

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 26.04.2018

Verdict on : 23.05.2018

CORAM

THE HONOURABLE Mr. JUSTICE **M.M.SUNDRESH**

**W.P.Nos.44126 & 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.

.. Petitioner in
W.P.No.44126 to 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 WPs.

Writ petitions filed under Article 226 of the Constitution of India praying for an issuance of 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.

For petitioner in : Mr.Mr.P.Chidambaram, Sr.C.,
W.P.No.44126/2016 Mr.Satish parasaran, Sr.C.,
Mr.P.H.Arvinth Pandian, Sr.C.,
Mr.Saikrishna Rajagopal
Ms.Ruby singh Ahuja
Mr.Rahul Balaji
Mr.Sidharth Chopra
Ms.Sneha Jain
Ms.Aakanksha Munjhal
Ms.Gitanjali Mathew
Ms.Monisha Suri
Ms.Surasika parthasarathy
Mr.Utsav Trivedi

For petitioner in : Dr. Abhishek Singhvi, Sr.C
W.P.No.44127/2016 Mr.P.S.Raman Sr.C.,
Mr.Gopal Jain, Sr.C.,
Mr.Saikrishna Rajagopal
Ms.Ruby singh Ahuja
Mr.Rahul Balaji
Mr.Sidharth Chopra
Ms.Sneha Jain
Ms.Aakanksha Munjhal
Ms.Gitanjali Mathew
Ms.Monisha Suri
Ms.Surasika parthasarathy
Mr.Utsav Trivedi

For respondents in : Mr.G.Rajagopalan, ASG for
W.P.No.44126/2016 Mr.Venkatasamy Babu for R1 to R3
Mr.P.Wilson, Sr.C., for
M/s P.Wilson Associates for R4

For respondents in : Mr.Saket Singh for
W.P.No.44127/2016 Mr.Richardson Wilson for R4

Intervenor in : Mr.G.Masilamani, Sr.C., for
WMP.Nos.2779 & M/s King & Partridge for
2780/2017 Mr.Jose John
Mr.M.Narendran
Ms.Lilly Francis
Ms.Nikitha, J.S.,

Intervenor in : Mr.AR.L.Sundaresan, S.C., for
WMP.No.11131/2017 in Mr.Arjun Suresh for
W.P.No.44126/2017 M/s Dua Associates

Intervenor in : Mr.Jayant K.Mehta for
WMP.No.1417/2017 Mr.B.Kishore for
M/s Dua Associates

Intervenor in : Mr.Krishna Srinivas for
WMP No.5667/2017 M/s S.Ramasubramanian Associates

COMMON ORDER

A Division in the Bench created this reference. Ironically, answering the reference would create a decision of the Division Bench.

2. If patience is considered as a virtue, it could be stated to have well served, upon hearing the submissions of eloquence of the learned counsels representing competing interest.

3.Heard the learned Senior Counsels and learned counsel appearing for the petitioners, respondents and intervenors and perused the documents, pleadings and written arguments.

4. SCOPE OF REFERENCE:-

4.1. Before venturing into the case in detail, it would be appropriate to define the role of this Court as the boundary lines are

to be defined, drawn and marked. Clause 36 of the Letters Patent of the Madras High Court defines and delineates the contours of the power to be exercised by the learned single Judge, when a reference is made as to the decision given on any point of difference. Apropos Clause 36:-

“36. Single Judges and Division Courts:-

And We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Madras, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purpose, (in pursuance of Section 108 of the Government of India Act, 1915), and if such Division Court is composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there shall be a majority, but if the Judges should be equally divided (they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case included who those first heard it.)”

4.2. The role required to be played by a single Judge is accordingly distinctly marked. This specific role assigned is to confirm either of the decisions on a point of difference. Even in a case where the exact point of difference is not indicated, the Reference Court can formulate and proceed to answer it on a reading of the respective

views. Such a role would encompass both fact and law. For concurring with a view of one as against another, the Reference Court can give its own reasons by supplementing it. On the same score, if the ultimate decision is one and the same, but reasons being different, the Reference Court cannot go beyond it. The power available cannot be equated with that of a review nor an exercise resulting in sitting in judgment over the other.

4.3. After completion of the main round of arguments, the learned Senior Counsels appearing for the petitioners took an unexpected stand against the grain on the restrictive scope of reference inter alia contending that both the learned Judges concurred with each other on the jurisdiction of the Telecom Regulatory Authority of India Act, 1997, (hereinafter referred to as "the TRAI Act, 1997") over "content". Resultantly, the one and only issue to be considered is to the existence of "content" as a "fact" in the impugned Regulations and Tariff Order. The said contention so made cannot be countenanced for more than one reason. It is an half hearted attempt to read the judgment as a statute. In the lead judgment, the scope of the TRAI Act, 1997, The Copyright Act, 1957 and the Tamil Nadu Cable Television Networks (Regulation) Act, 1995, and rules were indeed considered, though to a limited extent. While it is a case of the

petitioners that the regulatory authority, hereinafter referred to as TRAI, through the impugned Regulations and Tariff Order, regulates the "content", no such power is available under the TRAI Act, which jurisdiction is occupied by the Copyright Act, 1957. In the differing judgment, the Hon'ble Chief Justice has clearly stated in paragraph 3 of the order that the question raised in the writ petitions is to the jurisdiction of TRAI on the availability of the power under the TRAI Act to issue the impugned Regulations and Tariff Order. Incidentally, it was further held that sufficient power is available in the TRAI Act and the Copyright Act, 1957, deals with a different field. The learned Chief Justice has come to the conclusion that the power under the TRAI Act is wide enough to pass the impugned Regulations. Thus, the submissions made can only be termed as a leap frog attempt to oversimplify the issue by a strategic shift through the art of advocacy perhaps warranted by the direction of the wind.

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4.4. The learned Senior Counsels appearing for some of the respondents inter alia would contend that the decision of the learned Chief Justice qua regulation 7(4), which places a fetter on the discount offer to the distributor being that of the single Judge requires to be dealt with by this Court. To be noted, the aforesaid Regulation 7(4) has to be read with proviso to tariff order 3(3). Though this Court is

tempted to agree with the submissions made by the learned counsels, with specific reference to the grounds of challenge as recorded in the lead judgment in paragraph 4(b) and 6(i)(a) that the writ petitioners are not assailing the impugned order on merit, the reasons assigned by the learned Chief Justice including the scope of invoking the extraordinary and discretionary power conferred by the constitution to Article 226, the issue qua price fixation and the existence of a manifest arbitrariness, total and substantive unreasonableness qua a subordinate legislation is unable to accede to the request made.

4.5. Even assuming the reasons assigned by the learned Chief Justice are different, the ultimate result is the same insofar as the regulations and tariff order referred to supra are concerned. Furthermore, Clause 36 of the Letters Patent clearly prohibits such an exercise. If for the argument sake, the decision of the learned Chief Justice is taken as that of a single Judge, going into the same on merits by this Court would lead to exercising the power of review, which is also not available. Accordingly, the feeble, half hearted submissions made by the learned counsels for the respondents also stand rejected.

4.6. In the lead judgment, the following conclusion was arrived at.

“**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.”

4.7. In the differing decision, the Hon'ble Chief Justice has concurred with sub paragraphs 1 to 4 of the lead judgment. Therefore, these issues have attained finality.

4.8. The conclusion of the learned Chief Justice is as follows:

“58..... 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.”

Hence, only these points of differences leading to the respective decisions are to be answered by this Court in either way.

5.FACTUAL MATRIX AND ISSUES:-

5.1. Admittedly, in the case on hand, no point of difference was framed at the time of reference. Thus, this Court can frame and answer accordingly as held in **ALL INDIA ANNA DRAVIDA MUNNETRA KAZHAGAM V. THE STATE ELECTION COMMISSIONER, REP., BY D.CHANDRASEKARAN AND OTHERS((2007) 2 Law Weekly 1)**. The following passage would be of relevance.

182. Even though Clause 36 of the Letters Patent requires that if the opinion of the Judges should be equally divided, they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including who those first heard it, no specific point on which difference has arisen has been specified. When the matter was placed before me, at the threshold this aspect was highlighted by me and the

learned counsels appearing for all the parties have stated that even though points of difference have not been specifically pointed out by the Division Bench, the difference as apparent from various discussions and conclusions of the two learned Judges should be culled out and should be decided on that basis without returning the matter for spelling out the difference.

5.2. For deciding the issues, a factual setting is necessary. In the lead judgment the facts have been captured with abundant clarity. Therefore, this Court is relieved of the repetition of factual narration except to the extent required.

5.3. The petitioners are broadcasters and television channels. The broadcast of the petitioners is meant to reach the general public being the subscriber. The broadcasting would involve both uplinking and downlinking. It has got three principal actors in its exercise viz., broadcasters-petitioners, distribution platform operators (multi system operators, etc.,) and the consumers, who are otherwise called customers/subscribers. There is also a fourth fringe player whose limited role stands in between the distributor platform operator and the subscriber called local cable TV operator.

5.4. As the telecommunication service in general and broadcasting service, in particular, involves a regulatory regime apart

being governed by a sector specific Act, the process of uplinking and downlinking by a broadcaster requires permission, which according to the respondents is relatable to Section 4 of the Indian Telegraphic Act, 1988. Earlier, the entire process of broadcasting was being done in an analogue mode. This is otherwise called as "non addressable system". By this process, a single wire would get attached to a TV set. It would carry number of channels in an analogue mode. In this process, consumer/subscriber had no choice but to pick all the channels. The broadcaster was also at a disadvantageous position. It was virtually impossible to assess the number of subscribers. Many of the Local Cable Television Operators (LCO) were allegedly withholding the information on purpose. It also restrained launching of new channels due to capacity constraints, as felt by Multi System Operators.

5.5. Due to the advancement in technology, addressable system came into being. Being digital, it carries hundreds of channels. Apart from paving way for new technologies, the digital platform as it stands today includes Multi System Operator(MSO), Direct to Home(DTH), Head in the Sky(HITS) and IPTV. This position is in vogue throughout the country except a small part of this State due to an interim order of the Court stated to be in operation.

5.6. The relationship between a broadcaster and distributor is rather unique. It is governed by downlinking guidelines, downlinking permission and the proforma meant for an application for such permission. Accordingly, a transmission of a broadcast can only be done through a distributor. A specific percentage can be charged by the distributor for the services rendered. The broadcaster is supposed to reveal the names of the distributors in the application form itself. Therefore, there is a clear cut mechanism put in place between the two service providers viz., broadcaster and distributor.

5.7. Under the interconnected regulations, a broadcaster must provide its signal to every distributor on reasonable terms. These regulations are founded on the principles of "must provide" and "non exclusion". Accordingly, the broadcaster is duty bound to publish a Reference Interconnected Offer (RIO) setting forth the technological and commercial terms. The object of this regulation is to avoid discrimination and absolute control by a broadcaster as against a distributor.

5.8. The broadcaster uplinks the signal of its channel either by using its own Teleport or by leasing it. To be noted, the signals of the pay channels are in encrypted form. Now, we have different

categories of channels, such as, Free to Air Channels, Pay Channels, Standard and High Definition Channels. A broadcaster, after obtaining permission, gives its own equipment to the distributor for downloading the signals. A distributor does the work of unencrypting the encrypted signals of the broadcaster and thereafter, re-encrypts it for transmission to the end user. These signals are said to have been communicated to the end users/subscribers when they reach the set top box. This set top box will be fixed at the place of the subscriber. Therefore, the process involves a chain of events before a signal reaches the subscriber.

5.9. At least from the year 2004 onwards, the process of regulating the broadcasting services under TRAI Act, leading to the present impugned Regulations and the Tariff Order, started happening.

5.10. Accordingly, by the Tariff Order dated 01.10.2004, the ceiling price of television channel was fixed. By the second amendment Order dated 01.12.2004, 7% increase on the television channel was made. Similarly, under the third tariff order dated 31.08.2006, the price of the television channel was capped at Rs.5/- (ceiling limit) apart from mandating the offering as a-la-carte. Tariff orders have

also been passed periodically increasing the price of the television channels. Under 14th Amendment dated 06.04.2015, the relationship of a-la-carte and bouquet was created. Thus, one can say that seeds of Regulations and Tariff Order were sowed a decade ago, continued and implemented periodically.

5.11. Before giving birth to the impugned Regulations and Tariff Order, the fourth respondent undertook an exhaustive process by which the broadcasters including the petitioners were asked to furnish their views. This elaborate exercise could very well be seen in consultative process adopted through its papers. This, together with the explanatory memorandums attached along with the Regulations and Tariff Order would indicate the fair process adopted. Objections and views were duly recorded and dealt with. To be noted, the petitioners themselves insisted and agreed with some of the provisions but for the reasons known proceeded to challenge before this Court.

5.12. Broadcasting service was excluded initially from the definition of "Telecommunication Services" under Section 2(1)(k) of the TRAI Act, 1997. The scope and ambit of the aforesaid enactment would be dealt with infra. Vide Act 2/2000, a proviso was added thus permitting the Central Government to notify any other services as

Telecommunication Services. In pursuant to the aforesaid proviso, a notification was issued by the Central Government in S.O.44 (E) and 45 (E) dated 09.04.2001 by which broadcasting services was notified as telecommunication services and TRAI was given an additional function to specify standard norms and periodicity of revision of rates of pay channels including interim measures. A fruitful recapitulation:-

"S.O. 44(E).--In exercise of the powers conferred by the proviso to clause (k) of sub-section (1) of [section 2](#) of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997), the Central Government hereby notifies the broadcasting services and cable services to be telecommunication service. [Notification No. 39 issued by Ministry of Communication and Information Technology dated 9 January 2004. S.O. No. 44(E) issued by TRAI, vide F. No. 13-1/2004]"

ORDER

"S.O. 45(E).--In exercise of the powers conferred by clause (d) of sub-clause (1) of [section 11](#) of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997) (hereinafter referred to as the Act), the Central Government hereby entrusts the following additional functions to the Telecom Regulatory Authority of India, established under Sub-section (1) of [Section 3](#) of the Act, in respect of broadcasting services and cable services, namely:

(1) Without prejudice to the provisions contained in clause (a) of sub-section (1) of [section 11](#) of the Act, to make recommendation regarding --

(a) the terms and conditions on which the 'addressable systems' shall be provided to customers Explanation--For the purposes of this clause, 'addressable system' with its grammatical variation, means an electronic device or more than one electronic devices put in an integrated system through which signals of cable television network can be sent in encrypted or unencrypted form,

which can be decoded by the device or devices at the premises of the subscriber within the limits of authorisation made, on the choice and request of such subscriber, by the cable operator for that purpose to the subscriber.

(b) the parameters for regulating maximum time for advertisements in pay channels as well as other channels.

(2) Without prejudice to the provisions of sub-section (2) of [section 11](#) of the Act, also to specify standard norms for, and periodicity of, revision of rates of pay channels, including interim measures.

[Notification No. 39 issued by Ministry of Communication and Information Technology, dated 9 January 2004. S.O. No. 45(E) issued by TRAI, vide F. No. 13-1/2004]"

Needless to state that the petitioners have not put into challenge this notification.

5.13. One of the petitioners challenged the proviso to Section 2(1)(k) of the TRAI Act, which inter alia led to the notification of Standing Order 44(E) and 45(E). In this connection, the other petitioner is the sister concern having a common parent company. Resultantly, the Tariff Order passed was also put into challenge. Incidentally, another broadcaster has challenged Section 11(2) of the Act as well. The challenge made was repelled by the Division Bench of the Delhi High Court in **STAR INDIA PRIVATE LIMITED VS. TELECOM REGULATORY AUTHORITY OF INDIA AND OTHERS ((2008) 146 DLT 455 (DB))**. While holding that the petitioner is a service provider within the meaning of TRAI Act, it was held that the

tariff fixation under Section 11(2) of the Act is the duty and thus within the competence of the TRAI. It is pertinent to note that the Special Leave Petition filed by the petitioner was also dismissed by the Apex Court holding that there was no merit in SLP No.23612-23613 of 2007.

5.14. The relationship between a broadcaster and the distributor through the Reference Interconnected Offer (RIO) dictated by the regulations was challenged before the Telecom Disputes Settlement and Appellate Tribunal, in which, M/s Media Pro Enterprises India Private Limited was a party. It was nothing but an aggregate of broadcasters including the one of the petitioners herein, who has also been arrayed as fourth respondent. Here again, the contention was rejected while reiterating the views of the Division Bench of the Delhi High Court, referred supra. Once again the Special Leave Petition was dismissed by the Apex Court.

5.15. The petitioner also filed a miscellaneous application in M.A. No.108 of 2009 in Petition No.172 of 2009 before the Tribunal inter alia contending that it is a service provider under the TRAI Act. The finding rendered by the Tribunal is as under:

“ 35. The fact that the petitioner, as a provider of "Broadcasting

Service", is a service provider is beyond any dispute. Admittedly, the respondent is also a service provider within the meaning of the provisions of the Act. The dispute herein is, thus, between two service providers."

5.16. The petitioners were asked by the impugned regulations and tariff order package and sell their pay channels, free to air channels, High and Standard definition channels in a specified manner keeping in mind the overall interest of all inclusive of the general public. Thus, through this process, the petitioners are made to make their offers as a-la-carte and bouquet channels. They are asked not to mix the pay channels and free to air channels with each other. Therefore, the offer should either be a bouquet of free to air channels or pay channels. Similarly, they are not supposed to offer in a bouquet, both high definition and standard definition formats of the same channels. A monetary cap was fixed on the bouquet of pay channels. The extent of discount offer is also restricted to encourage the customer to effectively exercise its choice to choose channel of their liking on an a-la-carte basis. Thus, the impugned Regulations and the Tariff order make it mandatory for the broadcasters to make their offers in a particular way. A deemed extension of geographical territory was also provided in favour of the distribution under certain circumstances. It is needless to state that the actual content of the programme in a channel has never been touched.

5.17. These Regulations and Tariff Order are put into challenge by the petitioners inter alia contending that they deal with "content" for which there is no power available under the TRAI Act, which only deals with "carriage". The other contention is that the field is occupied by the Copyright Act, 1957, by which, the broadcasters reproduction right has been recognised and protected.

5.18. From the above, two principal issues crop up for determination:-**(1) whether the impugned Regulations and the Tariff Order can exist and operate through the powers conferred to and under the TRAI Act, 1997; (2) Whether the impugned Regulations and the Tariff Order would impinge upon the provisions of Copyright Act, 1957.**

5.19. There are other issues branch out from these two main issues as noted supra. The issue as to whether "content" is involved as against "carriage" can be answered only by answering the core issues framed. In other words, answering the issues would amount to answering the issue qua the "content". It is to be noted that the word "content" is looked at differently by both sides. The question as to whether the impugned Regulations and the Tariff Order are valid in

law or not has to be seen through the aforesaid issues framed, on an analysis of provisions of the enactments and their interpretation.

5.20. On the contrary, giving a factual finding without any legal basis would create a serious impact on the provisions governing. It would amount to deciding legal issues on the disputed questions of fact. After all, a legal issue can only be decided on an admitted fact. The Regulations, the Tariff Order and their impact are admitted facts. Therefore, the question for consideration is the availability of power leading to their birth and legal bar, if any. It is also to be noted at the cost of repetition that even the lead judgment as alluded to earlier, the petitioners have agreed that they do not venture to go into the merits of the case. Thus, the very existence of "content" as the petitioners seek to espouse would come under the caption "merit". Packaging Channels may be a smart, prudent business acumen, but then we are on the legality rather than the logic, reason and object behind. Hence, it would be imperative to answer issues framed supra, which were, in fact, dealt with in both judgments in their own ways.

6. PRINCIPLES:-

6.1. Before venturing further let us keep in mind the general principles of law required to be applied in the case.

6.2. Judging a statute through "literal" to "Hyden's Golden Rule" has gone through a circle. What is being applied by the Courts today is on the reasonable, creative and Fair Construction Principle. A liberal interpretation is required more in a social, welfare legislation with the objective in mind.

