In exercise of power under the TRAI Act, as amended, the Central Government issued notification S.O.44(E) and 45(E), whereby broadcasting service was notified to be a telecommunication service and TRAI was empowered to fix the rates of TV Channels.

8. Broadcasting services are undoubtedly 'telecommunication services' within the meaning of Section 2(1)(k) of the TRAI Act, and TRAI has the power to regulate the same. It is not even the case of the writ petitioner that TRAI has no power at all to regulate.

9. TRAI derived its power to make the impugned regulations under Section 36 of the TRAI Act. In *BSNL v. Telecom Regulatory Authority of India*, reported in (2014) 3 SCC 222, the Supreme Court held:

"89. Under sub-section (1) thereof TRAI can

make regulations to carry out the purposes of the TRAI Act specified in various provisions of the TRAI Act including Sections 11, 12 and 13. The exercise of power under Section 36(1) is hedged with the condition that the regulations must be consistent with the TRAI Act and the rules made thereunder. There is no other restriction on the power of TRAI to make regulations. In terms of Section 37, the regulations are required to be laid before Parliament which can either approve, modify or annul the same. Section 36(2), which begins with the words 'without prejudice to the generality of the power under sub-section (1)' specifies various topics on which regulations can be made by TRAI."

10. As held by the Supreme Court in *Cellular Operators Assn. of India v. TRAI*, reported in (2016) 7 SCC 703, the regulation-making power under the TRAI Act is wide and pervasive, and is not trammelled by the provisions of Sections 11, 12(4) and 13, it is a power that is non-delegable and, therefore, legislative in nature. The exercise of this power is hedged in with the condition that it must be exercised consistently with the Act and the Rules thereunder in order to carry out the purposes of the Act. Since the regulation-making power has first to be consistent with the Act, it is necessary that

it not be inconsistent with Section 11 of the Act, and in particular Section 11(1)(b) thereof.

11. Delegated and/or Subordinate Legislations like the impugned Regulation and the impugned Tariff Order may be challenged as being in excess of the power and/or authority conferred by statute on the delegatee. The question would therefore be, whether the impugned Regulation or the impugned Order are relatable to any of the sub-sections (a) to (d) of Section 11(1) or to Section 11(2) of the TRAI Act. The answer to the aforesaid question is, in my view, in the affirmative. In any case, the regulation making power under the TRAI Act is wide and pervasive and is not trammelled by the provisions of Sections 11, 12(4) and 13 of the TRAI Act, as declared by the Supreme Court in *Cellular Operators Assn. of India*, supra.

12. Delegated and/or Subordinate Legislation might also be challenged on the ground of manifest arbitrariness. The test of "manifest arbitrariness" has been well discussed by the Supreme Court in *Khoday Distilleries Ltd. v. State of Karnataka*, reported in (1996) 10 SCC 304. The Supreme Court held:

"13. It is next submitted before us that the

amended Rules are arbitrary, unreasonable and cause undue hardship and, therefore, violate Article 14 of the Constitution. Although the protection of Article 19(1)(g) may not be available to the appellants, the Rules must, undoubtedly, satisfy the test of Article 14, which is a guarantee against arbitrary action. However, one must bear in mind that what is being challenged here under Article 14 is not executive action but delegated legislation. The tests of arbitrary action which apply to executive actions do not necessarily apply to delegated legislation. In order that delegated legislation can be struck down, such legislation must be manifestly arbitrary; a law which could not be reasonably expected to emanate from an authority delegated with the law-making power. In Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India [Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India, (1985) 1 SCC 641 : 1985 SCC (Tax) 121], this Court said that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. A subordinate legislation may be questioned under Article 14 on the ground that it is unreasonable; 'unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary'. Drawing a comparison between the law in England and in

India, the Court further observed that in England the Judges would say, 'Parliament never intended the authority to make such Rules; they are unreasonable and ultra vires'. In India, arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. But subordinate legislation must be so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution."

13. In *Sharma Transport v. State of Andhra Pradesh*, reported in (2002) 2 SCC 188, the Supreme Court held:

"25. ... The tests of arbitrary action applicable to executive action do not necessarily apply to delegated legislation. In order to strike down a delegated legislation as arbitrary it has to be established that there is manifest arbitrariness. In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression "arbitrarily" means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone."

14. Delegated and/or Subordinate Legislation may also be

struck down on the ground of violation of Article 19(1)(g) of the Constitution of India, unless a balance is struck between the freedom to carry on business guaranteed by Article 19(1)(g) and the reasonable restriction permitted under Article 19(6) of the Constitution. The impugned Regulations and the impugned Tariff Order are neither vitiated by manifest arbitrariness nor by violation of Article 19(1)(g) of the Constitution of India, which permits reasonable restrictions.

15. In *Cellular Operators Assn. of India*, supra, the Supreme Court observed:

"80. Section 11(4) of the Act requires that the Authority shall ensure transparency while exercising its powers and discharging its functions. "Transparency" has not been defined anywhere in the Act. However, we find, in a later parliamentary enactment, namely, the Airports Economic Regulatory Authority of India Act, 2008, that Section 13 deals with the functions of the Airports Economic Regulatory Authority (which is an Authority which has legislative and administrative functions). "Transparency" is defined, by sub-section (4), as follows:

The Airports Economic Regulatory Authority of India Act, 2008

"13. Functions of Authority.—(1)-(3) ***

(4) The Authority shall ensure transparency while exercising its powers and discharging its functions, *inter alia*—

(a) by holding due consultations with all stakeholders with the airport;

(b) by allowing all stakeholders to make their submissions to the authority; and

(c) by making all decisions of the authority fully documented and explained."

81. This definition of "transparency" provides a good working test of "transparency" referred to in Section 11(4) of the TRAI Act.

82. In fact, a judgment of the Court of Appeal in England, being *R. v. North and East Devon Health Authority, ex p Coughlan* [*R. v. North and East Devon Health Authority, ex p Coughlan*, 2001 QB 213 : (2000) 2 WLR 622 (CA)], puts the meaning of "consultation" rather well as follows: (QB p. 258 C-D, para 108)

"108. It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must

include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken...."

16. In *Union of India v. Cynamide India Ltd.*, reported in (1987) 2 SCC 720, referred to and relied upon in *Cellular Operators Assn. Of India*, supra, the Supreme Court held:

"5. The second observation we wish to make is, legislative action, plenary or subordinate, is not subject to rules of natural justice. In the case of parliamentary legislation, the proposition is self-evident. In the case of subordinate legislation, it may happen that Parliament may itself provide for a notice and for a hearing—there are several instances of the legislature requiring the subordinate legislating authority to give public notice and a public hearing before say, for example, levying a municipal rate—in which case the substantial non-observance of the statutorily prescribed mode of observing natural justice may have the effect of invalidating the subordinate legislation. The right here given to rate payers or others is in the nature of a concession which is not

to detract from the character of the activity as legislative and not quasi-judicial. But, where the legislature has not chosen to provide for any notice or hearing, no one can insist upon it and it will not be permissible to read natural justice into such legislative activity."

17. In *Cellular Operators Assn. of India*, supra, the Supreme Court observed:

"92. We find that, subject to certain well-defined exceptions, it would be a healthy functioning of our democracy if all subordinate legislation were to be "transparent" in the manner pointed out above. Since it is beyond the scope of this judgment to deal with subordinate legislation generally, and in particular with statutes which provide for rule making and regulation making without any added requirement of transparency, we would exhort Parliament to take up this issue and frame a legislation along the lines of the US Administrative Procedure Act (with certain well-defined exceptions) by which all subordinate legislation is subject to a transparent process by which due consultations with all stakeholders are held, and the rule or regulation-making power is exercised after due consideration of all stakeholders' submissions, together with an explanatory memorandum which broadly takes

into account what they have said and the reasons for agreeing or disagreeing with them. Not only would such legislation reduce arbitrariness in subordinate legislation-making, but it would also conduce to openness in governance. It would also ensure the redressal, partial or otherwise, of grievances of the stakeholders concerned prior to the making of subordinate legislation. This would obviate, in many cases, the need for persons to approach courts to strike down subordinate legislation on the ground of such legislation being manifestly arbitrary or unreasonable."