6.3. LORD DENNING:

"A Judge should ask himself the question (how). If the makers of the Act had themselves come across this rule in the texture of it, how would they have straightened it out? He must do so as they would have done. A Judge must not alter the material on which (the Act) it is woven but he can and should iron out the creases."

6.4. CRAIES IN STATUTE LAW:

"... It is the duty of Courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed' .. that in each case you must look to the subject-matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory."

6.5. OLIVER WENDELL HOMES:

"It is sometimes more important to emphasise the obvious than to elucidate the obscure."

6.6. A.DRIEDGER, Construction of Statute(2nd Ed. 1983):

The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the Scheme of the Act, the object of the Act, and the intention of Parliament.

6.7. The celebrated and often quoted words of Justice Chinnappa Reddy in **RESERVE BANK OF INDIA VS. PEERLESS GENERAL FINANCE AND INVESTMENT COMPANY LIMITED AND OTHERS (1987 1 SCC 424)**, holds the field even today. Relevant passage is apposite:

"51. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word.

If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

6.8. An entry in the List under the Seventh Schedule is the field of legislation. Thus the power is derived only under Article 246 of the Constitution of India. Such an entry has to be given widest amplitude of its power as against a narrow and restricted one. A liberal construction of the words in an entry is the rule. Hence legislative entries are to be interpreted broad and wide. However, the general rule of interpretation also would apply by a combined reading of provisions, objects and reasons put together as a whole.

6.9. R.S.REKHCHAND MOHOTA SPINNING & WEAVING MILLS LTD., VS. STATE OF MAHARASHTRA (1997) 6 Supreme Court Cases 12).

"8.....The interpretation of the statute would apply to the interpretation of the entries subject to reservation that their application is of necessity conditioned by the subject-matter of the enactment itself. It should be remembered that the problem before us is to construe a word appearing in Entry 45 which is a head of legislative power. It cannot be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended to it. It is, therefore, clear 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. Reference to legislative practice may be admissible for cutting down the meaning of a word in order to reconcile two conflicting provisions in two legislative lists. 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. The same principle was reiterated in Kunnathat Thathunni Moopil Nair v. State of Kerala 1961 3 SCR 77 (SCR at p. 106) by Sarkar, J. though in a dissenting tone but on this principle there is no dissent by majority and it cannot be dissented. It was said thus:

“8.It is well known that entries in the legislative lists have to be read as widely as possible. It is not necessary to cut down the plain meaning of the word ‘land’ in Entry 49 to give full effect to the word ‘forest’ in Entry 19. In my view, the two entries, namely, Entry 49 and Entry 18 deal with entirely different matters. Therefore, under Entry 49 taxation on land on which a forest stands is permissible and legal.”

9. In the case of Synthetics and Chemicals Ltd. v. State of U.P 1990 1 SCC 109 a Bench of seven Judges of this Court considered the effect of interpretation of the Constitution and legislative entries in para 67 which reads as under: (SCC pp. 150-51)

“67. It is well to remember that the meaning of the expressions used in the Constitution must be found from the language used. We should interpret the words of the Constitution on the same principle of interpretation as one applies to an ordinary law but these very principles of interpretation compel one to take into account the nature and scope of the Act which requires interpretation. A Constitution is the mechanism under which laws are to be made and not merely an Act which declares what the law is to be. It is also well settled that a Constitution must not be construed in any narrow or pedantic sense and that construction which is most beneficial to the widest possible amplitude of its power, must be adopted. An exclusionary clause in any of the entries should be strictly and, therefore, narrowly construed. No entry should, however, be so read as not (sic) to rob it of entire content. A broad and liberal spirit should, therefore, inspire those whose duty it is to interpret the Constitution, and the courts are not free to stretch or to pervert the language of an enactment in the interest of any legal or constitutional theory. Constitutional adjudication is not strengthened by such an attempt but it must seek to declare the law but it must not try to give meaning on the theory of what the law should be, but it must so look upon a Constitution that it is a living and organic thing and must adapt itself to the changing situations and pattern in which it has to be interpreted. It has also to be borne in mind that where division of powers and jurisdiction in a federal Constitution is the scheme, it is desirable to read the Constitution in harmonious way. 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 of fields of legislation. These demarcate the area over which the appropriate legislatures can operate. 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. Each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it. In interpreting an entry it would not be reasonable to import any limitation by comparing or contrasting that entry with any other in the same list. It has to be interpreted as the Constitution must be interpreted as an organic document in the light of the experience gathered. In the constitutional scheme of division of powers under the legislative lists, there are separate entries pertaining to taxation and other laws. The aforesaid principles are fairly well settled by various decisions of this Court and other courts. Some of these decisions have been referred to in the decision of this Court in [India Cement Ltd. v. State of T.N 1990 1 SCC 12](#)”

10. In a recent judgment, this Court, by a Bench of two Judges, to which K. Ramaswamy and G.P Pattanaik, JJ. were members, in [Indian Aluminium Co. v. State of Kerala 1996 7 SCC 637](#) considered the same question in paras 12 and 20 which read as under: (SCC pp. 647 and 649)

“12. The primary question, therefore, is: Whether the impugned Act enacted by the State Legislature is one under Entry 53 of the State List, viz., ‘Taxes on the consumption or sale of electricity’. Indisputably, the title of the Act as well as the charging Section 3 employ the words ‘duty on supply of electricity’. Under **article 246(3) of the constitution**, every State legislature has explicit power to make law for that State with respect to the matters enumerated in List II (State List) of the Seventh Schedule to the Constitution. The State's power to impose tax is derived from the Constitution. The entries in the three lists of the Seventh Schedule are not power of legislation but merely fields of legislation. The power is derived under Article 246 and other related articles of the Constitution. The

legislative fields are of enabling character designed to define and delimit the respective areas of legislative competence of the respective legislatures. There is neither implied restriction imposed on the legislature nor is any duty prescribed to exercise that legislative power in a particular manner. But the legislation must be subject to the limitations prescribed under the Constitution.

20. When the vires of an enactment is challenged, it is very difficult to ascertain the limits of the legislative power. Therefore, the controversy must be resolved as far as possible, in favour of the legislative body putting the most liberal construction upon the relevant legislative entry so that it may have the widest amplitude. The court is required to look at the substance of the legislation. It is an equally settled law that in order to determine whether a tax statute is within the competence of the legislature, it is necessary to determine the nature of the tax and whether the legislature had power to enact such a law. The primary guidance for this purpose is to be gathered from the charging section. It is the substance of the impost and not the form that determines the nature of the tax.”

11. Thus, it is settled principle of interpretation that legislative entries are required to be interpreted broadly and widely so as to give powers to the legislature to enact the law with respect to matters enumerated in the legislative entries. Substantive power of the legislature to enact the law is under **article 246 of the constitution** and legislative entries in the respective Lists I to III of the Seventh Schedule are of enabling character, designed to define and de-limit the respective areas of legislative competence of the respective legislatures, the substantive power in Article 246 and all other related articles.”

7. CONFLICT OF ENACTMENTS:

7.1. When two enactments are stated to be pitted against each other, a Court of law is required to adopt a construction in harmony with both of them. A suspicion through a jaundiced eye cannot be the approach. What is required to be seen is the object and intentment of the legislations. They must be allowed to travel in their respective

channels. Even if the Channel is one, their respective waters are not supposed to mix with each other. This principle would apply both for interpreting a provision of law and provisions contained in two different enactments. A conflict cannot be foreseen as against the presumption of validity of a legislative exercise. Thus, the interpretation must depend upon the text and the context. There is very limited difference between a purposive, reasonable, creative and fair construction interpretation. One has to fall upon the object and the reasons behind an enactment. The Court may sit in the armed chair of a maker of the enactment and see through its eyes.

7.2. Interpretations of two enactments as stated above are to be made on the settled legal principles. Thus, there is no presumption of one enactment encroaching upon the other unless there is a clear inconsistency or repugnancy. Therefore, the Court has to be satisfied that the provisions contained in both the enactments sought to be impugned with respect to one of them are irreconcilable and such inconsistency appears so apparent. In the absence of a direct conflict or collision between the two enactments, one cannot be held as contrary to the other. In such a case, even if there is an incidental overlapping, it would not violate the provisions. Occasional vagaries do not matter much.

7.3. By a general principle, a special Act is to be given primacy over a general one. However, this also has to be seen on the provisions governing both enactments. There may be a case where General Act may have the substantive provision as against the special one.

7.4. In **MACQUARIE BANK LIMITED VS. SHILPI CABLE TECHNOLOGIES LIMITED ((2018) 2 Supreme Court Cases 674)**, the Supreme Court has considered the principle governing interpretation through the following paragraphs.

“27. Equally, Dr. Singhvi’s argument that the Code leads to very drastic action being taken once an application for insolvency is filed and admitted and that, therefore, all conditions precedent must be strictly construed is also not in sync with the recent trend of authorities as has been noticed by a concurring judgment in Ms. Eera through Dr. Manjula Krippendorf v. State (Govt. of NCT of Delhi) & Anr, Criminal Appeal Nos. 1217-1219 of 2017 decided on July 21, 2017. In this judgment, the correct interpretation of Section 2(1)(d) of the Protection of Children from Sexual Offences Act, 2012 arose. After referring to the celebrated Heydon’s case, 76 E.R. 637 [1584] and to the judgments in which the golden rule of interpretation of statutes was set out, the concurring judgment of R.F. Nariman, J., after an exhaustive survey of the relevant case law, came to the conclusion that the modern trend of case law is that creative interpretation is within the Lakshman Rekha of the Judiciary. Creative interpretation is when the Court looks at both the literal language as well as the purpose or object of the statute, in order to better determine what the words used by the draftsman of the legislation mean. The concurring judgment then concluded: (Eera case, SCC p.204, para 127).

“ 127. It is thus clear on a reading of English, U.S., Australian and our own Supreme Court judgments that the ‘Lakshman Rekheera’ has in fact been extended to move away from the strictly literal rule of interpretation back to the rule of the old English case of Heydon, where the Court must have recourse to the purpose, object, text, and context of a particular provision before arriving at a judicial result. In fact, the wheel has turned full circle. It started out by the rule as stated in 1584 in Heydon’s case, which was then waylaid by the literal interpretation rule laid down by the Privy Council and the House of Lords in the mid 1800s, and has come back to restate the rule somewhat in terms of what was most felicitously put over 400 years ago in Heydon’s case.”

28. In dealing with penal statutes, the Court was confronted with a body of case law which stated that as penal consequences ensue, the provisions of such statutes should be strictly construed. Here again, the modern trend in construing penal statutes has moved away from a mechanical incantation of strict construction. Several judgments were referred to and it was held that a purposive interpretation of such statutes is not ruled out. Ultimately, it was held that a fair construction of penal statutes based on purposive as well as literal interpretation is the correct modern day approach.

29. However, Dr. Singhvi cited [Raghunath Rai Bareja v. Punjab National Bank](#), (2007) 2 SCC 230 and relied upon paragraphs 39 to 47 for the proposition that the literal construction of a statute is the only mode of interpretation when the statute is clear and unambiguous. Paragraph 43 of the said judgment was relied upon strongly by the learned counsel, which states:

“In other words, once we depart from the literal rule, then any number of interpretations can be put to a statutory provision, each judge having a free play to put his own interpretation as he likes. This would be destructive of judicial discipline, and also the basic principle in a democracy that it is not for the Judge to legislate as that is the task of the elected representatives of the people. Even if the literal interpretation results in hardship or inconvenience, it has to be followed (see G.P. Singh's Principles of Statutory Interpretations, 9th Edn., pp. 45-49). Hence departure from the literal rule should only be done in very rare cases, and ordinarily there should be judicial restraint in this connection.”

30. Regard being had to the modern trend of authorities referred to in the concurring judgment in Ms. Eera through Dr. Manjula Krippendorf (supra), we need not be afraid of each Judge having a free play to put forth his own interpretation as he likes. Any arbitrary interpretation, as opposed to fair interpretation, of a statute, keeping the object of the legislature in mind, would be outside the judicial ken. The task of a Judge, when he looks at the literal language of the statute as well as the object and purpose of the statute, is not to interpret the provision as he likes but is to interpret the provision keeping in

mind Parliament's language and the object that Parliament had in mind. With this caveat, it is clear that judges are not knight-errants free to roam around in the interpretative world doing as each Judge likes. They are bound by the text of the statute, together with the context in which the statute is enacted; and both text and context are Parliaments', and not what the Judge thinks the statute has been enacted for. Also, it is clear that for the reasons stated by us above, a fair construction of [Section 9\(3\)\(c\)](#), in consonance with the object sought to be achieved by [the Code](#), would lead to the conclusion that it cannot be construed as a threshold bar or a condition precedent as has been contended by Dr. Singhvi.

.....**43.**The doctrine of harmonious construction of a statute extends also to a harmonious construction of all statutes made by Parliament. [In Harshad S. Mehta v. State of Maharashtra](#) (2001) 8 SCC 257 at 280-81, the Special Court (Trial of Offences Relating to Transactions in [Securities](#)) Act, 1992 was held, insofar as the criminal jurisdiction of the Special Court was concerned, to be harmoniously construed with [the Code](#) of Criminal Procedure, 1973 in the following terms:

“48. To our mind, the Special Court has all the powers of a Court of Session and/or Magistrate, as the case may be, after the prosecution is instituted or transferred before that Court. The width of the power of the Special Court will be same whether trying such cases as are instituted before it or transferred to it. The use of different words in [Sections 6 and 7](#) of the Act as already noticed earlier also shows that the words in [Section 7](#) that the prosecution for any offence shall be instituted only in the Special Court deserve a liberal and wider construction. They confer on the Special Court all powers of the Magistrate including the one at the stage of investigation or inquiry. Here, the institution of the prosecution means taking any steps in respect thereof before the Special Court. The scheme of the Act nowhere contemplates that it was intended that steps at pre-cognizance stage shall be taken before a court other than a Special Court. We may note an illustration given by Mr Salve referring to Section 157 of the Code. Learned counsel submitted that the report under that section is required to be sent to a Magistrate empowered to take cognizance of offence. In relation to offence under the Act, the Magistrate has no power to take cognizance. That power is exclusively with the Special Court and thus report under Section 157 of the Code will have to be sent to the Special Court though the section requires it to be sent to the Magistrate. It is clear that for the expression “Magistrate” in [Section 157](#), so far as the Act is concerned, it is required to be read as “Special Court” and likewise in respect of other provisions of the Code. If the expression “Special Court” is read for the expression “Magistrate”, everything will fall in line. This harmonious construction of the provisions of the Act and the Code makes the Act work. That is what is required by principles of statutory interpretation. [Section 9\(1\)](#) of the Act provides that the Special Court shall in the trial of such cases follow the procedure prescribed by the Code for the trial of warrant cases

before the Magistrate. The expression “trial” is not defined in the Act or the Code. For the purpose of the Act, it has a wider connotation and also includes in it the pre-trial stage as well. [Section 9\(2\)](#) makes the Special Court, a Court of Session by a fiction by providing that the Special Court shall be deemed to be a Court of Session and shall have all the powers of a Court of Session. In case, the Special Court is held not to have the dual capacity and powers both of the Magistrate and the Court of Session, depending upon the stage of the case, there will be a complete hiatus. It is also to be kept in view that the Special Court under the Act comprises of a High Court Judge and it is a court of exclusive jurisdiction in respect of any offence as provided in [Section 3\(2\)](#) which will include offences under [the Indian Penal Code](#), the [Prevention of Corruption Act](#) and other penal laws. It is only in the event of inconsistency that the provisions of the Act would prevail as provided in [Section 13](#) thereof. Any other interpretation will make the provision of the Act unworkable which could not be the intention of the legislature. [Section 9\(2\)](#) does not exclude [Sections 306 to 308](#) of the Code from the purview of the Act. This section rather provides that the provisions [of the Code](#) shall apply to the proceedings before the Special Court. The inconsistency seems to be only imaginary. There is nothing in the Act to show that [Sections 306 to 308](#) were intended to be excluded from the purview of the Act.”

44. Similarly, in [CTO v. Binani Cements Ltd.](#) (2014) 8 SCC 319 at 332, the rule of construction of two Parliamentary statutes being harmoniously construed was laid down as follows:

“35. Generally, the principle has found vast application in cases of there being two statutes: general or specific with the latter treating the common subject-matter more specifically or minutely than the former. Corpus Juris Secundum, 82 C.J.S. Statutes § 482 states that when construing a general and a specific statute pertaining to the same topic, it is necessary to consider the statutes as consistent with one another and such statutes therefore should be harmonised, if possible, with the objective of giving effect to a consistent legislative policy. On the other hand, where a general statute and a specific statute relating to the same subject-matter cannot be reconciled, the special or specific statute ordinarily will control. The provision more specifically directed to the matter at issue prevails as an exception to or qualification of the provision which is more general in nature, provided that the specific or special statute clearly includes the matter in controversy ([Edmond v. United States \[137 L Ed 2d 917 : 520 US 651 \(1997\)\]](#) , [Warden v. Marrero \[41 L Ed 2d 383 : 417 US 653 \(1974\)\]](#)).”

45. More recently, in [Binoy Viswam v. Union of India](#) (2017) 7 SCC 59 at 132, this Court construed the [Income Tax Act](#), 1961 and the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and [Services](#)) Act, 2016 harmoniously in the following manner:

“98. In view of the above, we are not impressed by the contention of the petitioners that the two enactments are contradictory with each other. A harmonious reading of the two enactments would clearly suggest that whereas enrolment of Aadhaar is voluntary when it comes to taking benefits of various welfare schemes even if it is presumed that requirement of Section 7 of the Aadhaar Act that it is necessary to provide Aadhaar number to avail the benefits of schemes and services, it is up to a person to avail those benefits or not. On the other hand, purpose behind enacting [Section 139-AA](#) of the Act is to check a menace of black money as well as money laundering and also to widen the income tax net so as to cover those persons who are evading the payment of tax.”

48. In [Central Bank of India v. State of Kerala](#) (2009) 4 SCC 94 at 141-42, the non-obstante clauses contained in [Section 34\(1\)](#) of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and Section 35 of the Securitisation and Reconstruction of Financial Assets and [Enforcement of Security Interest Act](#), 2002 were held not to override specific provisions contained in the Bombay Sales Tax Act, 1959 and the Kerala Sales Tax Act 1963 dealing with a declaration of a first charge in the following terms:

“130. Undisputedly, the two enactments do not contain provision similar to the Workmen's [Compensation Act](#), etc. In the absence of any specific provision to that effect, it is not possible to read any conflict or inconsistency or overlapping between the provisions of the [DRT Act](#) and the Securitisation Act on the one hand and Section 38-C of the Bombay Act and Section 26-B of the Kerala Act on the other and the non obstante clauses contained in [Section 34\(1\)](#) of the DRT Act and Section 35 of the Securitisation Act cannot be invoked for declaring that the first charge created under the State legislation will not operate qua or affect the proceedings initiated by banks, financial institutions and other secured creditors for recovery of their dues or enforcement of security interest, as the case may be.

131. The Court could have given effect to the non obstante clauses contained in [Section 34\(1\)](#) of the DRT Act and Section 35 of the Securitisation Act vis-à-vis Section 38-C of the Bombay Act and Section 26-B of the Kerala Act and similar other State legislations only if there was a specific provision in the two enactments creating first charge in favour of the banks, financial institutions and other secured creditors but as Parliament has not made any such provision in either of the enactments, the first charge created by the State legislations on the property of the dealer or any other person, liable to pay sales tax, etc.,

cannot be destroyed by implication or inference, notwithstanding the fact that banks, etc. fall in the category of secured creditors.”

49. Since there is no clear disharmony between the two Parliamentary statutes in the present case which cannot be resolved by harmonious interpretation, it is clear that both statutes must be read together. Also, we must not forget that [Section 30](#) of the Advocates Act deals with the fundamental right under [Article 19\(1\)\(g\)](#) of the Constitution to practice one’s profession. Therefore, a conjoint reading of [Section 30](#) of the Advocates Act and [Sections 8](#) and [9](#) of the Code together with the Adjudicatory Authority Rules and Forms thereunder would yield the result that a notice sent on behalf of an operational creditor by a lawyer would be in order.”

7.5. KSL AND INDUSTRIES LIMITED VS. ARIHANT THREADS LIMITED AND OTHERS ((2015) 1 Supreme Court Cases 166).

“This Court in *solidaire* case approved the observations of the Special Court to the effect 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.”

8. PRESUMPTION:

While holding that there is a presumption in favour of the legislation qua the scope of both the enactments on the same subject matter, it was accordingly held by the Supreme Court in **KISHOREBHAI KHAMANCHAND GOYAL VS. STATE OF GUJARAT AND ANOTHER ((2003) 12 Supreme Court Cases 274)** as:

6. There is presumption against a repeal by implication; and the reason of this rule is based on the theory that the Legislature while enacting a law has a complete knowledge of the existing laws on the same subject matter, and therefore, when it does not provide a repealing provision, the intention is clear not to repeal the existing legislation. (See: Municipal Council, Palai through the Commissioner of Municipal Council, Palai vs. I.J. Joseph 1963 AIR(SC) 1561), Northern India Caterers (Private) Ltd. and Anr. vs. State of Punjab and Anr. 1967 AIR(SC) 1581), Municipal Corporation of Delhi vs. Shiv Shanker 1971 (1) SCC 442) and Ratan Lal Adukia and Anr. vs. Union of India 1990 AIR(SC) 104). When the new Act contains a repealing section mentioning the Acts which it expressly repeals, the presumption against implied repeal of other laws is further strengthened on the principle expressio unius (persone vel rei) est exclusio alterius. (The express intention of one person or thing is the exclusion of another) as illuminatingly stated in Garnett vs. Bradley [1878] 3 A.C. 944 (HL). The continuance of existing legislation, in the absence of an express provision of repeal by implication lies on the party asserting the same. The presumption is, however, rebutted and a repeal is inferred by necessary implication when the provisions of the later Act are so inconsistent with or repugnant to the provisions of the earlier Act and that the two cannot stand together. But, if the two can be read together and some implication can be made of the words in the earlier Act, a repeal will not be inferred. (See: A.G. vs. Moore 1878 (3) ExD 276, Ratanlal's case (supra) and R.S. Raghunath vs. State of Karnataka and Anr. 1992 AIR(SC) 81).

7. The necessary questions to be asked are:

- (1) Whether there is direct conflict between the two provisions-
- (2) Whether the Legislature intended to lay down an exhaustive Code in respect of the subject-matter replacing the earlier law;
- (3) Whether the two laws occupy the same field.

(See: Pt. Rishikesh and Anr. vs. Salma Begum (Smt.) 1995 (4)

SCC 718), and [Shri A.B. Krishna & Ors. vs. The State of Karnataka & Ors.](#) 1998 (1) JT 613).

8. The doctrine of implied repeal is based on the theory that the Legislature, which is presumed to know the existing law, did not intend to create any confusion by retaining conflicting provisions and, therefore, when the court applies the doctrine, it does not more than give effect to the intention of the Legislature by examining the scope and the object of the two enactments and by a comparison of their provisions. The matter in each case is one of the construction and comparison of the two statutes. 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." (See Craies on Statute Law, Seventh Edition, page 366, with reference to Re: Berrey [1936] Ch. 274). To determine whether a later statute repeals by implication an earlier, it is necessary to scrutinize the terms and consider the true meaning and effect of the earlier Act. Until this is done, it is impossible to ascertain whether any inconsistency exists between the two enactments. The areas of operation of the Act and the [Establishments Act](#) in question are different with wholly different aims and objects. They operate in their respective fields and there is no impediment for their existence side by side. (See [State of M.P. vs. Kedia Leather and Liquor Ltd. and Ors.](#) (2003 (6) Supreme 213).

9. READING DOWN:

9.1. The doctrine of "reading down" has to be adopted on a contingency. When the enactment is distinct and clear, such an exercise which might lead to a judicial legislation shall not be undertaken. Thus, the Court should not take the role of judicial

craftsman unless the context otherwise requires. This is also for the reason that there is a general presumption that a legislature does not intend to exceed its jurisdiction.

9.2. In **INDRA DAS VS. STATE OF ASSAM ((2011) 3 Supreme Court Cases 380)**, the Apex Court has held that effort should always be made by the Court to uphold the validity of the statute. While doing so, the doctrine of reading down can also be adopted.

“27. Similarly, we are of the opinion that the provisions in various statutes i.e. 3 (5) of TADA or [Section 10](#) of the Unlawful Activities (Prevention) which on their plain language make mere membership of a banned organization criminal have to be read down and we have to depart from the literal rule of interpretation in such cases, otherwise these provisions will become unconstitutional as violative of Articles 19 and 21 of the Constitution. It is true that ordinarily we should follow the literal rule of interpretation while construing a statutory provision, but if the literal interpretation makes the provision unconstitutional we can depart from it so that the provision becomes constitutional.

28. As observed by this Court in [Government of Andhra Pradesh vs. P. Laxmi Devi](#) (supra) every effort should be made by the Court to try to uphold the validity of the statute, as invalidating a statute is a grave step. Hence we may sometimes have to read down a statute in order to make it constitutional.”

10. EXTERNAL AID:

There is no difficulty in interpreting a parie materia provision through external aid. However, such an exercise shall also be done on exceptional circumstances. To be noted, it may be done on satisfying that both the enactments deal with the same field.

11. LEGAL FICTION:

11.1. A legal fiction is a presumption of facts, which are necessary. Therefore, law itself requires certain facts to be in existence though not factually available. An interpretor is required to imagine certain facts. While construing the provision involving legal fiction, the object and purpose of such a fiction has to be seen, understood and applied. Such a presumption has to be taken thereafter, to its logical conclusion.

11.2. **RAJASTHAN STATE INDUSTRIAL DEVELOPMENT AND INVESTMENT CORPORATION AND ANOTHER VS. DIAMOND & GEM DEVELOPMENT CORPORATION LIMITED AND ANOTHER ((2013) 5 Supreme Court Cases 470).**

“ VI. “As if” – Meaning of

26. The expression “as if”, is used to make one applicable in respect of the other. The words "as if" create a legal fiction. By it, when a person is "deemed to be" something, the only meaning possible is that, while in

reality he is not that something, but for the purposes of the Act of legislature he is required to be treated that something, and not otherwise. It is a well settled rule of interpretation that, in construing the scope of a legal fiction, it would be proper and even necessary, to assume all those facts on the basis of which alone, such fiction can operate. The words “as if”, in fact show the distinction between two things and, such words must be used only for a limited purpose. They further show that a legal fiction must be limited to the purpose for which it was created. (Vide: [Radhakissen Chamria & Ors. v. Durga Prasad Chamria & Anr.](#), AIR 1940 PC 167; [Commr. of Income-tax, Delhi v. S. Teja Singh](#), AIR 1959 SC 352; [Ram Kishore Sen & Ors. v. Union of India & Ors.](#), AIR 1966 SC 644; [Sher Singh v. Union of India & Ors.](#), AIR 1984 SC 200; [State of Maharashtra v. Laljit Rajshi Shah & Ors](#), AIR 2000 SC 937; [Paramjeet Singh Patheja v. ICDS Ltd.](#) AIR 2007 SC 168; and [Commissioner of Income Tax v. Willamson Financial Services & Ors.](#) (2008) 2 SCC 202).

27. In *East End Dwelling Co. Ltd. v. Finsbury Borough Council*, 1952 AC 109, this Court approved the approach which stood adopted and followed persistently. It set out as under:

“The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs”.

28. [In Industrial Supplies Pvt. Ltd. & Anr. v. Union of India & Ors.](#), AIR 1980 SC 1858, this Court observed as follows:-

"It is now axiomatic that when a legal fiction is incorporated in a statute, the court has to ascertain for what purpose the fiction is created. After ascertaining the purpose, full effect must be given to the statutory fiction and it should be carried to its logical conclusion. The court has to assume all the facts

and consequences which are incidental or inevitable corollaries to giving effect to the fiction. The legal effect of the words 'as if he were' in the definition of owner in [Section 3\(n\)](#) of the Nationalisation Act read with [Section 2\(1\)](#) of the Mines Act is that although the petitioners were not the owners, they being the contractors for the working of the mine in question, were to be treated as such though, in fact, they were not so."

(Emphasis added)

29. The instant case is required to be decided in the light of the aforesaid settled legal propositions.

12. SUBORDINATE LEGISLATION:

12.1. The law governing a challenge to the subordinate legislation is well crystallised by the Courts. Thus, until and unless one finds lack of competency, manifest arbitrariness, total and substantive unreasonableness, such a legislation cannot be declared as ultra vires.

12.2. CELLULAR OPERATORS ASSOCIATION OF INDIA AND OTHERS VS. TELECOM REGULATORY AUTHORITY OF INDIA AND OTHERS ((2016) 7 Supreme Court Cases 703).

20. [In State of Tamil Nadu v. P. Krishnamoorthy](#), (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:-

“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.”

This case involves the petitioner as well.

12.3. The aforesaid legal position has also been reiterated in a recent judgment in **SHAYARA BANO VS. UNION OF INDIA AND OTHERS (MINISTRY OF WOMEN AND CHILD DEVELOPMENT SECRETARY AND OTHERS)((2017) 9 Supreme Court Cases page 1)**.

13. PROVISIO:

13.1. A proviso has to be read in harmony with the main one. It has to be understood normally from the constructions of the main provision.

13.2. **LAXMINARAYAN R.BHATTAD VS. STATE OF MAHARASHTRA AND ANOTHER ((2003) 5 Supreme Court Cases 413).**

“26.....55. A proviso, as is well known, may serve different purposes:

- (i) qualifying or excepting certain provisions from the main enactment;
- (ii) it may entirely change the very concept or the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;
- (iii) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and
- (iv) it may be used merely to act as an optional addendum to the enactment with the sole object of explaining the real intendment of the statutory provision.

27. Mr. Shenoy, the learned Counsel for the Petitioner has contended that a proviso may exist as an independent provision provided it does not make any reference to the main body of the Section to which it stands attached. He has further argued that such independent provisions may derogate from the other provisions and if they are of subsequent vintage, then even on the application of the maxim 'leges posteriores priores contrarias abrogant' they

would remain impervious or impregnable to attacks of being struck down being ultra vires. His submission is that since the substantive part of [Section 2\(1\)\(k\)](#) of TRAI Act clearly contemplates broadcasting services the proviso cannot be construed as an independent legislation and hence must be struck down. In the Rejoinder he has relied on the decision of the Privy Council in *James Winter v. Attorney General of Victoria* (1874-75) L.R.6 P.C. 378 and to the extracted paragraph from [Dwarka Prasad v. Dwarka Das Saraf](#) : "We may mention in fairness to Counsel that the following, among other decisions, were cited at the Bar bearing on the uses of provisos in statutes: [C.I.T. v. Indo-Mercantile Bank Ltd.](#) 1959 Supp. 2 SCR 256; [Ram Narain Sons Ltd. v. Asstt. C.S.T.](#) ; *Thompson v. Dibdin* 1912 AC 533; *Rex v. Dibdin* 1910 Pro Div 57 and [Tahsildar Singh v. State of U.P.](#) 1959 Supp 2 SCR 875. The law is trite. A proviso must be limited to the subject-matter of the enacting clause. It is a settled rule of construction that a proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment. 'Words are dependent on the principal enacting words, to which they are tacked as a proviso. They cannot be read as divorced from their context' (1912 AC 544). If the rule of construction is that prima facie a proviso should be limited in its operation to the subject-matter of the enacting clause, the stand we have taken is sound. To expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. A proviso ordinarily is but a proviso, although the golden rule is to read the whole section, inclusive of the proviso, in such manner that they mutually throw light on each other and result in a harmonious construction.

The proper course is to apply the broad general rule of construction which is that a section or enactment must be construed as a whole, each portion throwing light if need be on the rest."

सत्यमेव जयते

13.3. This legal statement is taken due note of by the Division Bench of the Delhi High Court in the petitioners' own case referred supra.

"The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together is to prevail."

14. SUBSTANTIVE PROVISION:

A substantive provision draws its power from the object of the Act. Thus its words are to be construed as illustrative having substantive powers and functions qua the intendment of the Act.

15. EJUSDEM GENERIS AND NOSCITUR A SOCIIS:

15.1. The principle of *ejusdem generis* has to be applied with caution. There has to be genus and thus a specie. *Noscitur a sociis* is the rule of construction with reference to the words found in immediate action with them. It is much wider than the rule of *ejusdem generis*. In fact, rule of *ejusdem generis* is one of the species of *Noscitur a sociis*. Here again, general rule of interpretation depending on the text and context is required to be adopted at first. Thus, the words as used are to be understood as such before applying the rule of *Noscitur a sociis*.

15.2. SUBRAMANIAN SWAMY VS. UNION OF INDIA, MINISTRY OF LAW AND OTHERS ((2016) 7 Supreme Court Cases 221).

“71. In *State of Bombay v. Hospital Mazdoor Sabha*, (AIR 1960 SC 610 = (1960) 2 SCR 866), it has been held that it must be borne in mind that *noscitur a sociis* is merely a rule of construction and it cannot prevail in cases where it is clear that wider words have been deliberately used in order to make the scope of the defined word correspondingly wider. It is only where the intention of the legislature in associating wider words with words of narrower significance is doubtful, or otherwise not clear that the said rule of

construction can be usefully applied. It can also be applied where the meaning of the words of wider import is doubtful; but, where the object of the legislature in using wider words is clear and free of ambiguity, the rule of construction in question cannot be pressed into service.

72. In *Bank of India v. Vijay Transport*, (1988 Supp, SCC 47 = AIR 1988 SC 151), the Court was dealing with the contention that a literal interpretation is not always the only interpretation of a provision in a statute and the court has to look at the setting in which the words are used and the circumstances in which the law came to be passed to decide whether there is something implicit behind the words actually used which would control the literal meaning of the words used. For the said purpose, reliance was placed on *R.L. Arora (2) v. State of Uttar Pradesh*, ((1964) 6 SCR 784 = AIR 1964 SC 1230). Dealing with the said aspect, the Court has observed thus, (*Vijay Transport Case, Bank of India Vs. Vijay Transport*, (1988 Supp SCC 47 = AIR 1988 SC 151). SCC p. 51, para 11)

“... 11..... It may be that in interpreting the words of the provision of a statute, the setting in which such words are placed may be taken into consideration, but that does not mean that even though the words which are to be interpreted convey a clear meaning, still a different interpretation or meaning should be given to them because of the setting. In other words, while the setting of the words may sometimes be necessary for the interpretation of the words of the statute, but that has not been ruled by this Court to be the only and the surest method of interpretation. ...”

73. The Constitution Bench, in *Godfrey Phillips India Ltd. and another v. State of U.P. and others*, (2005) 2 SCC 515, while expressing its opinion on the aforesaid rule of construction, opined: (SCC pp.550 and 551, paras 81 & 83)

“81. We are aware that the maxim of *noscitur a sociis* may be a treacherous one unless the “societas” to which the “socii” belong, are known. The risk may be present when there is no other factor except contiguity to suggest the “societas”. But where there is, as here, a term of wide denotation which is not free from ambiguity, the addition of the words such as “including” is sufficiently indicative of the societas. As we have said, the word “includes” in the present context indicates a commonality or shared features or attributes of the including word with the included.

* * *

83. Hence on an application of general principles of interpretation, we would hold that the word “luxuries” in Entry 62 of List II means the activity of enjoyment of or indulgence in that which is costly or which is generally recognised as being beyond the necessary requirements of an average member of society and not articles of luxury.”

74. At this juncture, we may note that in Ahmedabad (P) Primary Teachers’ Assn. v. Administrative Officer, ((2004) 1 SCC 755=2004 SCC (L&S) 306), it has been stated that noscitur a sociis is a legitimate rule of construction to construe the words in an Act of Parliament with reference to the words found in immediate connection with them. In this regard, we may refer to a passage from Justice G.P. Singh, Principles of Statutory Interpretation, (13th Edn., 2012) 509, where the learned author has referred to the lucid explanation given by Gajendragadkar, J. We think it appropriate to reproduce the passage:-

“It is a rule wider than the rule of ejusdem generis; rather the latter rule is only an application of the former. The rule has been lucidly explained by GAJENDRAGADKAR, J. in the following words:

“This rule, according to MAXWELL, Interpretation of Statutes (11th Edn., 1962) 321, means that when two or more words which are susceptible of analogous meaning are coupled together, they are understood to be used in their cognate sense. They take as it were their colour from each other, that is, the more general is restricted to a sense analogous to a less general.”

The learned author on further discussion has expressed the view that meaning of a word is to be judged from the company it keeps, i.e., reference to words found in immediate connection with them. It applies when two or more words are susceptible of analogous meanings are coupled together, to be read and understood in their cognate sense. (Principles of Statutory Interpretation by G.P. Singh (8th Edn.) 379. Noscitur a sociis is merely a rule of construction and cannot prevail where it is clear that wider and diverse etymology is intentionally and deliberately used in the provision. It is only when and where the intention of the legislature in associating wider words with words of narrowest significance is doubtful or otherwise not clear, that the rule of noscitur a sociis is useful.

75. The core issue is whether the said doctrine of noscitur a sociis should be applied to the expression “incitement of an offence” used in Article 19(2) of the Constitution so that it gets associated with the term “defamation”. The term “defamation” as used is absolutely

clear and unambiguous. The meaning is beyond doubt. The said term was there at the time of commencement of the Constitution. If the word “defamation” is associated or is interpreted to take colour from the terms “incitement to an offence”, it would unnecessarily make it a restricted one which even the founding fathers did not intend to do. Keeping in view the aid that one may take from the Constituent Assembly Debates and regard being had to the clarity of expression, we are of the considered opinion that there is no warrant to apply the principle of *noscitur a sociis* to give a restricted meaning to the term “defamation” that it only includes a criminal action if it gives rise to incitement to constitute an offence. The word “incitement” has to be understood in the context of freedom of speech and expression and reasonable restriction. The word “incitement” in criminal jurisprudence has a different meaning. It is difficult to accede to the submission that defamation can only get criminality if it incites to make an offence. The word “defamation” has its own independent identity and it stands alone and the law relating to defamation has to be understood as it stood at the time when the Constitution came into force.

76. The submission is that Sections 499 and 500 IPC are not confined to defamation of the State or its components but include defamation of any private person by another private person totally unconnected with the State. In essence, the proponent is that the defamation of an individual by another individual can be a civil wrong but it cannot be made a crime in the name of fundamental right as protection of private rights qua private individuals cannot be conferred the status of fundamental rights. If, argued the learned counsel, such a pedestal is given, it would be outside the purview of Part III of the Constitution and run counter to Articles 14, 19 and 21 of the Constitution. It is urged that defamation of a private person by another person is unconnected with the fundamental right conferred in public interest by Article 19(1) (a); and a fundamental right is enforceable against the State but cannot be invoked to serve a private interest of an individual. Elucidating the same, it has been propounded that defamation of a private person by another person cannot be regarded as a ‘crime’ under the constitutional framework and hence, what is permissible is the civil wrong and the remedy under the civil law. Section 499 IPC, which stipulates defamation of a private person by another individual, has no nexus with the fundamental right conferred under Article 19(1)(a) of the Constitution, for Article 19(2) is meant to include the public interest and not that of an individual and, therefore, the said constitutional provision cannot be the source of criminal defamation. This argument is built up on two grounds: (i) the common thread that runs through the various grounds engrafted under Article 19(2) is relatable to the protection of the interest of the State and the public in general and the word “defamation” has to be

understood in the said context, and (ii) the principle of noscitur a sociis, when applied, “defamation” remotely cannot assume the character of public interest or interest of the crime inasmuch a crime remotely has nothing to do with the same.