18. The judgment in *Cellular Operators Association of India*, supra, has to be read as a whole. In *Madhav Rao Jiawaji Rao Scindia Bahadur v. Union of India*, reported in AIR 1971 SC 530, the Supreme Court cautioned "*it is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment.*"

19. Not everything said by a Judge in his judgment constitutes a precedent. What is binding is the principle on which a case is decided. It is, therefore, important to analyse a decision and segregate the *ration decidendi*, which is to be

followed as a precedent.

20. In *Islamic Academy of Education v. State of Karnataka*, reported in (2003) 6 SCC 697, the Supreme Court held:

"139. A judgment, it is trite, is not to be read as a statute. The ratio decidendi of a judgment is its reasoning which can be deciphered only upon reading the same in its entirety. The ratio decidendi of a case or the principles and reasons on which it is based is distinct from the relief finally granted or the manner adopted for its disposal. (See *Executive Engineer, Dhenkanal Minor Irrigation Division v. N.C. Budharaj* [(2001) 2 SCC 721] .)

140. In *Padma Sundara Rao v. State of T.N.* [(2002) 3 SCC 533] it is stated: (SCC p. 540, paragraph 9)

"There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in *Herrington v. British Railways Board* [(1972) 2 WLR 537 : 1972 AC 877 : (1972) 1 All ER 749 (HL)] (Sub nom *British Railways*

Board v. Herrington). Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."

(See also *Haryana Financial Corpn. v. Jagdamba Oil Mills* [(2002) 3 SCC 496] .)

141. In *General Electric Co. v. Renusagar Power Co.* [(1987) 4 SCC 137] it was held: (SCC p. 157, paragraph 20)

"As often enough pointed out by us, words and expressions used in a judgment are not to be construed in the same manner as statutes or as words and expressions defined in statutes."

21. According to settled theory of precedents, every decision contains three basic postulates, – (i) finding of facts, direct and inferential; (ii) statements of the principles of law applicable to the legal problems that arise in the facts of the case; and (iii) judgment based on the combined effect of the above.

22. As held by the Supreme Court in *Union of India v. Chajju Ram*, reported in (2003) 5 SCC 568, a judgment and/or

decision is an authority for what it actually decides. What is of essence is its ratio, which is the issue raised and decided, and not every observation made in the judgment, or what logically follows therefrom. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved. The enunciation of the reason or principle on which a question has been decided is alone binding as a precedent.

23. Therefore, in order to understand and appreciate the binding force of the decision in *Cellular Operators Assn. of India*, supra, it may be necessary to see what were the facts in the case in which the decision was given, and what was the point which had to be decided. The interpretation of Sections 11 and 36 in the said judgment are undoubtedly binding.

24. The law as enunciated by the Supreme Court, referred to above, and in particular the judgment of the Supreme Court in *Cellular Operators Assn. of India*, supra, is that TRAI is to ensure transparency while discharging its functions and exercising its powers. However, it is for the legislature to enact law for transparency in making subordinate legislation.

25. The writ petitions were opposed on various grounds:

- i. Want of territorial jurisdiction, as no part of cause of action had arisen within the territorial jurisdiction of this Court;
- ii. The technical ground that two declaratory reliefs had been sought in each writ petition;
- iii. Claim to reliefs not supported by pleadings.

The writ petitions originally challenged the draft tariff order and the draft regulations. The prayers have been amended after issuance of the impugned tariff regulation and the impugned tariff order, but pleadings have not been amended. The petitioners have not paid separate court fees, including enhanced court fees for the relief sought.

- iv. The writ petitions are barred by principles of constructive res judicata.

- v. The writ petitions are not maintainable in view of existence of an alternative efficacious remedy of statutory appeal before the Telecom Disputes Settlement and Appellate Tribunal (TDSAT) under Section 14(1)(b) of

the TRAI Act.

26. I am in agreement with Sundar,J. that none of the objections to the writ petitions listed in sub-paragraphs (i) to (v) of the preceding paragraph are sustainable.

27. The question of law raised by the writ petitioners is whether the scope of TRAI's power and jurisdiction under the TRAI Act is limited to regulation of carriage or means of transmission of television channels or whether it extends to regulation of content, that is the TV Channel itself that is protected under the Copyright Act. The writ petitioners submit that the Copyright Act, 1957, hereinafter referred to as "the Copyright Act", regulates content of television channels.

28. The writ petitioners have questioned the power, authority and jurisdiction of TRAI to issue the impugned Regulations and the impugned Tariff Order to the extent the impugned Regulations and/or the impugned Tariff Order regulate content.

29. The amendment of the Copyright Act in 2012 does

not take away the power of TRAI to fix rates of broadcasting services or to regulate the manner of offering service under Section 11 read with Section 36 of the TRAI Act. The power of TRAI to fix rates of broadcasting services, including rates of TV channels has been upheld by orders of Court referred to in the judgment of M.Sundar, J.

30. By the 2012 Amendment, Parliament amended Section 39A of the Copyright Act to make Sections 30A, 33, 33A, 34, 35 and 35 applicable to broadcast reproduction rights under Section 37.

31. Broadcast Reproduction Right is not an all encompassing right that eclipses all other legislations and circumscribes the power of TRAI. The Broadcast Reproduction Right is only a right of the broadcaster under the Copyright Act to protect its broadcast from exploitation by a third party.

32. In fact, Broadcast Reproduction Rights protect a broadcaster under Section 37(3), which is set out herein below for convenience:

"(3) During the continuance of a broadcast

reproduction right in relation to any broadcast, any person who, without the licence of the owner of the right does any of the following acts of the broadcast or any substantial part thereof,-

- (a) re-broadcasts the broadcast; or*
- (b) causes the broadcast to be heard or seen by the public on payment of any charges; or*
- (c) makes any sound recording or visual recording of the broadcast; or*
- (d) makes any reproduction of such sound recording or visual recording where such initial recording was done without licence or, where it was licensed, for any purpose not envisaged by such licence; or*
- (e) sells or hires to the public or offers for such sale or hire, any such sound recording or visual recording referred to in clause (c) or clause (d) shall, subject to the provision of Section 39, be deemed to have infringed the broadcast reproduction right."*

33. As a matter of fact, the Broadcast Reproduction Rights were not introduced for the first time in 2012. Section 37 in its present form has existed since 1994 when it was substituted by Act 38 of 1994. As a right Broadcast Reproduction Right has been in existence since 1957 when the Copyright Act was enacted.

34. After amendment, Section 30A makes Section 19 applicable to a licence of a Broadcast Reproduction Rights as they apply to a licence of copyright. Section 33 extends the provisions regarding a Copyright Society to Broadcast Reproduction Rights. Section 33A makes tariff schemes applicable to Broadcast Reproduction Rights to protect the copyright in works or performer's right subsisting in the broadcast. Section 34 pertains to administration of rights of owners of copyright by a Copyright Society, which have now been extended to Broadcast Reproduction Rights. Section 35 relates to control over copyright societies and Section 36 deals with submission of returns and reports by the Copyright Society.

35. By virtue of 2012 Amendments like copyright societies, holders of broadcast reproduction rights are to form a society for administering broadcast reproduction rights and for carrying on business in respect of broadcast reproduction rights. Where a broadcast reproduction right in which copyright or performer's right subsists, licensing of the said broadcast reproduction right can only be done by the broadcast reproduction society.