77. We have already stated about the doctrine of noscitur a sociis with regard to ‘incitement of an offence’. Mr. Rao, learned senior counsel, has emphasized on public interest relying on the said principle and in that context has commended us to the decisions in K. Bhagirathi G. Shenoy and others v. K.P. Ballakuraya, (1999) 4 SCC 135 and RBI v. Peerless General Finance and Investment Co. Ltd., (1987) 1 SCC 424.”

16. APPROBATE AND REPROBATE:

16.1. While dealing with the relief sought for by a party, who approaches the Court, the conduct plays a pivotal role. A party shall not be allowed to blow hot and cold and thus, approve and reprobate. This is based upon the principle of estoppel, subject to limitation of the good conscience and right.

16.2. Similarly, in the case of **RAJASTHAN STATE INDUSTRIAL CORPORATION** referred supra, the principle governing the doctrine of approve and reprobate has been dealt with, which is as under:

“ I. Approbate and Reprobate

15. A party cannot be permitted to “blow hot-blow cold”, “fast and loose” or “approve and reprobate”. Where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, or order upon himself. This rule is applied to ensure equity, however, it must not be applied in such a manner, so as to violate the principles of, what is right and, of good conscience.

(Vide: [Nagubai Ammal & Ors. v. B. Shama Rao & Ors.](#), AIR

1956 SC 593; C.I.T. Madras v. Mr. P. Firm Muar, AIR 1965 SC 1216; Ramesh Chandra Pradeep Oil Corporation v. Municipal Corporation of Delhi & Anr Sankla etc. v. Vikram Cement etc., AIR 2009 SC 713; ., AIR 2011 SC 1869; Cauvery Coffee Traders, Mangalore v. Hornor Resources (International) Company Limited, (2011) 10 SCC 420; and V. Chandrasekaran & Anr. v. The Administrative Officer & Ors., JT 2012 (9) SC 260).

16. Thus, it is evident that the doctrine of election is based on the rule of estoppel- the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppels in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had.”

17. TRAI ACT, 1997:

17.1. A regulated regime came into being through the creation of a sector specific enactment viz., The Telecom Regulatory Authority of India Act, 1997 (Act 24 of 1997). It can be said, this Act is a creation of a judgment of the Apex Court in **SECRETARY, MINISTRY OF INFORMATION & BROADCASTING, GOVT. OF INDIA AND OTHERS V. CRICKET ASSOCIATION OF BENGAL AND OTHERS ((1995) 2 Supreme Court Cases 161)**. In this celebrated judgment, the pressing need to create a comprehensive enactment regulating the airwaves or frequencies being public properties was felt and emphasized. So also the overwhelming public interest to create a level playing field, avoid monopoly, regulate the service providers and the usage of

frequencies, airwaves, content of the programmes and to sustain, promote and improve the quality. Accordingly, a direction was issued to the Government of India to formulate a comprehensive enactment after noting the inadequacies inherent in the Indian Telegraphic Act, 1885. The following are the important passages.

"55.....The-right to telecast/broadcast has certain inherent limitations imposed by nature, whereas Article 19(2) applies to restrictions imposed by the State. The object of licensing is not to cast restrictions on the expression of ideas, but to regulate and Marshall scarce resources to ensure their optimum enjoyment by all including those who are not affluent enough to dominate the media.

57.....The right of viewer can only be safeguarded by the regulatory agency by controlling the frequencies of broadcast as it is otherwise impossible for viewers to exercise their right to free speech qua the electronic media in any meaningful way.

78. There is no doubt that since the airwaves/frequencies are a public property and are also limited, they have to be used in the best interest of the society and this can be done either by a central authority by establishing its own broadcasting network or regulating the grant of licences to other agencies, including the private agencies. What is further, the electronic media is the most powerful media both because of its audio-visual impact, and its widest reach covering the section of the society where the print media does not reach. The right to use the airwaves and the content of the programmes therefore, needs regulation for balancing it and as well as to prevent monopoly of information and views relayed, which is a potential danger flowing from the concentration of the right to broadcast/telecast in the hands either of a central agency or of few private affluent broadcasters. That is why the need to have a central agency representative of all sections of the society free from control both of the Government and the dominant influential sections of the society.

82.The fourth contention is that, as held by the US Supreme Court, the freedom of speech has to be viewed also as a right of

the viewers which has a paramount importance, and the said View has significance in a country like ours. To safeguard the rights of the viewers in this country, it is necessary to regulate and restrict the right to access to telecasting. There cannot be any dispute with this proposition. We have in fact referred to this right of the viewers in another context earlier. True democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. One-sided information, disinformation, misinformation and non-information all equally create an uninformed citizenry which makes democracy a farce when medium of information is monopolised either by a partisan central authority or by private individuals or oligarchic organisations. This is particularly so in a country like ours where about 65 per cent of the population is illiterate and hardly 1-1/2 per cent of the population has an access to the print media which is not subject to precensorship. When, therefore, the electronic media is controlled by one central agency or few private agencies of the rich, there is a need to have a central agency, as stated earlier, representing all sections of the society. Hence to have a representative central agency to ensure the viewers' right to be informed adequately and truthfully is a part of the right of the viewers under Article 19 [1] (a).

120.....Hence every citizen has a right to use the best means available for the purpose. At present, electronic media, viz., T.V. and radio, is the most effective means of communication.

122. We, therefore, hold as follows:

[i] The airwaves or frequencies are a public property. Their use has to be controlled and regulated by a public authority in the interests of the public and to prevent the invasion of their rights. Since the electronic media involves the use of the airwaves, this factor creates an in-built restriction on its use as in the case of any other public property.

[ii] The right to impart and receive information is a species of the right of free-

the best means of imparting and receiving information and as such to have an access to telecasting for the purpose. However, this right to have an access to telecasting has limitations on

account of the use of the public property, viz., the airwaves, involved in the exercise of the right and can be controlled and regulated by the public authority. This limitation imposed by the nature of the public property involved in the use of the electronic media is in addition to the restrictions imposed on the right to freedom of speech and expression under [Article 19 \[2\]](#) of the Constitution.

[iii] The Central Government shall take immediate steps to establish an independent autonomous public authority representative of all sections and interests in the society to control and regulate the use of the airwaves. [iv] Since the matches have been telecast pursuant to the impugned order of the High Court, it is not necessary to decide the correctness of the said order.....

194....Airwaves, being public property must be utilised to advance public good. Public good lies in ensuring plurality of opinions, views and ideas and that would scarcely be served by private broadcasters, who would be and who are bound to be actuated by profit motive.

To repeat, airwaves are public property and better remain in public hands in the interest of the very freedom of speech and expression of the citizens of this country.

200.....The fact remains that private broadcasting, even if allowed, should not be left to market forces, in the interest of ensuring that a wide variety of voices enjoy access to it.

201(b)(b)Airwaves constitute public property and must be utilised for advancing public good. No individual has a right to utilise them at his choice and pleasure and for purposes of his choice including profit.....

(c)Broadcasting media is inherently different from Press or other means of communication/information. The analogy of press is misleading and inappropriate. This is also the view expressed by several Constitutional Courts including that of the United States of America.

4. [The Indian Telegraph Act](#), 1885 is totally inadequate to govern an important medium like the radio and television, i.e., broadcasting media. [The Act](#) was intended for an altogether different purpose when it was enacted. This is the result of the law in this country not keeping pace with the technological advances in the field of information and communications. While all the leading democratic countries have enacted laws

specifically governing the broadcasting media, the law in this country has stood still, rooted in the [Telegraph Act](#) of 1885. Except [Section 4\(1\)](#) and the definition of telegraph, no other provision of the Act is shown to have any relevance to broadcasting media. It is, therefore, imperative that the parliament makes a law placing the broadcasting media in the hands of a public/statutory corporate or the corporations, as the case may be. This is necessary to safeguard the interests of public and the interests of law as also to avoid uncertainty, confusion and consequent litigation."

17.2. Accordingly, a decision was made by the promulgation of an ordinance leading to the deliverance of the Telecom Regulatory Authority of India Act, 1997. Some of the provisions of the ordinance were taken note of by the Apex Court in **DELHI SCIENCE FORUM VS. UNION OF INDIA ((1996) 2 Supreme Court Cases 405)**.

"31.....The existence of a Telecom Regulatory Authority with the appropriate powers is essential for introduction of plurality in the Telecom Sector. The National Telecom Policy is a historic departure from the practice followed during the past century. Since the private sector will have to contribute more to the development of the telecom network than DOT/MTNL in the next few years, the role of an independent Telecom Regulatory Authority with appropriate powers need not be impressed, which can harness the individual appetite for private gains, for social ends. The Central Government and the Telecom Regulatory Authority have not to behave like sleeping trustees, but have to function as active trustees for the public good."

Thus, the Act came into existence in the year 1997. It is imperative to point out that several experts in different fields including eminent legal personalities took part in the process.

17.3. The preamble of the Act 24 of 1997 is as under.

" An Act to provide for the establishment of the¹ [Telecom Regulatory Authority of India and the Telecom Disputes Settlement and Appellate Tribunal to regulate the telecommunication services, adjudicate disputes, dispose of appeals and to protect the interests of service providers and consumers of the telecom sector, to promote and ensure orderly growth of the telecom sector,] and for matters connected therewith or incidental thereto."

A reading of the aforesaid would clearly show that the object was to regulate the telecommunication services, to protect the interest of service providers, such as, broadcasters, distributors etc., along with the consumers, who are otherwise called as subscribers and to promote orderly growth. The preamble also gives additional powers to deal with matters connected and incidental to the object. Hence, there is no doubt that the Act in its sweep takes care of many factors. Thus, the Act was introduced in exercise of the power under Article 246 of the Constitution of India over a subject coming under Entry 31 of List 1 of the VII Schedule.

17.4. The word "regulate" as adumbrated in the preamble assumes greater importance in relation to the subject sought to be dealt with. A restrictive and rigid meaning shall not be given to the word "regulate". Otherwise, the very object and intendment of the Act

would be at peril. **BHARAT SANCHAR NIGAM LIMITED VS. TELECOM REGULATORY AUTHORITY OF INDIA AND OTHERS ((2014) 3 Supreme Court Cases 222).**

"81. The terms 'regulate' and 'regulation' have been interpreted in large number of judgments. We may notice few of them. In *V.S. Rice & Oil Mills v. State of A.P.* AIR 1964 SC 1781, agreements for a period of ten years had been executed for supply of electricity and the same did not contain any provision authorising the Government to increase the rates during their operation. However, in exercise of power under Section 3(1) of the Madras Essential Articles Control and Requisitioning (Temporary Powers) Act, 1949, the State Government issued order enhancing the agreed rates. The same was challenged on the ground that any increase in agreed tariff was out of the purview of Section 3(1). Chief Justice Gajendragadkar, speaking for the Constitution Bench, observed as under:

“The word regulate is wide enough to confer power on the State to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and its availability at fair prices. The concept of fair prices to which Section 3(1) expressly refers does not mean that the price once fixed must either remain stationary, or must be reduced in order to attract the power to regulate. The power to regulate can be exercised for ensuring the payment of a fair price, and the fixation of a fair price would inevitably depend upon a consideration of all relevant and economic factors which contribute to the determination of such a fair price. If the fair price indicated on a dispassionate consideration of all relevant factors turns out to be higher than the price fixed and prevailing, then the power to regulate the price must necessarily include the power to increase so as to make it fair. Hence the challenge to the validity of orders increasing the agreed tariff rate on the ground that they are outside the purview of Section 3(1) cannot be sustained.”

82. In *State of Tamil Nadu v. Hind Stone* (1981) 2 SCC 205, this Court held that the word 'regulate' must be interpreted to include

‘prohibition’ within its fold. Some of the observations made in that judgment (paragraph10) are extracted below:

“We do not think that ‘regulation’ has that rigidity of meaning as never to take in ‘prohibition’. Much depends on the context in which the expression is used in the statute and the object sought to be achieved by the contemplated regulation. It was observed by Mathew, J. in [G.K. Krishnan v. State of T.N.](#) (1975) 1 SCC 375: ‘The word “regulation” has no fixed connotation. Its meaning differs according to the nature of the thing to which it is applied.’ In modern statutes concerned as they are with economic and social activities, ‘regulation’ must, of necessity, receive so wide an interpretation that in certain situations, it must exclude competition to the public sector from the private sector. More so in a welfare State. It was pointed out by the Privy Council in [Commonwealth of Australia v. Bank of New South Wales](#) (1949) 2 All ER — and we agree with what was stated therein — that the problem whether an enactment was regulatory or something more or whether a restriction was direct or only remote or only incidental involved, not so much legal as political, social or economic consideration and that it could not be laid down that in no circumstances could the exclusion of competition so as to create a monopoly, either in a State or Commonwealth agency, be justified. Each case, it was said, must be judged on its own facts and in its own setting of time and circumstances and it might be that in regard to some economic activities and at some stage of social development, prohibition with a view to State monopoly was the only practical and reasonable manner of regulation. The statute with which we are concerned, the [Mines and Minerals \(Regulation and Development\) Act](#), is aimed, as we have already said more than once, at the conservation and the prudent and discriminating exploitation of minerals. Surely, in the case of a scarce mineral, to permit exploitation by the State or its agency and to prohibit exploitation by private agencies is the most effective method of conservation and prudent exploitation. If you want to conserve for the future, you must prohibit in the present. We have no doubt that the prohibiting of leases in certain cases is part of the regulation contemplated by [Section 15](#) of the Act.”

83. In *K. Ramanathan v. State of Tamil Nadu* (1985) 2 SCC 116, this Court interpreted the word ‘regulation’ appearing in Section 3(2)(d) of the Essential Commodities Act, 1955 and observed:

“The word “regulation” cannot have any rigid or inflexible meaning as to exclude “prohibition”. The word “regulate” is difficult to define as having any precise meaning. It is a word of broad import, having a broad meaning, and is very comprehensive in scope. There is a diversity of opinion as to its meaning and its application to a particular state of facts, some courts giving to the term a somewhat restricted, and others giving to it a liberal, construction. The different shades of meaning are brought out in *Corpus Juris Secundum*, Vol. 76 at p. 611:

“‘Regulate’ is variously defined as meaning to adjust; to adjust, order, or govern by rule, method, or established mode; to adjust or control by rule, method, or established mode, or governing principles or laws; to govern; to govern by rule; to govern by, or subject to, certain rules or restrictions; to govern or direct according to rule; to control, govern, or direct by rule or regulations.

‘Regulate’ is also defined as meaning to direct; to direct by rule or restriction; to direct or manage according to certain standards, laws, or rules; to rule; to conduct; to fix or establish; to restrain; to restrict.” See also: *Webster’s Third New International Dictionary*, Vol. II, p. 1913 and *Shorter Oxford Dictionary*, Vol. II, 3rd Edn., p. 1784.

It has often been said that the power to regulate does not necessarily include the power to prohibit, and ordinarily the word “regulate” is not synonymous with the word “prohibit”. This is true in a general sense and in the sense that mere regulation is not the same as absolute prohibition. At the same time, the power to regulate carries with it full power over the thing subject to regulation and in absence of restrictive words, the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control, and involves the adoption of a rule or guiding principle to be followed, or the making of a rule with respect to the subject to be regulated. The power to regulate implies the power to check and may imply the power to prohibit under certain circumstances, as where the best or only efficacious regulation consists of suppression. It would therefore appear that the word “regulation” cannot have

any inflexible meaning as to exclude “prohibition”. It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation, and the Court must necessarily keep in view the mischief which the legislature seeks to remedy.

The question essentially is one of degree and it is impossible to fix any definite point at which “regulation” ends and “prohibition” begins. We may illustrate how different minds have differently reacted as to the meaning of the word “regulate” depending on the context in which it is used and the purpose and object of the legislation. In *Slattery v. Nalyor* LR (1888) 13 AC 446 the question arose before the Judicial Committee of the Privy Council whether a Bye-law by reason of its prohibiting internment altogether in a particular cemetery, was ultra vires because the Municipal Council had only power of regulating internments whereas the Bye-law totally prohibited them in the cemetery in question, and it was said by Lord Hobhouse, delivering the judgment of the Privy Council:

“A rule or Bye-law cannot be Held as ultra vires merely because it prohibits where empowered to regulate, as regulation often involved prohibition.”

84. In *Jiyajeerao Cotton Mills Ltd. v. M.P. Electricity Board* 1989 Supp (2) SCC 52, the validity of the orders providing for higher charges/tariff for electricity consumed beyond legally fixed limit was upheld in view of [Section 22\(b\)](#) of the Electricity Act, which permits the State Government to issue an appropriate order for regulating the supply, distribution and consumption of electricity. It was held that the Court while interpreting the expression “regulate” must necessarily keep in view the object to be achieved and the mischief sought to be remedied. The necessity for issuing the orders arose out of the scarcity of electricity available to the Board for supplying to its customers and, therefore, in this background the demand for higher charges/tariff was held to be a part of a regulatory measure.

85. In *Deepak Theatre v. State of Punjab* 1992 Supp (1) SCC 684, this Court upheld classification of seats and fixation of rates of admission according to the paying capacity of a cinegoer by observing that the same is an integral part of the power to make regulation and fixation of rates of admission became a legitimate ancillary or incidental power in furtherance of the regulation under the Act.

86. The term 'regulation' was also interpreted in *Quarry Owners' Association v. State of Bihar* (2000) 8 SCC 655 in the context of the provisions contained in the Mines and Minerals (Regulation Development) Act, 1957 and it was held:

“Returning to the present case we find that the words “regulation of mines and mineral development” are incorporated both in the Preamble and the Statement of Objects and Reasons of this Act. Before that we find that the Preamble of our Constitution in unequivocal words expresses to secure for our citizens social, economic and political justice. It is in this background and in the context of the provisions of the Act, we have to give the meaning of the word “regulation”. The word “regulation” may have a different meaning in a different context but considering it in relation to the economic and social activities including the development and excavation of mines, ecological and environmental factors including States' contribution in developing, manning and controlling such activities, including parting with its wealth, viz., the minerals, the fixation of the rate of royalties would also be included within its meaning.”

87. Reference in this connection can also be made to the judgment in *U.P. Coop. Cane Unions Federation v. West U.P. Sugar Mills Association* (2004) 5 SCC 430. In that case, the Court interpreted the word 'regulation' appearing in U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 and observed:

“Regulate” means to control or to adjust by rule or to subject to governing principles. It is a word of broad impact having wide meaning comprehending all facets not only specifically enumerated in the Act, but also embraces within its fold the powers incidental to the regulation envisaged in good faith and its meaning has to be ascertained in the context in which it has been used and the purpose of the statute.”

88. It is thus evident that the term 'regulate' is elastic enough to include the power to issue directions or to make regulations and the mere fact that the expression “as may be provided in the regulations” appearing in clauses (vii) and (viii) of Section 11(1)(b) has not been used in other clauses of that sub-section does not mean that the regulations cannot be framed under Section 36(1) on the subjects specified in clauses (i) to (vi) of Section 11(1)(b). In fact, by framing regulations under Section 36, the Authority can facilitate the exercise

of functions under various clauses of [Section 11\(1\)\(b\)](#) including clauses (i) to (vi)."

17.5. Of the different players involved, who could be divided into two groups, namely service providers and the customers, the latter's interest would certainly have primacy being the general public. This was already dealt with in the judgment of the Apex Court referred supra in **SECRETARY OF MINISTRY OF INFORMATION AND BROADCASTING VS. CRICKET ASSOCIATION OF BENGAL ((1995) 2 Supreme Court Cases 161)**. It was also reiterated in the subsequent decision in **STAR INDIA PRIVATE LIMITED VS. TELECOM REGULATORY AUTHORITY OF INDIA AND OTHERS ((2008) 146 DLT 455 (DB))**. The aforesaid position has been dealt with in specific terms. The following passage would be apposite.