36. Tariff scheme under the Copyright Act, as amended, is understood in the context of Sections 33A of the Copyright Act and Rule 56 of the Copyright Rules, 2013 to refer to the tariff payable by the broadcaster to the owner of the copyright or performance right in respect of works which are broadcast by the broadcaster in various media.

37. The amendments in the Copyright Act, in my view, have nothing to do with the inter se relationship between the broadcaster and the distributor in the activity of broadcast. It also does not deal with the price of a channel that an end consumer pays to the broadcaster. These provisions, after amendment, deal only with the broadcaster's relationship with holders/owners of copyright/performer's rights in the individual programme, which is re-broadcasted or reproduced.

38. The impugned Regulations and/or the impugned Tariff Orders operate in a different sphere unconnected with Broadcast Reproduction Rights, governed by the Copyright Act.

39. The broadcasters can only transmit signals to the distributors named in the permission for re-transmission to the

subscribers. It is, therefore, incorrect to say that the broadcast is complete when signal is given by the broadcaster to the distributor. That is only one step in the broadcast. The activity is complete when the distributor further re-transmits the signal to the end subscriber. The distributor and the broadcaster are the two arms in the activity of broadcasting, as argued by Mr. Wilson.

40. On behalf of the writ petitioners, it has been emphatically argued that TRAI has jurisdiction to regulate broadcasting as a "form/means of communication", that is the "carriage" aspect and TRAI cannot regulate "content", that is the television channel, which is protected under the Copyright Act.

41. Section 11(1)(b)(ii) to 11(1)(b)(vii) confer on TRAI the power to ensure compliance by service providers of terms and conditions of licence; to fix the terms and conditions of interconnectivity between the service providers; to ensure technical compatibility and effective interconnection between different service providers; to regulate arrangement amongst service providers for sharing their revenue derived from providing telecommunication services; to lay down standards of quality of service to be provided by the service providers and

ensure quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunications service; to maintain register of interconnect agreements and of all such other matters as may be provided in the Regulations.

42. The regulation of interconnect agreements between the broadcasters and the distributors or between two service providers and the terms of such agreements, including sharing of revenue from providing broadcasting service fall within the scope of Section 11(1)(b) and TRAI can make regulations to regulate the same. Section 11(1)(c) of the TRAI Act enables TRAI to levy fees and other charges in respect of telecommunication services which includes broadcasting services.

43. The writ petitioners are covered by the definition of service provider under Section 2(1)(j) of the TRAI Act, since the writ petitioners possess uplinking and downlinking permission issued by the Ministry of Information and Broadcasting, under Section 4 of the Indian Telegraph Act, 1885.

44. In *Hotel and Restaurant Association and another v. Star India (P) Ltd. and others*, reported in (2006) 13 SCC 753, the Supreme Court held that TRAI had power under Section 11 of the TRAI Act to notify different rates for different persons or class of persons for similar telecommunication services.

45. As observed by M.Sundar, J., TRAI has not fixed any upper limit or cap for the writ petitioners in pricing their channels. It is open to the writ petitioners and other similarly circumstanced broadcasters to declare any particular channel as a pay channel or a free channel. Only when any particular channel is put in a bouquet that it cannot be priced at Rs.19/- per month per subscriber.

46. There is also no compulsion that pay channels should only be offered in bouquets. If the cost of the content of any channel is very high and its content exclusive the writ petitioners are free to declare that particular channel as a pay channel and price the channel at such price as is deemed appropriate.

47. May be bouquets are popular in the market and attract

viewers, who subscribe to such bouquets. It is still open to the writ petitioners to offer bouquets. It can also offer bouquets and some popular channels as pay channels.

48. In *Cellular Operators Association of India*, supra, the Supreme Court expressed the hope that Parliament would bring in legislation introducing transparency in subordinate legislation.