" 53.....What must not be overlooked is that the subscriber has a fundamental right of viewership which has pre-eminence over that of the broadcasters' fundamental rights. The impugned Regulations are calculated to protect the viewers' interest."

17.6. **AVISHEK GOENKA VS. UNION OF INDIA AND ANOTHER ((2012) 5 Supreme Court Cases 275)**.

"22.We have clearly stated that it is not for this Court to examine the merit or otherwise of such policy and regulatory matters which have been determined by expert bodies having possessing requisite technical knowhow and are statutory in nature. However, the Court would step in

and direct the technical bodies to consider the matter in accordance with law, while ensuring **that public interest is safeguarded** and arbitrary decisions do not prevail."

(emphasis supplied)

Therefore, if one sees the preamble along with the statement of object and reasons it is clear that the intention was to make provisions regulating the services to meet the customers demand at a reasonable price. Hence, the paramount interest is that of the consumer, who should be given the choice to select a channel on a level playing ground. Two amendments were made in the year 2000 and 2004. Once the Act is understood as a social, welfare one, a liberal approach has to be adopted in tune with the objects meant to be achieved. We are particularly concerned with Section 11, which would be dealt with at a later point of time. Suffice it is to state that the Act is meant to regulate a large number of activities. It is also to be noted that no such regulation like the impugned one and the tariff order can ever be made under any other enactment including The Copyright Act, 1957.

17.7. Section 2 of the Telecom Regulatory Authority of India Act, 1997 deals with definitions. It opens with the words "unless context otherwise requires". Therefore, the words mentioned therein are to be given their natural meaning in tune with the object enshrined. Section 2(e) of the Act defines the "licensee". "Licensee"

is one who is licensed under sub section (1) of section 4 of the Indian Telegraph Act, 1885. To be noted, without such a licence, a broadcaster cannot undertake the function of uplinking and downlinking. The licensee also becomes a "service provider" under sub clause (j) of section 2 of the Act. There is no difficulty in holding that a broadcaster is a service provider. Section 2(j) merely says a "service provider" includes the licensee. Thus, a person can be a service provider despite not being a licensee under the Indian Telegraph Act, 1885. After all, a public property is licenced in favour of the third party, which will not have the privilege unless it is conferred accordingly. A finding to that effect has also been given by the Division Bench of Delhi High Court in **STAR INDIA PRIVATE LIMITED's** case referred to supra.

19. Section 3(1AA) of the Telegraph Act being the definition of 'telegraph' had already been introduced into that statute with effect from 2.5.1961. It is in this context that it has been emphasized that the definitions in the TRAI Act has palpably been substantially lifted from the Telegraph Act. Therefore, even if the TRAI Act is ignored, telecom services as well as broadcasting services would be regulated by the Telegraph Act. The umbilical connection is also apparent from manifold and repeated references in TRAI Act to the Telegraph Act. The definition of licensee and licensor in the former statute refers back to Section 4 of the latter Act. The Broadcasting Bill which was intended to be contemporaneous legislation to the TRAI Act, was introduced in Parliament in 1997 and was referred to the Joint Parliamentary Committee for detailed consideration. The Bill, however, lapsed consequent upon the premature and precipitate dissolution of Parliament in December 1997. The intention of Parliament was already manifestly clear, namely, that although broadcasting is inherently covered under the TRAI Act and

the **Telegraph Act**, its galloping growth has warranted that it should be governed by a separate statutory structure. It was for this reason that although broadcasting services would fall within the umbra of the definition of telecommunication services as available in **Section 2(k)** of the TRAI Act, it was from the very inception intentionally excluded there from, in the sanguine expectancy that the Broadcasting Bill would very soon receive statutory standing alongside the **TRAI Act**. In the event, however, the planning proved presumptuous. The Proviso is the penumbra which will persist only till the passing of the Broadcasting Bill or the Convergence Bill, as the case may be. It appears to us that this is the intention of Parliament.

17.8. As stated supra, this judgment has been taken note of and approved by the Appellate Authority in M.P.No.108 of 2009 etc., in Petition No.172 of 2009. Therefore, there is no difficulty in holding that a broadcaster is the "service provider" under the purview of the Act.

17.9. Much has been said on the definition contained in Section 2(1)(k) of the Act, which defines a "telecommunication service".

“(k) “telecommunication service” means service of any description (including electronic mail, voice mail, data services, audio tax services, video tax 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 electromagnetic means but shall not include broadcasting services”.

17.10. We must bear in mind that we are dealing with the definition section. Thus, it is not a substantive provision. It includes

service of any description and therefore, services mentioned thereunder are merely illustrative in nature. What is important herein is the service being made available to "the end user". This provision does not define either telecommunication or broadcasting. Either we can go for external aid or the impugned regulation, which defined them accordingly. So are the other definition provisions. There is no difficulty in reading the regulation along with the impugned regulation atleast with reference to the definitions. This provision can be read to mean as **"which is made available to the users by means of any transmission or which is made available to users by reception of signs, signals, writing images and sounds or intelligence of any nature, by wire, radio, visual or other electromagnetic means"**. Therefore, the words "means of any transmission" stand apart as against reception of signs by wire, radio etc., or other electromagnetic means. Here again, the word "any transmission" has to be given wider import. All means of transmissions are included in this. It is axiomatic that a definition clause cannot be used to understand object as it shall only be otherwise. What is important is the service made available to the users, though means may be different. Thus, this section cannot be given a restrictive or narrow meaning to destroy the very enactment itself. This may also be academic since a notification came into being

as per the proviso and thus, a broadcasting service is accordingly brought into the purview of the Act. Perhaps that is the reason why a challenge was made earlier to the very provision itself at the instance of the petitioner.

17.11. It is pertinent to note that the challenge made to the definition section was repelled by the Delhi High Court and confirmed by the Apex Court. Therefore, there is no difficulty in holding that broadcasting service is a specie of the genus i.e., telecommunication service.

17.12. Section 2(2) speaks in clear terms that words and expressions, though used and not defined in this Act, but defined in two other enactments will have the same meaning. There is no difficulty in appreciating the rationale behind the aforesaid provision. Such a legislation is absolutely permissible especially, when enactments dealt with similar matters and in any case, there is no challenge made to this provision. After all, a legislation by reference or incorporation is certainly permissible in law.

17.13. The next important provision is Section 11 of the Act. Section 11 has got four different parts. This section speaks about the

functions of the authority. It has got two fundamental functions, viz., recommendatory and regulatory. We are primarily concerned with Sections 11(1)(b), (c), (d), 11(2) and 11(4). It is well settled that when substantive powers are given through the provisions, to give effect to the object of the Act, the words are to be treated as illustrative and not exhaustive. Thus, once the power to regulate the activities of various stake holders is recognised keeping in view of the predominant public interest, the thing would automatically fall in place. Section 11(b) speaks about compliance of the terms and conditions of the licence. This also would take in its ambit, licence issued under Section 4 of the Indian Telegraph Act, 1885. This provision also deals with laying down standard of quality of service. The underlying interest is that of the consumer. Therefore, Section 11(b) has to be read as a whole. If that is done, then, there is no difficulty in bringing the availability and existence of the power in favour of TRAI to regulate. The words "quality of service" and "public interest" are to be given an extensive and expansive meaning. Similarly, sub clause "d" of Section 11 provides sufficient power to perform such other functions as may be necessary to carry out the provisions of the Act. Therefore, this provision, viz., Section 11(d) is directly relatable to the provisions of the Act along with this object. In other words, exercise of a power in this provision need not be read into Section 11 (b) being distinct

and independent. What is to be noted is that the functions might be varied and that is the reason why, the word "include" has been mentioned while referring to administrative and financial functions being part. Sub clause 11(2) provides sufficient ammunition for the authority to specify the rates for the telecommunication services. It is curious to note that the word "television channel" has never been mentioned under the Act as against broadcasting service. Needless to state that a challenge made to this provision was repelled by the Division Bench of the Delhi High Court while rejecting the case of the petitioner to a challenge made to Section 2(k).

17.14. Something can also be said about sub section 3 of Section 11 of the Act. The manner in which this provision is couched would clearly show the extent of power that can be exercised by the authority. The negative covenant in a sense highlights the numerous powers, which is otherwise available to achieve the object. Some times from the exception carved out, the extent of power can be assessed. Similarly, maintaining transparency while exercising power in discharging the function would also qualify the extent and the area available. To put it differently, safeguards are required when powers are more. If it is a mere administrative action to be exercised on a restrictive field then there is no need for any safeguard.

17.15. Section 12 of the Act speaks about the powers of the authority to call for information, conduct investigation etc. In sub clause (4) a power to issue direction to a service provider, for its proper functioning is bestowed on the authority. This provision also once again reiterates the extent of power that can be wielded by the authority over a service provider.

17.16. Section 13 touches upon the power of the authority to issue direction in discharge of the function under Section 11(1) of the Act. These directions are meant to be complied by the service providers. While Section 11 speaks about function, this provision, the power. Section 11(1) has to be read along with Section 13. Here again, it is to be noted that this power is required only for the reason a larger role is bestowed upon the authority in his function under Section 11(1) of the Act.

17.17. The proviso makes it clear that such directions are to be restricted to the matters specified in Section 11(1)(b) of the Act. One can say this is because Section 11(1)(a) is merely recommendatory in nature.

17.18. Now let us come to the provisions dealing with regulations. Section 36 is the source provider to make regulation consistent with the Act and the Rules. Making a regulation is a legislative Act to be done through the parliament. Under Section 36(2), such regulation may provide for the matters specified therein. This power has to be exercised in particular and without prejudice to the general power conferred under Section 36(1) of the Act. Thus, under Section 36(1), the TRAI Act makes regulations to carry out the objects of the enactment enshrined under Sections 11, 12 and 13. Such a power is rather wide and primacy. This power as conferred is merely illustrative as stated above.

17.19. Except complying with the Act and Rules, there is no other restriction to TRAI Act to make a regulation under Section 36 of the Act. Section 36(2) specifies various topics for enacting the regulations. They can also be referable to Sections 11(1)(b) and 11(1)(c). Section 36(2) does not encroach upon the powers conferred under Section 36(1) of the Act. Hence, there is absolutely no restriction on the exercise of power under Section 36(1) by the existence of Section 36(2).

17.20. Section 38 pertains to application of certain laws. Both enactments viz., Act 24 of 1997 and Indian Telegraph Act, 1885, are to be read in unison as complementing each other. To be noted that TRAI Act came into being on the inability of the Indian Telegraph Act, 1885 to deal with the march of technology. Therefore, there is no apparent conflict, which position is made clear by Section 38 of the Act. Perhaps that is the reason why the observation to that effect has also been made by the Division Bench of Delhi High Court in **STAR INDIA PRIVATE LIMITED** referred to supra, stating that the umbilical cord between the two enactments can be seen.

17.21. Now, let us come to the notifications and the impugned regulations. As discussed and noted, the notification issued by the Central Government in S.O.44 (E) and 45 (E) dated 09.04.2001 gives sufficient power. It not only brings a broadcasting services into the fold of the Act but also, all addressable systems along with standard norms periodicity and revision of rates for pay channels. Power is to be exercised without prejudice to the context of Section 11(2) of the Act. Though this notification came into being in the year 2004, the same has not been put into challenge. On the contrary, they did make a challenge to the very definition clause perhaps on the

understanding that the notification is only consequential. Hence, suffice it is to state that the petitioners are bound by the Act, notification and the regulations and Tariff Order issued from time to time. Perhaps, the petitioners understood the aforesaid position and thus did not raise any murmur to the earlier tariff orders, which might have also been questioned on the very same lines, as they now contend.

17.22. The following decisions would clearly establish the availability and existence of the power under Sections 11 and 36 of the TRAI Act. **AVISHEK GOENKA VS. UNION OF INDIA AND ANOTHER ((2012) 5 Supreme Court Cases 275)**

"18. If one examines the powers and functions of TRAI, as postulated under Section 11 of the Act, it is clear that TRAI would not only recommend, to the DoT, the terms and conditions upon which a licence is granted to a service provider but has to also ensure compliance of the same and may recommend revocation of licence in the event of non-compliance with the regulations. It has to perform very objectively one of its main functions, i.e., to facilitate competition and promote efficiency in the operation of the telecommunication services, so as to facilitate growth in such services. It is expected of this regulatory authority to monitor the quality of service and even conduct periodical survey to ensure proper implementation."

17.23. STAR INDIA PRIVATE LIMITED VS. TELECOM REGULATORY AUTHORITY OF INDIA AND OTHERS ((2008) 146 DLT 455 (DB))

“35. We shall now shift focus to [Section 11](#) of the TRAI Act which has been substantially altered by the [Amending Act](#) of 2000 inasmuch as its first sub-section has been completely substituted by the extant one. However, the provision with which we are presently concerned, viz. Sub-section (2), has not been touched. It empowers TRAI to determine and prescribe "the rates at which the telecommunication services within and outside India shall be provided." Its Proviso bestows discretion on TRAI "to 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 therefore. The fact that different treatment can be meted out to similarly placed persons is indeed far-reaching....."

42. In conclusion, therefore, the fixation of tariffs by the Authority is within their competence even in regard to broadcasters. The devising of an upper limit of pay channels will have the effect of a wider dissemination and viewership thereby safeguarding the pre-eminent right of the citizenry in the context of freedom of speech and expression.

43. [Section 11\(2\)](#) of TRAI Act states that notwithstanding anything contained in the [Indian Telegraph Act](#), the Authority may notify the rates at which telecommunication services shall be provided; the Authority may notify different rates for different persons or class of person for reason to be recorded; the Authority shall not act against the sovereign and integrity of India; or the security of the State; or friendly relations with foreign States; or public order, decency or morality. Learned Senior Counsel for the Petitioners contend that this Section bestows unchannelised, unguided, undefined and untrammelled powers on the delegate namely the Authority, and hence should be struck down. What has to be ascertained in every case where such a submission has been put forward is whether the legislative policy has been delineated before the delegation is made, and also whether a correctional system of superintendence and supervision of the delegate's actions has been put in place. Courts should also consider the degree to which

delegation is inevitable or necessary or expedient. The frontiers within which the Delegate/Authority must function is further identifiable from indicia available in the Act itself. The Preamble enjoins that the Authority should endeavor to (a) regulate the telecommunication services, (b) protect the interests of service providers and consumers of the telecom sector, (c) to promote and ensure orderly growth of the telecom sector. Jural experience would vouch that fees or rates prescribed in the statute invariably become unrealistic aons before they receive corrective attention. Where fees, tariffs and rates are dependent on market forces it is expedient to leave their determination and change to the Executive or the Authority or the Regulators, as the case may be. Where redressal machinery is provided for such delegation should be impervious to objection. Inasmuch as the TRAI Act provides for the establishment of the Telecom Disputes Settlement and Appellate Tribunal (TDSAT) with jurisdiction inter alia to hear and dispose of appeals against any direction, decision or order of the Authority, this important safeguard against any possible abuse or arbitrary exercise of power is duly in place. A second Appeal to the Hon'ble Supreme Court of India is also provided for.

49. Furthermore, the TRAI is clearly competent to prescribe the conditions and tariff impugned before us by virtue of the TRAI Act itself. We have already upheld the legality of Section 2(1)(k), the consequence of which is that broadcasting is undeniably and unassailably covered by that statute. TRAI accordingly is expected to make recommendation inter alia in respect of "measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in services (see Section 11(1)(a)(iv))". TRAI must regulate arrangements amongst service providers of sharing their revenue derived from providing telecommunication services (see Section 11(1)(b)(iv)) and generally to perform such other function including such administrative and financial functions as may be entrusted to it by the Central Government as may be necessary to carry out the provisions of the Act (see Section 11(1)(d)). However, on a perusal of Section 11(2) there is no scope for any controversy concerning the competence of the TRAI to prescribe the impugned rates at which telecommunication services are to be provided. Therefore, de hors the CTN Act and the CTN Rules TRAI is otherwise competent to fix tariffs, as also to prescribe the Standard Interconnection Agreements."

17.24. BHARAT SANCHAR NIGAM LIMITED VS. TELECOM REGULATORY AUTHORITY OF INDIA AND OTHERS ((2014) 3 Supreme Court Cases 222).

"89.The exercise of power under [Section 36\(1\)](#) is hedged with the condition that the regulations must be consistent with the Act and the Rules made thereunder. There is no other restriction on the power of the Authority 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 the Authority. Three of these topics relate to meetings of the Authority, the procedure to be followed at such meetings, the transaction of business at the meetings and the register to be maintained by the Authority. The remaining two topics specified in Clauses (e) and (f) of [Section 36\(2\)](#) are directly referable to [Section 11\(1\)\(b\)\(viii\)](#) and [11\(1\)\(c\)](#). These are substantive functions of the Authority. However, there is nothing in the language of [Section 36\(2\)](#) from which it can be inferred that the provisions contained therein control the exercise of power by the Authority under [Section 36\(1\)](#) or that [Section 36\(2\)](#) restricts the scope of [Section 36\(1\)](#).....

97. The same proposition has been reiterated in [Academy of Nutrition Improvement v. Union of India](#) (2011) 8 SCC 274 [Para66] . The observations contained in the last portion of that paragraph suggesting that the power conferred upon the rule making authority does not entitle it to make rules beyond the scope of the Act has no bearing on these cases because it has not been argued before us that the regulations framed under [Section 36](#) are ultra vires the provisions of the TRAI Act."

17.25. HOTEL AND RESTAURANT ASSOCIATION AND ANOTHER VS. STAR INDIA (P) LIMITED AND OTHERS ((2006) 13 Supreme Court Cases 753).

17.26. The Apex Court has considered with clarity on the extent of the power available to TRAI and the role required to be played. These are the necessary paragraphs:

"24. Section 11 of TRAI Act provides for the functions of TRAI. Clause (a) of Sub-section (1) of [Section 11](#) of TRAI Act empowers TRAI to make recommendations either suo motu or on the request from the licensor, on the matters enumerated therein. Clause (b) thereof empowers it inter alia to fix the terms and conditions of inter-connectivity between the service providers.

25. Sub-section (2) of [Section 11](#) of TRAI Act contains a non-obstante clause providing that TRAI may frame from time to time by order (s) notified in the official gazette the rates at which the telecommunication services within India and outside India shall be provided under the said Act including the rates at which messages shall be transmitted to any country outside India. Proviso appended to Sub-section (2) thereof empowers TRAI to notify different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid TRAI shall record the reasons therefor.

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 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 of taken into consideration throwing the interest of others to the wind."

17.27. The impugned Regulations and Tariff Order have been

passed as a sequel to the earlier ones. The regulatory regime started functioning from the year 2004 onwards. Thus, the manner of packaging and offering coupled with the rates cut is regulated from time to time. Consultation process would show an element of fairness adopted by TRAI. Almost all the objections raised have been dealt with sufficient reasons as could be seen from the explanatory memorandum attached to the impugned proceedings. As noted, strangely the petitioners challenged some of the clauses in the Regulations and the Tariff Order, despite asking for and agreed upon. Be that as it may, the Regulations and the impugned Tariff Order clearly mention the object, logic and the reason behind them. They do not fix any cap on the pricing of the channel. However, it was felt that the underlying principle that the consumer is the king is being destroyed by the so called business acumen, marketing strategy or commercial prudence. Suffice it is to state that the petitioners are aggrieved by the impugned Regulations and the Tariff Order. Therefore, power can be generously traced to Sections 36, 11(i)(b) and 11(i)(d) of the TRAI Act. As discussed above, these provisions along with the Notification do provide sufficient ammunition to sustain the impugned regulation.