49. However the Regulation impugned in the aforesaid case was not struck down on the ground of absence of transparency, but on the ground of manifest arbitrariness, as call drops attracted penalty on service providers even though they conformed to the quality standards laid down by the Quality of Service Regulations 2009, and such penalty did not advance the avowed object of the Regulation impugned, of quality control. The Supreme Court disagreed with findings of transparency arrived at by the High Court.

50. It is true as held by M.Sundar, J. that in *Cellular Operators Association of India*, supra, the Supreme Court was dealing with the same Regulation making power in the same statute. However the Regulation impugned was different. A

judgment rendered in the context of a different Regulation does not operate as a binding precedent in the case, where we are deciding inter alia validity of the impugned Regulation and the impugned Tariff Order.

51. In deciding the question of whether TRAI has power under the TRAI Act to regulate content, any concession made by Counsel is inconsequential.

52. With the greatest of respect, I am unable to agree that by putting a cap on the price of a bouquet, TRAI is regulating content. The broadcasters are free to choose their channels, offer single or multiple pay channels and one or more bouquets.

53. The scope of judicial review of the impugned Regulations and the impugned Tariff Order is limited. The Court does not normally exercise power of judicial review unless it finds that formation of belief by the statutory authority is vitiated by mala fides, dishonesty or corrupt practice. The impugned Regulation or the impugned Tariff Order cannot be set aside unless it is found to be beyond the limits of power conferred upon the authorities by the legislature, or is based on grounds

extraneous to the legislation or if there are no grounds at all for passing the impugned Regulations or the impugned Tariff Order or if the grounds are such that no one can reasonably arrive at the opinion or satisfaction required thereunder. The proposition finds support from the decision of the Supreme Court in *People's Union for Civil Liberties and another v. Union of India and others*, reported in (2004) 2 SCC 467.

54. It is equally well settled that in exercise of power of judicial review, this Court is not to sit in appeal over the decisions of administrative authorities. A writ petition for judicial review would lie only on certain well defined grounds. A mere wrong decision without anything more is not enough to attract the power of judicial review. Reference may in this context be made to the decision of the Supreme Court in *State of Uttar Pradesh and others v. Rakesh Kumar Keshari and another*, reported in (2011) 5 SCC 341.

55. The reason for putting cap of 15% to the discount on the MRP of a bouquet disclosed in to the impugned Tariff Order is that, as per data available with TRAI, some bouquets are being offered by the distributors of television channels at a discount of

up to 80% -90% of the sum of a-la-carte rates of pay channels constituting those bouquets. Such high discounts force the subscribers to take bouquets only and thus reduce subscriber choice. This, in my view, cannot be a reason to restrict the discount.

56. As per the impugned Tariff Order, bouquets formed by the broadcasters contain only few popular channels. The distributors of television channels are often asked to take the entire bouquet as otherwise they are denied the popular channels altogether or given such popular channels at RIO rates. To make the matters worse, the distributors of television channels have to pay as if all the channels in the bouquet are being watched by the entire subscriber base, when in fact only the popular channels will have high viewership. In such a scenario, at the retail end, the distributors of television channels somehow push these channels to maximum number of subscribers so as to recover costs. This marketing strategy based on bouquets essentially results in 'perverse pricing' of bouquets vis-à-vis the individual channels. As a result, the customers are misled to subscribe to bouquets rather than subscribing to a-la-carte channels of their choice. Thus, in the process, the public, in

general, end up paying for “unwanted” channels and this, in effect, restricts subscriber choice. Bundling of large number of unwanted channels in bouquets also result in artificial occupation of distributors’ network capacity. This acts as an entry barrier for newer TV channels.

57. It is not for this Court exercising its extraordinary jurisdiction under Article 226 of the Constitution of India to decide whether price fixation under the impugned Tariff Order and/or impugned Regulations is commensurate with the cost incurred by the broadcasters. It is, however, reiterated that the impugned Regulations do not put an inflexible cap on pricing. The cap is only on the pricing of channels offered in a bouquet and not otherwise. The restrictions on the pricing of bouquets are apparently in the interest of the end users who may not be duped and/or misled by inclusion of any number of free channels and less popular channel that make a bouquet appear to be lucrative by sheer reason of number of channels in the bouquet. In any case, it is for the Court to consider the correctness of the fixation. The powers have been exercised within the jurisdiction.

58. I am unable to agree with the conclusion of M.Sundar,

J. that the provisions of the impugned Regulation and the impugned Tariff Order are not in conformity with the TRAI Act. In my view the impugned provisions neither touch upon the content of programmes of broadcasters, nor liable to be struck down. However, the clause putting cap of 15% to the discount on the MRP of a bouquet is arbitrary. The said provision is, in my view, not enforceable. In my considered view, the challenge to the impugned Regulation and the impugned Tariff Order fail.

59. Since we have not been able to agree, the writ petitions may be placed before a third Judge. Since the Chief Justice has delivered the dissenting judgment, the matter may be placed before the next available Judge in order of seniority for nomination of the Judge before whom the matter may be placed.

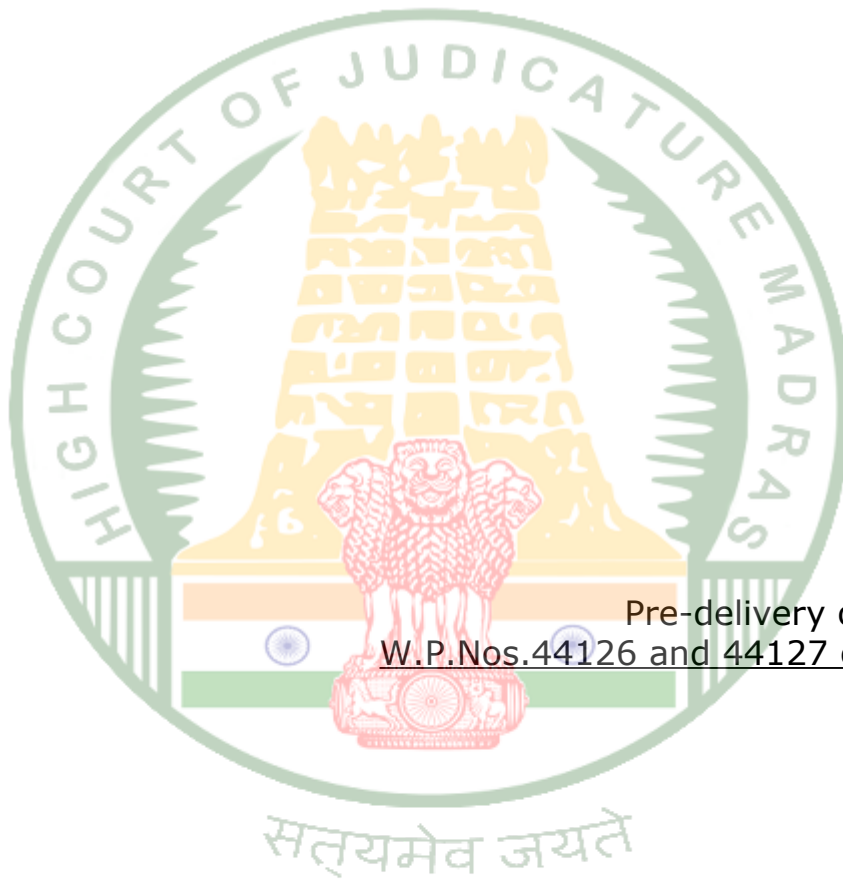
(I.B., CJ)
02.03.2018

Index : Yes/No
Internet : Yes/No
sasi

Note to Registry :
Issue order copy today (2.3.2018).

THE HON'BLE CHIEF JUSTICE
AND
M.SUNDAR, J.

(sasi)



Pre-delivery order in
W.P.Nos.44126 and 44127 of 2016

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