18. IMPUGNED REGULATIONS:

18.1. Chapter 1 deals with the definition clause. This chapter speaks of al-a-carte channel. On the similar lines, it speaks about the bouquet of channels. For the first time, the word "broadcaster" has been defined along with a "Local Cable Operator" and "Multi System Operator". Incidentally, it defines "a programme". "A service provider", "set top box", "subscriber" and "a television channel" have been defined. The following are the definition clauses.

(h) "broadcaster" means a person or a group of persons, or body corporate, or any organization or body who, after having obtained, in its name, downlinking permission for its channels, from the Central Government, is providing programming services;

(i) "broadcaster's share of maximum retail price" with reference to a pay channel or a bouquet of pay channels means any fee payable by a distributor of television channels to a broadcaster for signals of pay channel or bouquet of pay channels, as the case may be, and for which due authorization has been obtained by such distributor from that broadcaster;

(j) "broadcasting services" means the dissemination of any form of communication like signs, signals, writing, pictures, images and sounds of all kinds by transmission of electro-magnetic waves through space or through cables intended to be received by the general public either directly or indirectly and all its grammatical variations and cognate expressions shall be construed accordingly;

(kk) "service provider" means the Government as a service provider and includes a licensee as well as any broadcaster, distributor of television channels or local cable operator;

(ii) "set top box" or "STB" means a device, which is connected to or is part of a television receiver and which enables a subscriber to view subscribed channels;

(mm) "subscriber" for the purpose of these regulations, means a person who receives broadcasting services, from a distributor of television channels, at a place indicated by such person without further transmitting it to any other person and who does not

cause the signals of television channels to be heard or seen by any person for a specific sum of money to be paid by such person, and each set top box located at such place, for receiving the subscribed broadcasting services, shall constitute one subscriber;

(pp) “television channel” means a channel, which has been granted permission for downlinking by the Central Government under the policy guidelines issued or amended by it from time to time and reference to the term ‘channel’ shall be construed as a reference to “television channel”.

18.2. As discussed above, the definition clauses, which come under chapter-1 are to be read in consonance with the main Act unless the contrary is proved. Accordingly, “broadcaster” has been defined as the one, who obtains permission for its channel and provides programme service. The word “interconnection” has been defined as the one in between the service providers and the subscribers. Therefore, the relationship between the service providers and the subscribers has been rightly taken note of. To make the position clear, a licensee is once again reiterated as the service provider, which is inclusive of broadcaster, distributor and local cable operator. Therefore, all the three set of actors have been brought under the purview of the service provider. A set top box, which otherwise called STB, has been defined as a device which enables the end user viz., the subscriber to view the subscribed channels. Therefore, it is clear that without the set top box, which is to be provided by a service provider, no subscriber can either actually or

likely to view. This definition also makes it clear that what is sufficient is the availability of a channel to be seen. "Subscriber" has been defined as the one, who receives the broadcasting services without further transmission. "A television channel" has been defined as the one, which has been granted permission for downlinking. Thus, to attract the definition clause, a permission is mandatory.

18.3. The regulations also define the programme, which means exhibition of films, features, drama etc. Programme means any television broadcast and includes: - (i) exhibition of films, features, dramas, advertisements and serials; (ii) any audio or visual or audio visual live performance or presentation and the expression "programming service" shall be construed accordingly.

18.4. The aforesaid definition of word "programme" and "programme service" will have to be understood as being a member of broadcasting service family. A broadcasting services is a wide term inclusive of different forms of broadcasting vis a vis radio broadcasting television broadcasting, web broadcasting etc. Now in the impugned regulations, we are concerned with television broadcasting by which both audio (sounds and video) pictures and image signals are made available to the public. Hence, this definition clause makes it clear

that it does not take in its ambit the other forms of broadcasting service. Therefore, a programming service has been defined separately to show it distinctly from the other forms of broadcasting services.

18.5. Thus, from the scheme of things, there is no role for a television channel either under the Act or under the Regulation. The impugned regulation has come into being through the exercise of the power available under the Act. So is the case of the impugned Tariff Order. The Tariff Order has been passed in exercise of the power conferred under Section 11(2) of the Act read with notification No.39. It does not deal with pricing individual components of the content, such as, a particular movie or a sport. Programme has never been touched upon with the specific reference to the nature of content. The following are some of the reasons assigned by the authority in the explanatory memorandum.

“64. The Authority has noted that at present the uptake of channels on a-la-carte basis is negligible as compared to the bouquet subscriptions. Analysis yields that the prime reason for such poor uptake of a-la-carte channels is that the a-la-carte rates of channels are disproportionately high as compared to the bouquet rates and further, there is no well defined relationship between these two rates. As per data available with TRAI, some bouquets are being offered by the distributors of television channels at a discount of upto 80% -90% of the sum of a-la-carte rates of pay channels constituting those bouquets. These discounts are based on certain eligibility criteria/conditions to be fulfilled by the distributor of television channels in order to avail those discounts from broadcasters. Such high discounts force the subscribers to take bouquets only and thus reduce subscriber

choice. As a result, while technically, a-la-carte rates of channels are declared, these are illusive and subscribers are left with no choice but to opt for bouquets. 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 forced 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.

65. In order to facilitate subscribers to exercise their options in line with intention of lawmakers to choose individual channels, in the new framework the broadcasters will declare to customers/subscribers the MRP of their a-la-carte channels and bouquets of pay channels. In order to ensure that prices of the a-la-carte channels are kept reasonable, the maximum discount permissible in formation of a bouquet has been linked with the sum of the a-la-carte prices of the of pay channels forming that bouquet. A broadcaster can offer a maximum discount of 15% while offering its bouquet of channels over the sum of MRP of all the pay channels in that bouquet so as to enable customer choice through a-la-carte offering and also prevent skewed a-la-carte and bouquet pricing (refer example 1). The bouquet(s) offered by the broadcasters to subscribers shall be provided by the distributors of television channels to the subscribers without any alteration in composition of the bouquet(s). In case a broadcaster feels that more discount can be provided in formation of the bouquet, it indirectly means that a-la-carte prices at the first stage has been kept high and there is a need to revise such a-la-carte prices downwardly. Full flexibility has been given to broadcasters to declare price of their pay channels on a-la-carte basis to correct such situations, if it may come.

66. Some stakeholders are of the opinion that limiting the discount to subscribers while forming bouquets is anti subscriber. In this regard, while the Authority wants to facilitate the availability of a-la-carte choice to customers/ subscribers, it does not intend to encroach upon the freedom of broadcasters and distributors to do business. During the discussions in the Parliament on the motion for consideration of the Cable Television Networks (Regulation) Amendment Bill, 2011, the then Minister of Information and Broadcasting emphasised the need to establish a system for subscribers to choose a-la-carte channels of choice. The Authority has also made several attempts in this regard, but for one or the other reason could not succeed. Here it is important to understand that the Authority has not been able to do pricing of channels in the absence of pricing of content. Present trends indicate that majority of channels are priced much below the prevailing ceiling, but higher ceilings were prescribed to give flexibility to broadcasters to monetise their channels and freedom to do business. Further, different channels even in the same genre may have varying cost of production and potential to monetise, but within the framework. A broadcaster may price even non-driver channels at a much higher value that they can command. Non-discovery of reasonable price of a channel in a market is one of the constraints that can be manipulated and misused to price a channel in a-la-carte from which is illusory. Such high a-la-carte prices permits broadcasters/distributors to provide high discounts to push non-drivers channels in form of bouquets to the subscribers while reducing the probability of choosing the a-la-carte channels of choice as required by the lawmakers in the Parliament. The possibility to forcing bouquets over a-la-carte choice by using higher discounts can be further understood by following example, where a 41 broadcaster has a total of 35 pay channels out of which only 5 are driver channels :

67. In the present regulatory framework incidences have come to the knowledge where discount upto 90% on the declared RIO prices has been given by broadcasters. Obviously such efforts kill competition and reduce a-la-carte choice which is anti-subscriber. Accordingly, the Authority has prescribed a discount of 15% to be provided by 42 broadcasters at wholesale level and further 15% to be provided by distributors at retail level. The net effect to subscribers at retail level will be a discount of approximately 30% on the bouquets of channels. Therefore flexibility of formation of bouquet has been given to broadcasters and MSOs both to such an extent that total permissible discount does not kill the a-la-carte choice. The Authority has been careful in prescribing a framework which does not encourage non-driver channel to be

pushed to subscribers against their choice. Non-driver channels which are provided as part of bouquets not only kill choice of the ala-carte channels but also eat away the channel carrying capacity available with distributors which may result in artificial capacity constraints at distribution platforms for launch of new/competitive channels. Such restrictions are anti-subscriber and have to be carefully handled. Accordingly, the Authority has consciously decided the present framework of prescribing relationship between a-la-carte and bouquet prices to protect interest of customers/ viewers and as well as those of service providers. However, the Authority will keep a watch on the developments in the market and may review the maximum permissible discount while offering a bouquet, in a time period of about two years.

68. A broadcaster is free to offer its pay channels in the form of bouquet(s) to customers. While subscribing to bouquet, a customer may not be aware of the price of each channel forming the bouquet. Abnormal high price of a pay channel may result in higher price of a bouquet leading to adverse impact on subscribers' interests. It is an established fact that bundling of channels complicates and obscures their pricing. Prices are obscured because subscribers do not always understand the relationship between the bundle price and a price for each component. However, the bundling of channels offers convenience to the subscribers as well as services providers in subscription management. Keeping in view these realities and to protect the interests of subscribers, the Authority has prescribed a ceiling of Rs. 19/- on the MRP of pay channels which can be provided as part of a bouquet. Therefore, any pay channel having MRP of more than Rs. 19/- cannot become part of any bouquet. The amount of Rs. 19/- has been prescribed keeping in view the prevailing highest genre wise ceilings of Rs. 15.12 for all addressable systems between broadcaster & DPOs at wholesale level and further enhancing it 1.25 times to account for DPOs distribution fee. Broadcasters also have complete freedom to price their pay 43 channels which do not form part of any bouquet and offered only on a-la-carte basis. Similar conditions will also be applicable to DPOs for formation of the bouquets. However, the Authority will keep a watch on the developments in the market and may review the manner in which a channel can be provided as part of a bouquet, in a time period of about two years.”

19. THE COPYRIGHT ACT, 1957:

19.1. Before going into the provisions we are concerned with, it

is made abundantly clear that the discussion is relatable only the issue involved i.e., whether the impugned regulations and Tariff order militate and violate the Copyright Act.

19.2. Indian Copyright Act, 1914, was a poor cousin of Copyright Act, 1911 of the United Kingdom for obvious reasons. After independence, on the need to expand the scope and to increase powers and functions, the Copyright Act, 1957 was introduced. The field of legislation for the enactment is entry 49 of list 1 of VII Schedule. Accordingly, certain rights akin to copyright are also conferred on the broadcasting authorities in respect of programmes broadcast by them. When the Act came into being in the year 1957, the word "broadcast" was not defined.

19.3. In the subsequent amendment introduced by the Act 23 of 1983, a "broadcast" has been defined and so also, the words "communication to the public", which are as under.

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

19.4. Thus, a broadcast would mean a communication to the public, which is inclusive of re-broadcast by the means mentioned

thereunder. The words “communication to the public” have been defined under Section 2ff, which is appositely referred hereunder.

“(ff) “communication to the public” means making any work or performance 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 physical copies of it, whether simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available. Explanation.— For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public;”

19.5. “Work” has been defined under sub clause 'y' to mean any one of the following works.

“(y) “work” means any of the following works, namely:—

- (i) a literary, dramatic, musical or artistic work;
- (ii) a cinematograph film;
- (iii) a 2 [sound recording];”

19.6. If one reads sub clauses (ff) and (y) of Section 2, making any work would mean the works mentioned in sub clause 2(y). This should be available for being seen or heard or otherwise enjoyed by the public directly or by other means mentioned therein. Therefore, what is to be kept in mind is the availability of any work to be seen by the general public. This position has been reiterated once again by

the later portion of the definition section by creating a deeming fiction as to whether any member of the public actually sees, hears or otherwise enjoys the work, which is made available. Hence, two factors are important. One is the availability of the work and the other is the enjoyment by any member of the public. The question as to whether it is seen, heard or not becomes irrelevant. Therefore, a deeming fiction is created. A fact has been created, which is otherwise non-existent. Hence, much emphasis will have to be given for the availability and thus, actual seeing or hearing becomes a non-issue.

19.7. When such a work is "communicated to the public" as defined under Section 2 (ff) through the "means" mentioned in 2 (dd), it becomes a broadcasting. Therefore, a broadcast would actually happen only when it is communicated to the public. When such an activity is done by an organisation, it becomes a broadcaster. Accordingly, a cycle has to be completed from the point of view of the broadcaster to the end user viz., the subscriber.

19.8. The word "infringing copy" has been defined under Section 2-m to mean,

(m) "infringing copy" means—

(iv) in relation to a programme or performance in which such a broadcast reproduction right or a performer's right subsists

under the provisions of this Act, the sound recording or a cinematographic film of such programme or performance, if such reproduction, copy or sound recording is made or imported in contravention of the provisions of this Act;

19.9. To be noted, this definition section speaks about a programme along with a performance. As stated earlier, the word “broadcast” connotes a wider meaning as against the programme though they are interchangeable at times. When a broadcast of a programme takes place containing a work as defined, a BRR gets created.

20. Copyright (Amendment) Act, 2012: A bird's eye view :

20.1. As much emphasis is made by the petitioners on the amendment made to the Amendment Act in the year 2012, let us have a cursory look.

20.2. The Copyright (Amendment) Bill, 2010 was introduced before the Upper House on March 30, 2010. Until the Bill was introduced in the parliament, the contents were never let out. The origin of amendment was due to the grievances aired by the composers and the lyricists from the music industry. The amendments were sought for by the pressure group for different reasons. In

INDIAN PERFORMING RIGHT SOCIETY VS. EASTERN INDIA MOTION PICTURES ASSOCIATION (1977 SCR (3) 206), while construing Section 17(c) of the Copyright Act, the Apex Court held that all music or lyrics created for the purpose of cinematographic film would be deemed to be owned by the producer in the absence of any written contract to the contrary. The second reason was to strengthen the rights of the authors and to protect from unfair contracts. The third was with respect to the administration of the copyright societies as the existing ones did not yield the desired result.

20.3. For the abovesaid objective, the Bill sought to introduce the following proviso to Section 18:

“Provided that in case of any work incorporated in a cinematograph work, nothing contained in clauses (b) and (c) shall affect the right of the author in the work referred to in clause (a) of sub-section (1) of section 13.”

20.4. The Parliament Standing Committee also made a comment on Section 13(1)(a) of the Act which is as under:

"The Committee also takes note of the fact that independent rights of authors of literary and musical works in cinematograph films are being wrongfully exploited by the producers and music companies by virtue of Supreme Court judgment in Indian Performing Rights Society Vs. Eastern Indian Motion Pictures Association which held that film producer is the first owner of the copyright and authors and music

composers to not have separate rights".

Accordingly, in view of the amendment made, the authors are given right to own their music and lyrics even if they are created to make a film.

20.5. Towards strengthening the rights of the authors, it is sought to provide the right to royalty sharing. This has been made as an absolute and inalienable one. The amendment also provides, withholding of such a right even after the licence granted in favour of a third party. Incidentally, the amendment gave substantial rights to the authors over the copyright societies.

20.6. These amendments also went into the issue of transparency qua the copyright society. Accordingly, a copyright society is mandated to publish tariff scheme as against the earlier mere submission to the Registrar of Copyright. Further more, the right to challenge the Tariff Scheme of a copyright society has been given to any person aggrieved. The Copyright Board is also sufficiently empowered to discharge its functions. Thus it could be seen that the

object of the 2012 amendment is to enhance and protect the rights of the copyright holder in general and the music industry in particular.

This can also be seen from the speech made by the Honourable Minister on the floor of the parliament.

20.7. Chapter III of Copyright Act, 1957, deals with meaning of copyright and the work in which copyright subsists. Suffice it is to state that they do not concern with a broadcast reproduction right. Section 16 once again deals with a copyright, which cannot be enforced otherwise than the one provided under the Act. Thus, it restricts a copyright. Though this Section does not speak about a broadcast reproduction right, even otherwise, such a right can only be under the Act. To be noted, this is not a substantive provision, it fixes the area of operation qua a right.

20.8. Chapter IV governs ownership of copyright and the rights of the owner. In this, section 18 speaks of "assignment of copyright" with Section 19 mode of assignment. These provisions are meant to protect the right of the copyright holder with specific reference to the royalty factor.

20.9. Chapter VI of the Copyright Act, 1957 concerns itself with licences. Under Section 30, a licence may be granted by the owner in favour of the licensee. Section 31-D specifically mentions the

requirement of the licence for broadcasting of literary and musical works and sound recording. Here again, it mandates a broadcasting organisation to pay the owner of the copyright the royalties and for that purpose maintain the accounts. Thus, even this provision speaks about the duty of the broadcasting agencies vis a vis the rights of the owner. Chapter VII speaks of the registration and functioning of the copyright societies. The object is to make sure that a copyright holder is not left in lurch. That can also be seen on a perusal of Section 33-A of the Act, which speaks of tariff scheme and Section 34, which deals with administration of right of the owner by the copyright society. On a perusal of the speech of the Honourable Minister for Information and Broadcasting while introducing the Bill and the bird's eye view of the amendment, one can say with certainty that these provisions have been introduced to avoid the exploitation and alienation of the holder of the copyright. A specific reference has been made on the suffering of the copyright holder when substantial profit went into the kitty of a licensee much to his agony. Suffice it is to state that it does not contemplate the process of transmission between a broadcaster and a distributor prior to a broadcast, as defined under the Act.

20.10. Much has been said about the 'broadcast reproduction right'. Rights of broadcasting organisation have been brought under Chapter VIII. The Copyright Act only deals with the rights and duties of

individuals such as copyright holder and the licensee with a limited right to a third party. Therefore, it does not deal with a larger public interest, especially when the airwaves and frequencies are owned by the Government which is duty bound to protect the overwhelming public interest of the subscriber. This provision also does not deal with a "broadcast right" as such but only a "broadcast reproduction right". Before discussing further let us see the provision as such.

“37. Broadcast reproduction right.—

(1) Every broadcasting organisation 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 licence of the owner of the right does any of the following acts of the broadcast or any substantial part thereof,—

- (a) re-broadcast 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 1 [(e) sells or gives on commercial rental or offer for sale or for such rental, 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.”

20.11. Section 37 as aforesaid deals with the special right known as "broadcast reproduction right". What is important to be noted here is that such a right is in respect of the "broadcast". Therefore, the reproduction right would emanate only in respect of a broadcast. Until and unless the broadcast does takes place in the manner as defined in the Act, there is no corresponding right over a broadcast reproduction. Sub clause 2 once again reiterates that such a right shall subsist from the beginning of the calendar year following the year in which the broadcast is made.

20.12. The broadcast reproduction right is a right ascribed to a broadcasting organisation being a special one. Such a right is controlled and circumscribed by Section 37 of the Act. This provision has to be seen in tune with the other provisions, which are specifically applicable under Section 39-A. As discussed earlier, most of the provisions, in fact, deal with the duty of the broadcasting organisation and the right, if any, could only be confined to the provisions applicable and not beyond.

20.13. There is absolutely no copyright or a broadcast reproduction right given independently to a television channel. Such a right is relatable and attributable to a "particular broadcast" alone.

For example, it can be made applicable to a movie being a work and the programme as defined under the Act. In other words, the copyright does not recognise any specific right of television channel but it may become a broadcasting organisation, which can be restricted to a broadcast made. Hence, it is programme, work and thus broadcast centric.

20.14. To understand the position better, let us see Section 37 as it stood before at the time of Act 14 of 1957.

“37. Broadcast reproduction right-- (1) Where any programme is broadcast [****] by the Government or any other broadcasting authority, a special right to be known as "broadcast reproduction right" shall subsist in such programme.”

20.15. This section starts with the words "where any programme is broadcast". By the amendment, which stands as of now, the word "programme" has been taken out as against "broadcast". This is to give a wider coverage. Similarly, the words "by radio, television" were omitted in view of the subsequent technological development. The present amendment is also necessitated by the entry of private actors.

20.16. Section 37 is an unique piece of legislation and thus one of its kind. While it speaks about the right of a broadcasting

organisation, it also controls the extent of it. Thus, Section 37 is a core provision, which exclusively deals with a broadcasting reproduction right.

20.17. Section 37 certainly comes into play only after the initial broadcast. Section 37(3), in specific words speaks about the continuance of the broadcast reproduction right, in relation to "any broadcast". Here again, the word "broadcast" assumes a significance along with "continuation". Sub clauses (a) to (d) create a deeming fiction towards infringement of the broadcast reproduction right. If we have a look at sub clauses (a) to (c) of Section 3, they again speak about the reproduction of the broadcast being heard or seen by the public on payment of charges or making of sound recording. Thus, if one connects Section 37 with the definition section, accrue of a right is only after the initial broadcast takes place. After all, an interpretation has to be given on the understanding of the provisions and certainly not on a fact situation. Perhaps for violating right, if any, prior to the broadcast takes place, an organisation can seek the remedy in some other forum. But certainly that cannot be a factor to interpret the provisions otherwise. Therefore, on an analysis of Section 37, it is imperative that a broadcast should take place by reaching public either actual or available. This thinking is also strengthened by the

presence of Section 38, which speaks about a performance right, which would also accrue when he actually does it which is importantly relatable to that performance alone.

20.18. Section 39-A deals with application of certain provisions in case of broadcast reproduction right. It does not speak about the general provisions, which are otherwise applicable to a copyright holder. Since broadcasting reproduction right is a special right, it does not take away the right of a copyright holder over a broadcasting organisation. Therefore, Section 39-A has to be understood to mean, protecting the rights of a copyright holder as against the organisation being a licensee. A purposive interpretation of this section along with the proviso coupled with the speech delivered by the Honourable Minister on the floor of the parliament would settle the issue.

20.19. Much has been said on the application of Section 33-A of the Act read with Rule 56, which deals with tariff scheme. On combined reading, it is primarily a right involving a copyright holder. Secondly, it deals with the nature and quantum of royalties. A society is supposed to collect the royalty from the licensee in advance under Rule 56((5) of the Rules. It acts and performs on behalf of the owner who in most of the cases is under a disadvantageous position. A

window has been provided to a person aggrieved over the fixation of tariff.

20.20. Thus, on a conspectus of the above, there is no difficulty in holding that Copyright Act, 1957, and the TRAI Act, 1997, do stand apart in the respective arena. Their fields are distinct and separate. Under the Copyright Act, no third party is involved. There is no element of regulation. The TRAI Act is a sector specific Act. As airwaves is a public property, there is no overwhelming public interest under the Copyright Act unlike TRAI Act.

20.21. M/S JAK COMMUNICATIONS PVT. LTD., VS. M/S SUN TV NETWORK LIMITED AND ANOTHER ((2010) 2 Law Weekly 936).

“31. It is also argued that in view of the TRAI Act, the provisions of the Copyright Act cannot be enforced. In the wake of the judgment of the Supreme Court, we cannot read both the Acts in that manner and come to a conclusion that the subsequent TRAI Act would take away the power of civil Court to entertain a suit filed for infringement of copyright. Both the Copyright Act as well as the TRAI Act operate in the respective field. Whereas the Copyright Act deals with the ownership of the copyright and in case of infringement of that right, to enable the copyright owner to approach the civil Court seeking for injunction and other remedies, the TRAI Act confines itself to the disputes between the parties enumerated under Section 14 of that Act.

33. While interpreting two inconsistent or obviously

repugnant provisions of an Act, the Court should make an effort to so interpret the provisions as to harmonise them so that the purpose of the Act may be given effect to and both the provisions may be allowed to operate without rendering either of them redundant.

34. Interpretations are to be made to salvage a legislation to achieve its objective and not to let it fall merely because of a possible ingenious interpretation. It is also a settled position of law that where a provision is capable of one of two interpretations, the interpretation which validates rather than one which may invalidate a provision applies.

35. There might be some conflict between the rules and the provisions of the Act. There may also be a conflict sometimes between two Sections to be found in the same Act. In such circumstances, Courts have to try and reconcile them as best it may. If it cannot be done, the Courts have to determine which is the leading provision and which the subordinate provision and which must give way to the other. That would be so with regard to the enactment and with regard to rules which are to be treated as if within the enactment. Even if there be any conflict between the provisions, it is the duty of the court to harmonize the construction of statute.

36. As per the Rules of Statute and Interpretation as stated supra, in the event of conflict between the rules and provisions of the Act, Courts have to try and reconcile them at best it may and even if there be any conflict between the rules and provisions, it is the duty of the Court to put harmonious construction.”

सत्यमेव जयते

**20.22. M/S NOIDA SOFTWARE TECHNOLOGY PARK LTD.,
V. M/S MEDIA PRO ENTERPRISE INDIA PVT. LTD., AND OTHERS
(Petition No.295) (C) of 2014 dated 07.12.2017)**

20.23. The Telecom disputes Settlement and Appellate Tribunal

by an order dated 07.12.2015 held as follows:

“We now come to the submissions made by Mrs. Pratibha M. Singh, learned Senior Advocate appearing for Taj that in interpreting the Interconnect Regulations, primacy must be given to agreement based on mutual negotiations following the scheme of the [Copyright Act 1957](#).

[Section 39\(A\)](#) of the Copyright Act does not make [section 31](#) applicable to "broadcast reproduction rights" and it is thus true that under the scheme of the [Copyright Act](#), "broadcast reproduction rights" do not come under compulsory licensing. However, exclusion from compulsory licensing under the [Copyright Act](#) by no means suggests that provisions requiring "must provide" of the broadcasting content on "non-exclusive and non-discriminatory" terms may not be mandated in a different set of statutes, aimed at regulating the broadcasting service. It needs to be borne in mind that under the [Copyright Act](#) there is an omission and not a prohibition or bar against compulsory licencing for "broadcasting content rights".

Petition No.151(C) of 2010 disposed of by judgment and order dated 4 February 2011. Thus, contrary to the submissions made by Mrs. Singh, the matter of compulsory licencing of "broadcasting content rights" is left open to be dealt with in a different context, by a different set of laws, regulating another area of societal demands. In case of broadcasting service the Regulator felt, and very rightly so, that "must provide" of the broadcasting content is the first step towards any meaningful regulation of the service and the omission of such a condition would give unmatched monopolistic power to the broadcaster and would leave the broadcasting service completely at its mercy. It is well settled that two central legislations may overlap on the same subject matter. And as long as there is no doubt as regards the legislative competence or the source of legislative power, the courts have consistently upheld any action taken under a certain Act in regard to a matter that may be primarily covered by another legislation 18 . Other sectoral regulators have also rejected the argument that a compulsory licensing regime can only be created under the [Copyright Act](#) and that

creation of a virtual compulsory licensing regime under some other statute would be ultra vires¹⁹.”

Suffice it is to state that the petitioners are the parties to the aforesaid decision.

**20.24. COGECO CABLE INC., ROGERS COMMUNICATIONS INC.,
Vs. BELL MEDIA INC. (FORMERLY GLOBEMEDIA INC.) (2012 SCC 68):**

An interesting case dealt with by the Supreme Court of Canada came to the notice of this Court by chance, though not placed by the respective counsels. It would be worthwhile to consider the facts and the issues involved. This Court is also of the view that having come to know of the decision, it would be otherwise not fair not to discuss it. Thus keeping in mind the legal position qua the precedential value of foreign judgment, let us discuss.

20.25. The Canadian Broadcasting System is regulated and supervised by the Canadian Radio-television and Telecommunications Commission ("CRTC") under the Broadcasting Act, SC.91, C 11. A regulated regime was sought to be introduced in the year 2010 by which the private local television stations (broadcasters) could choose to negotiate direct compensation for the retransmission of their signals by the Broadcasting Distribution Undertakings ("BDUs") such as cables and satellite companies. These companies can be referred as

distributors. This new regime empowers a broadcaster to authorise or prohibit a distributor from retransmitting their programming service.

20.26. This regime was disputed by the "BDUs" inter alia contending that there is no power under the Broadcasting Act which was available only under the Copyright Act. The "CRTC" accordingly referred the following question to the Federal Court of Appeal:

“Is the Commission empowered, pursuant to its mandate under the Broadcasting Act, to establish a regime to enable private local television stations to choose to negotiate with broadcasting distribution undertakings a fair value in exchange for the distribution of the programming services broadcast by those local television stations?”

20.27. The contentions raised by the distributor companies were accordingly rejected on both the legal issues. A further challenge was made to the Supreme Court of Canada. By a slender majority of 5:4, appeal was allowed.

20.28. Before proceeding further, let us place on record the relevant provisions. Section 3(1) deals with the policy objectives. Section 3(1) of the Broadcasting Act declares the broadcasting policy for Canada.

3. (1) *It is hereby declared as the broadcasting policy for Canada that*

(e) each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;

(f) each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources;

(s) private networks and programming undertakings should, to an extent consistent with the financial and other resources available to them,

(i) contribute significantly to the creation and presentation of Canadian programming, and

(ii) be responsive to the evolving demands of the public; and

(t) distribution undertakings

(i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,

(iii) should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services."

20.29. Sections 9 and 10 deal with the powers and functions of the Commission inclusive of a power to make regulations. They are as under:

9(1) Subject to this Part, the Commission may, in furtherance of its objects,

- (a) establish classes of licences;
- (b) issue licences for such terms not exceeding seven years and subject to such conditions related to the circumstances of the licensee

(i) as the Commission deems appropriate for the implementation of the broadcasting policy set out in subsection 3(1), and

(ii) in the case of licences issued to the Corporation, as the Commission deems consistent with the provision, through the Corporation, of the programming contemplated by paragraphs 3(1)(l) and (m);

(c) amend any condition of a licence on application of the licensee or, where five years have expired since the issuance or renewal of the licence, on the Commission's own motion;

(d) issue renewals of licences for such terms not exceeding seven years and subject to such conditions as comply with paragraph (b);

(e) suspend or revoke any licence;

(f) require any licensee to obtain the approval of the Commission before entering into any contract with a telecommunications common carrier for the distribution of programming directly to the public using the facilities of that common carrier;

(g) require any licensee who is authorized to carry on a distribution undertaking to give priority to the carriage of broadcasting; and

(h) require any licensee who is authorized to carry on a distribution

undertaking to carry, on such terms and conditions as the Commission deems appropriate, programming services specified by the Commission.

10.(1) The Commission may, in furtherance of its objects, make regulations

- (a) respecting the proportion of time that shall be devoted to the broadcasting of Canadian programs;
- (b) prescribing what constitutes a Canadian program for the purposes of this Act;
- (c) respecting standards of programs and the allocation of broadcasting time for the purpose of giving effect to the broadcasting policy set out in subsection 3(1);
- (d) respecting the character of advertising and the amount of broadcasting time that may be devoted to advertising;
- (e) respecting the proportion of time that may be devoted to the broadcasting of programs, including advertisements or announcements, of a partisan political character and the assignment of that time on an equitable basis to political parties and candidates;
- (f) prescribing the conditions for the operation of programming undertakings as part of a network and for the broadcasting of network programs, and respecting the broadcasting times to be reserved for network programs by any such undertakings;
- (g) respecting the carriage of any foreign or other programming services by distribution undertakings;
- (h) for resolving, by way of mediation or otherwise, any disputes arising between programming undertakings and distribution undertakings concerning the carriage of programming originated by the programming undertakings;
- (i) requiring licensees to submit to the Commission such information regarding their programs and financial affairs or otherwise relating to the conduct and management of their affairs as the regulations may specify;

- (j) respecting the audit or examination of the records and books of account of licensees by the Commission or persons acting on behalf of the Commission; and
- (k) respecting such other matters as it deems necessary for the furtherance of its objects;

20.30. By a majority decision, it was held that the Act mainly deals with protecting and enhancing the cultural aspect. Section 3(1) merely deals with declaration of a policy and therefore cannot be provided with an independent grant of power. Section 3(1) is also to be seen in the light of intendment. The subject matter of the regulation cannot be traced to section 9 and 10. Thus the regulation ultra vires the Act.

20.31. The second issue is with respect to the infringement of the provisions of the Copyright Act. Section 21(1) of the Act deals with limited rights of a copyright holder with a communication signal that it broadcasts. Such a right is also subject to the one available under Section 31(1) in favour of "retransmitter", who can be called for our purpose as a distributor. The aforesaid provisions are hereunder:

"21(1). Subject to subsection (2), a broadcaster has a copyright in the communication signals that it broadcasts, consisting of the sole right to do the following in relation to the communication signal or any substantial part thereof:

- (a) to fix it,

(b) to reproduce any fixation of it that was made without the broadcaster's consent,

(c) to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast, and

(d) in the case of a television communication signal, to perform it in a place open to the public on payment of an entrance fee, and to authorize any act described in paragraph (a), (b) or (d).

31(1) In this section,

"new media retransmitter" means a person whose retransmission is lawful under the Broadcasting Act only by reason of the Exemption Order for New Media Broadcasting Undertakings issued by the Canadian Radio-television and Telecommunications Commission as Appendix A to Public Notice CRTC 1997-197, as amended from time to time;

"retransmitter" means a person who performs a function comparable to that of a cable retransmission system, but does not include a new media retransmitter.

"signal" means a signal that carries a literary, dramatic, musical or artistic work and is transmitted for free reception by the public by a terrestrial radio or terrestrial television station.

(2) It is not an infringement of copyright for a retransmitter to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if

(a) the communication is a retransmission of a local or distant signal;

(b) the retransmission is lawful under the Broadcasting Act;

(c) the signal is retransmitted simultaneously and without alteration, except as otherwise required or permitted by or under the laws of Canada;

- (d) in the case of the retransmission of a distant signal, the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act, and
- (e) the retransmitter complies with the applicable conditions, if any, referred to in paragraph (3)(b).

(3) The Governor in Council may make regulations

- (a) defining “local signal” and “distant signal” for the purposes of subsection (2); and
- (b) prescribing conditions for the purposes of paragraph (2)(3), and specifying whether any such condition applies to all retransmitters or only to a class of retransmitter.

20.32. On this, it was held that the right which is otherwise enured in favour of the retransmitter/distributor cannot be taken away through a regulation by CRTC under the Broadcasting Act. Both these reasons were not agreed upon in the dissenting decision.

20.33. Though in the first blush it might appear as if the same rationale may well be applied to the case on hand, it is not so. The Canadian Supreme Court proceeded on the footing that there is an element of public interest in the Copyright Act as against the Broadcasting Act. The position is totally different before us. It is rather otherwise. The aforesaid decision has been rendered on the basis of provisions contained therein and thus has no application to our case. If there is a public interest in a lis between two parties, be it a copyright owner on one hand and the licensee on the other hand, the same

cannot become a social or welfare legislation. There is a difference between an Act which is meant to protect and enhance the rights of the general public and the one which upholds the interest of one group of persons which might lead to an element of fairness. Providing a level playing field and creating an element of fairness is different from a welfare legislation. The power conferred under the TRAI Act as discussed at length is sufficient enough to cover the present Regulations and Tariff Order. The Canadian judgment also throws light on one important issue. Once again it deals with the broadcasting of only a "programme". Secondly the regulation therein was meant to act between a broadcaster and a distributor by regularising the power available under the Act. It is to be noted that such a regulation passed providing road map for the inter se relationship between the broadcaster and the distributor has already been upheld by the Court in our case. There is no BRR involved in the copyright in Canada. The Court also gave a finding that the activity sought to be introduced is governed and controlled by the Copyright Act, a situation totally non-existent before us. The dispute before the Canadian Court was between the broadcasters and the distributors. Therefore, the interest of the subscriber was never a point for consideration. There is no repository of source under our Copyright Act. It is only available with the TRAI Act. Hence, in the considered view of this Court, the

aforesaid decision is to be seen in its own context.

21. INDIAN TELEGRAPH ACT, 1885.

21.1. This enactment is of vintage - origin having crossed a century and a quarter. The deficiency in this enactment has in fact brought forth the TRAI Act, 1997. As held by the Courts, the provisions of this Act will have to be read in consonance with the TRAI Act, which is also indicated in Section 2(2) and 38. Part II deals with the privileges and powers of the Government. As per Section 4, exclusive privilege to grant licence lies with the Central Government. Without a licence or a permission under this section, one would not become eligible and entitled to use the airwaves. Such an entity will not come under the purview of the TRAI Act as the very right to use airwaves would get lost. When once a permission has been obtained, which is traceable to Section 4 of the Indian Telegraph Act, 1885, a status of the licensee under Section 2(e) of the TRAI Act comes into being. Section 4 is the sole provision, which enables the Central Government to part with this exclusive privilege to a third party to deal with the work under telegraph or telecommunication service. This aspect has been dealt with in extenso in **SECRETARY OF MINISTRY OF INFORMATION AND BROADCASTING VS. CRICKET ASSOCIATION OF BENGAL ((1995) 2 Supreme Court Cases 161)**

referred supra. Section 4 not only govern a broadcasting organisation, but also a DTH operator being the distributor. It is to be noted that rules have been framed for the usage of airwaves frequencies and spectrum. Suffice it is to state that no more interpretation is required on the scope of Section 4 since the first petitioner itself took a plea before the Tribunal in **STAR INDIA PRIVATE LIMITED VS. BSNL** that it is service provider within the meaning of TRAI Act and accordingly, it was held that any permission granted by any Ministry to a broadcaster is to be construed as a licence within the meaning of the Indian Telegraph Act, 1885. **BHARTI AIRTEL LTD., V. UNION OF INDIA ((2015) 12 Supreme Court Cases 1).**

"42. By a statutory declaration made under Section 4 of the Indian Telegraph Act, 1885, it is declared that the Government of India shall have the exclusive "privilege for establishing, maintaining and working telegraphs" (which includes telephones). The proviso to Section 4 of the said Act authorizes the Government of India to grant license to establish, maintain and work telegraphs (which includes telephones) "on such conditions and in consideration of such payments" as it thinks fit. Telephones include both wired and wireless telephones like cellular mobile phones, the establishment and working of which necessarily requires access to spectrum which again is controlled by the Government of India as it is already declared to be a natural resource by this Court. It can thus, be seen that no person other than the Government of India has any right to establish, maintain and work telephones. It is the exclusive privilege of the Government of India, which could be permitted to be exercised by others by a grant from the Government of India.

43. In other words, such licences are in the nature of largesse from the State. No doubt, the authority of the State to distribute such largesse is always subject to the condition that the State

must comply with the conditions of [Article 14](#) of the Constitution i.e. the distribution must be on the basis of some rational policy. Even the language of the proviso to [Section 4](#) of the Telegraph Act, which stipulates that the grant of license should be “on such conditions and in consideration of such payments as it thinks fit”, must necessarily be understood that the conditions must be rational and the payments forming the consideration for the grant of license must be non-discriminatory. The conditions contained in the licenses in question stipulate that the term of the license could be extended on mutually agreed terms, if the Government of India deems it expedient. The obligations of the Government of India flowing from the Constitution as well as a statute necessarily require the Government of India to grant licences as rightly pointed by the Tribunal (TDSAT) only “in public interest and for public good”.

21.2. The discussion made in the petitioner's case - **STAR INDIA PRIVATE LIMITED VS. TELECOM REGULATORY AUTHORITY OF INDIA AND OTHERS ((2008) 146 DLT 455)** (paragraph 19) referred supra also requires to be taken note of.

21.3. Thus, the contention on the restrictive scope of Telegraph Act does not hold water in the teeth of the specific provisions contained in Section 6A which provides sufficient authority to fix the rates, messages and fix other conditions.

21.4. Both these enactments viz., TRAI Act, 1997 and the Indian Telegraph Act, 1885 are to be read together and even de hors.

22. CABLE TV NETWORKS (REGULATION) ACT, 1995

22.1. This Act was also introduced using power conferred by the constitution along with the field of legislation as in the case of the TRAI Act, 1997. It was meant to control and regulate Cable Television Network. Thus, it should be kept in mind the specific object of this enactment. The definition section defines an authority, which is none other than the fourth respondent viz., TRAI Act. A broadcaster has been defined as the one who provides the programme service. Incidentally, the words "programme" and "programming service" have also been defined. However, it is interesting to note that this definition of programme has been made to mean any television broadcast. It also makes clear, the scope and ambit of the enactment.

22.2. Section 4-A of the Act deals with transmission of programme through digital addressable systems. This came into being with effect from 25.10.2011 by taking note of the technological development. The usage of set top box has been taken note of under this section through the explanation. This section also defines expression encrypted and unencrypted apart from free to air channel and pay channels. The Act also seeks to regulate the programme code and the developments code. Thus, this Act has also to be read along with the TRAI Act. It only helps TRAI Act through its provisions. Rule

10 was substituted by GSR940(E) dated 28.04.2012. Rule 10 as it stands before the amendment.

"10. Nature and prices of channels: (1) Every broadcaster shall declare the nature of each of its channels as 'pay' or 'free-to-air' as well as the maximum retail price of each of its 'pay' channels to be charged by the multi-system operators or local cable operators from the subscribers in each of the notified areas. (2) Every broadcaster shall file his declaration of the nature and prices of channels under sub-rule (1) before the Authority and the Central Government within fifteen days of the date of notification by the Central Government under section 4 A of the Act. (3) If in the opinion of the Authority, the price declared by the broadcaster in respect of any of its pay channels is too high, the Authority may, under section 11 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997), fix and declare the maximum retail price of such a pay channel or fix a general maximum retail price for all pay channels within which the broadcasters may declare their individual prices for each pay channel, to be paid by the subscribers in any of the notified areas, and such an order of the Authority shall be binding on the broadcasters and the multi-system operators and local cable operators."

This present rule after substitution.

" 10. Obligations of broadcaster, multi-system operator and cable operator:- Every Broadcaster, Multi-System Operator and cable operator shall comply with the regulations, guidelines and orders as maybe made or issued by the Authority."

22.3. This rule was amended to bring out more power to the authority. Difficulties are faced on the application of the tariff order as it existed at the relevant point of time to the cable services in the notified areas. This was because of the existence of the then Rule 10. Accordingly, confusion was likely to be created in defining retail price as well as wholesale price of a channel in a notified area. Thus, it was

decided to extend the tariff dispensation in the then tariff order to the cable services in a conditional access system notified area(cs). This was dealt with in the explanatory memorandum appended to the tariff order. The learned counsel for TRAI furnished the communications leading to the amendment to the Court. Objections have been raised to the effect that they were not accepted even during the earlier hearing. Be that as it may, there is nothing to contradict the conclusion arrived at in the explanatory memorandum leading to the rationale behind the amendment. The relevant passage is fruitfully extracted.

“III Applicability to the notified CAS areas:

47. As already indicated in paragraph 15 supra, the Authority is of the view that the tariff dispensation for broadcasting and cable services can follow two broad frameworks, one for addressable systems and the other for non-addressable systems. The general principles of tariff determination under the present tariff order are, thus, intended to be applicable to all addressable systems, including cable services provided through conditional access systems (CAS) in areas notified by the Central Government under section 4A of the Cable Television Networks (Regulation) Act, 1995. However, the immediate application of the present tariff order to cable services in such notified areas may lead to an anomaly as regards specification of wholesale and retail rates for pay channels. This is on account the fact that there are certain existing provisions in the Cable Television Networks Rules, 2004 relating to fixation of prices of channels. Rule 10 of the said Rules provides, inter alia, that every broadcaster shall declare the nature of each of its channels as “pay” or “free-to-air” as well as the maximum retail price of each of its pay channels to be charged by the multi system operators or local cable operators from the subscribers in areas notified by the Central Government under section 4A. The tariff

dispensation provided in the present order for addressable systems, on the other hand, mandates that a broadcaster shall specify its "wholesale" rates for addressable platforms. In case, the tariff dispensation in the present tariff order is immediately extended to cable services in such CAS notified areas, it may result in a situation where a broadcaster would be required to define retail price as well as wholesale price of its 33 channels in respect of such notified areas. In order to prevent this anomaly, a separate recommendation is being made to the Government for amending Rule 10 of the Cable Television Networks Rules. Till the required amendment is carried out by the Government, the existing tariff dispensation for cable services in areas notified by the Central Government under section 4A of the Cable Act, i.e., under the Telecommunication (Broadcasting and Cable) Services (Third) (CAS Areas) Tariff Order, 2006 (6 of 2006) and the revenue sharing arrangements under the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation, 2004" (13 of 2004), as they stand at present, shall continue to apply. The tariff dispensation under the present tariff order will be extended, mutatis mutandis, to cable services in such CAS notified areas after the Central Government makes requisite amendments in the relevant provisions of the Cable Rules."

Therefore, Rule 10 as it stands today cannot be interpreted as the petitioners seek, for the aforesaid reason. It also cannot be construed to abdicate the power to the copyright Act in pursuant to its subsequent amendment. There is no comparison whatsoever between the two enactments, which do not have the remotest connection or overlapping in their field of operation. This aspect has also been taken note of by the Tribunal in **M/S NOIDA SOFTWARE TECHNOLOGY PARK LTD., VS. M/S MEDIA PRO ENTERPRISE INDIA PVT LTD., AND OTHERS (Petition No.295(C) of 2014 dated 07.12.2017)**.

22.4. It is pertinent to note that the petitioner was also a party before the aforesaid proceedings. In fact, in the said decision, the earlier decision of the Division Bench of Delhi High Court in the writ petition filed by the petitioner was taken note of. Accordingly, paragraph 19 of the aforesaid judgment was quoted with approval, which is as under.

"49. Furthermore, the TRAI is clearly competent to prescribe the conditions and tariff impugned before us by virtue of the TRAI Act itself. We have already upheld the legality of Section 2(1)(k), the consequence of 2007SCC On Line Del 951 which is that broadcasting is undeniably and unassailably covered by that statute. TRAI accordingly is expected to make recommendation inter alia in respect of "measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in service [see Section 11(1)(a)(iv)]". TRAI must regulate arrangements amongst service providers of sharing their revenue derived from providing telecommunication services [see Section 11(1)(b)(iv)] and generally to perform such other function including such administrative and financial functions as may be entrusted to it by the Central Government as may be necessary to carry out the provisions of the Act [see Section 11(1)(d)]. However, on perusal of Section 11 (2) there is no scope for any controversy concerning the competence of the TRAI to prescribe the impugned rates at which telecommunication services are to be provided. Therefore, de hors the CTN Act and the CTN Rules TRAI is otherwise competent to fix tariffs, as also to prescribe the Standard Interconnection

Agreements."

22.5. It was further held by relying upon the earlier Tribunals order that both the TRAI Act and Cable TV Net Works(Regulation) Act, 1995, do have the power to regulate the broadcasting service. A fruitful extraction of the following relevant paragraph is hereunder.

"The Tribunal, referring to [Section 11\(2\)](#) of the TRAI Act negated the submissions and held that the legislative intent was clear and it recognized the need to regulate the broadcasting service.

The Tribunal then dealt with the broadcasters' challenge to the SIA, which, unlike RIO that is framed by the broadcaster itself, was statutorily prescribed and was thus clearly far more stringent than the provisions under consideration in this case. The SIA was challenged on the ground that it infringed the broadcasters' freedom of contract. Rejecting the submission the Tribunal held:

"Introduction of a standard format of the interconnect agreement as prescribed by the Authority has been seriously challenged. It was argued that this it (sic) curtails freedom of contract. The learned counsel for the appellants submits that in the contractual regime there is complete freedom for the parties to agree upon mutually accepted terms and conditions and there is no scope for interference by way of prescribing a standard format of agreement. So far as this argument of complete freedom to contract is concerned, first we have to note that the prescribed interconnect agreement comes into play only after the parties fail to reach an agreement on their own for which they have complete freedom. Ten days' time has been allowed to parties to negotiate. If they fail to arrive at an agreement within ten days, the prescribed agreement has to be entered into. The appellants argued that this period of 10 days is too short. We need not go into whether this period is short or whether it is sufficient. Parties may approach the TRAI for extension of the period. Secondly, Rule 10(4) of the CTN Rules, 1994 requires prescription of a standard interconnect agreement by the Authority which the broadcasters and the MSOs have to enter into in case they fail to arrive at mutually acceptable agreement. The TRAI has carried out the mandate of the Rule. The Rule is not challenged. Coming to the argument regarding curtailment of freedom to contract, [Article 19 \(1\)\(g\)](#) of the

Constitution gives the parties a freedom to trade which includes freedom to contract. However, this freedom is subject to reasonable restrictions. Even at the Common Law, there was never any absolute freedom to contract, for instance, nobody could enter into a contract to do an illegal act. As the society grew, need for regulation gradually increased and inroads were made in the freedom to contract. Article 19 permits 'reasonable restrictions' being imposed in the domain of freedom of contract. The TRAI Act and the CTN Act are both primary legislations which purport to regulate the broadcasting service. They provide for reasonable restrictions. The regulation is in the interest of society. There is no challenge to these statutes. The legislation permits curtailment of freedom to contract. It is settled that freedom of contract is not available in absolute terms and it can be curtailed by legislation for justifiable reasons. Power to regulate allows reasonable restrictions on freedom to contract. The argument, therefore, is without any merit and, therefore, has to be rejected."

22.6. Submissions have been made by placing reliance upon other enactments by the learned Senior Counsel appearing for the fourth respondent, such as, Sports, Broadcasting Signals (Mandatory) sharing with Prasar Bharati Act, 2007. This Court is not willing to borrow the provisions contained therein. Though an objection has been raised by the learned Senior Counsels appearing for the petitioners that the said Act does deal with the content, suffice it is to state that the entry is one and the same. Therefore, the contentions that entry 31 of list 1 of VII Schedule does not deal with content has no basis. However, we need not proceed further since the impugned regulation itself reiterates the very same definition provisions *ipso facto*. Thus, on a detailed analysis of the provisions contained in the

enactments other than the TRAI Act, 1997, one cannot hold that there exists any conflict, overlapping either incidental or direct and the field being occupied as against the TRAI Act, which has got a specific role to play. These enactments can at best be stated to sail along with the TRAI Act.

23. SUBMISSIONS OF THE PETITIONERS:

23.1. The learned Senior Counsels while seeking to sustain the lead judgment, made the following submissions.

23.2. The impugned Regulations and the Tariff Order do impact content and therefore, they ultra vires the TRAI Act, 1997 which does not have such a power. TRAI Act can only regulate the carriage and not the content. Section 2(1)(k) can be divided into three parts viz., clauses of services of transmission, method/means of transmission and technology of transmission. Thus, it is restricted to a manner in which the service is made. The principle of *noscitur a sociis* has to be applied to understand Section 2(1)(k). Thus, the meaning which can otherwise

be given to a telecommunication service has to be imported and adopted for the broadcasting service also. Section 11(1)(b), (c) and (e) do not confer any power to those impugned proceedings. Section

11(2) merely deals with fields of operation.

23.3. Regulation of the content, price and packaging is governed by the Copyright Act, 1957. Section 2 (dd) of the Copyright Act read with 2 (ff) would only mean either an uplinking or downlinking. A deeming fiction has to be taken to its logical conclusion. The amendment of the year 2012 takes away the power, if any, in any other enactment, including, the rules framed under the Cable Television Networks Regulation Act, 1995. Section 3(a) read with Rule 56 has to be seen giving right to a broadcasting right protection holder against a distributor. Section 37 paves way for a Television Channel to be governed under the Copyright Act. Thus, it is protected by the aforesaid provision. Therefore, Copyright Act is a separate code governing the field, especially, after the amendment made in the year 2012. It is not open to TRAI to contend otherwise after a specific stand in the counter affidavit. The role of TRAI under the Cable Television Networks (Regulation) Act, 1995 is very limited.

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23.4. Shri P.Chidambaram, in his inimitable style gives an example of a "Goods Train" carrying the goods to the destination. Accordingly, it is submitted that the function of TRAI under the Act is to charge only a carriage fee, deal with related aspects and thus,

cannot travel beyond it. Shri. Abhishek Singhvi in his reply placed reliance upon three judgments to buttress the submission that even before a communication to the public occurs, broadcast takes place.

They are:

- “(i) GARWARE PLASTICS & POLYESTER LTD., V. TELELINK & OTHERS ETC., (1989) Supreme Court Cases Online Bom 29);
- (ii) SUPER CASSETTES INDUSTRIES PVT. LTD., V. SBN NETWORK (2016 SCC Online Del 5926); and
- (iii) JAK COMMUNICATIONS PVT. LTD., VS. SUN TV NETWORK LTD, AND OTHERS ((2010) 2 Law Weekly 936)”

23.5. Insofar as the deferring judgment is concerned, it is submitted that the scope and ambit of the enactments have been wrongly understood. The finding rendered on the amendment made in the year 2012 amending Section 39-A cannot be sustained. It is wrong to construe that the Copyright Act deals with a copyright owner vis a vis a licensee viz., broadcasting right holder. The amendments do control a dispute between a broadcaster and the distributor. If a finding could be given on the cap fixed for the MRP of the bouquet along with restrictions on the discount of channels, the same logic ought to have been extended to the other clauses contained in the Regulations and the Tariff Order.

24. SUBMISSIONS OF THE RESPONDENTS:

24.1. The learned Senior counsels appearing for the respondents submitted that there is sufficient power available under the TRAI Act to pass the impugned proceedings. The impugned proceedings cannot be termed as regulating the content for which the power is also otherwise available. The counter affidavit filed has to be seen in the context of the challenge made to the impugned Regulations and Tariff Order. It cannot be read in isolation. The power conferred under Sections, 11, 12 and 13 read with Section 36 of the TRAI Act is rather wide and exhaustive.

24.2. The other enactments are to be seen as assisting the TRAI Act excluding the copyright which deals with a different aspect altogether. There is no right recognised under the Copyright Act in favour of the TV Channel. Rule 10 of the Cable Television Networks (Regulation) Act, 1995, has been wrongly construed. In any case, the power conferred cannot be transported through the amendment made to the Copyright Act, 1957. In the lead judgment, it has been proceeded on the wrong factual premise that bouquets are market driven. They are nothing but creation of broadcasters. The TRAI Act deals with different actors with specific emphasis on public interest. Merely because the petitioners are affected, it cannot be said that

content is involved. The TRAI Act and the Cable Television Networks (Regulation) Act, 1995 deal with the same entry. There is no challenge to the provision of the TRAI Act. The lead decision does not consider the scope of TRAI Act in the right perspective. There is no basis indicated on the conclusion that the content is involved. The decision rendered in **PETROLEUM AND NATURAL GAS REGULATORY BOARD V. INDRAPRASTHA GAS LIMITED AND OTHERS (2015) 9 Supreme Court Cases, 209** has to be seen contextually. Similarly, the decision relied upon by the petitioners in **ESPN STAR SPORTS V. GLOBAL BROADCAST NEWS LTD., (2008) (38) PTC 477 (DEL.) (DB)** cannot be understood to hold that Section 37 of the Copyright Act protects a television channel. Accordingly while rejecting the lead judgment, dissenting one has to be concurred with.

25. DISCUSSION ON SUBMISSIONS:

25.1. Before proceeding further, let us once again reiterate and reconfirm the scope and extent of scrutiny as understood by the parties and accordingly, recorded duly by the Court. A reproduction of the relevant passages would suffice.

4(b)..... 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.

6(g)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.....”

25.2. The jurisdiction of the enactments have already been dealt with in extenso. Suffice it is to state that TRAI Act involves regulation of airwaves and frequencies being public properties, touches upon various stakeholders with primacy to the public interest.

To put it differently, the general public is the king, being the subscriber whose interest should be guarded and protected under the Act as a prime factor. TRAI in thus, obligated to take adequate measures as mandated by the statute. The Cable Television Networks (Regulation) Act, 1995 and the Indian Telegraph Act, 1885 go with the TRAI Act strengthening the hands of the authority. TRAI Act came into being on the need enough to have a better enactment than the Telegraph Act, 1885, supported and safeguarded by the Cable Television Networks (Regulation) Act, 1995. This Act deals with cable television network. That is the reason why, the authority is the same along with the definition of digital addressable system and introduction transmission of programmes through digital addressable system etc. Therefore, this enactment deals with the last part of the broadcast. On the contrary, the Copyright Act deals with a different scenario altogether. There are only two players involved. The object of the Act is to protect the interest of the copyright holder and to the limited extent, a BRR holder and a third party with a specific reference to the tariff scheme. As discussed earlier, the BRR is not the same as a copyright though akin to it but with its own limitation. It is also subject to the copyright of a owner.

25.3. Section 2(k) of the TRAI Act merely explains a telecommunication service. Therefore, even assuming it can be divided into three parts as suggested by the learned counsel for the petitioners, the conclusion does not change as discussed supra. The TRAI Act does not deal with a mere means of transmission alone. Perhaps the petitioners do understand it rather well. That is the reason why they laid the challenge before the Division Bench of Delhi High Court to the very provision. The principle governing the noscitur a sociis cannot be applied as the petitioner suggested. There is no ambiguity on the definition provision.

25.4. The power conferred on the authority under Sections 11 to 13 has already been considered on quite a few occasions by the Courts. Nothing more is required to be added in the light of the discussions made already. If the contentions of the petitioners are accepted, the very provision contained under Section 11(2) would become redundant and otiose, notwithstanding a challenge in futility made before the Delhi High Court on the constitution validity of Section 11(2) is much to the knowledge of the petitioners.

25.5. Notably, tariff orders of similar nature were being introduced from time to time from the year 2004 onwards. Power to make regulation has been provided under Section 36. The Courts

have interpreted with such a power as pervasive notwithstanding the other provisions. To be noted, the notification No.39 has also not been challenged by the petitioners while challenging the proviso to Section 2(1)(k). This notification has also added additional power to the fourth respondent. To sum up, the TRAI Act being a centripetal, sector specific one, involving the utilisation of the public property, having a regulatory regime and to protect the public interest stands on its distinct footing.

25.6. As rightly submitted by the learned Senior Counsel appearing for the respondents, the permission obtained from the Central Government would bring a broadcaster within the fold of a service provider. The petitioners themselves claimed and raised disputes as service providers. A finding was also rendered by the Court which reached finality. Thus, as a natural sequitor, the Regulations and Tariff Order would ipso facto apply to the petitioners' case.

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25.7. The other enactments certainly strengthen the hands of the TRAI. Suffice it is to state that these enactments viz., Indian Telegraph Act, 1885, except the Cable Television Networks (Regulation) Act, 1995, have nothing to do with the Copyright Act,

1957. Rule 10 of the Cable Television Networks (Regulation) Rules, 1994, as it stands today strengthens the authority to deal with the difficulties faced in implementing a uniform system, including the notified areas. There is nothing to contradict the detailed analysis made, in the explanatory memorandum in this regard. In any case, such a power cannot be imported into the amendment of the year 2012 of the Copyright Act, which obviously deals with a different scenario.

25.8. We have also discussed at length on the interpretation and meaning of the provision contained in the Copyright Act. The submissions made by the learned Senior Counsels for the petitioners that a broadcast takes place a moment of uplinking and downlinking, which is certainly contrary to the Copyright Act. Any such interpretation would directly violate the provisions including the definition section contained under Section 2(dd) and 2(ff) of the Act. We may note that an encrypted form being a facet of cryptography involves secret writing and code.

25.9. The other provisions actually give sufficient protection to the copyright holder as against the licensee which may be the broadcaster having broadcasting reproduction right. The scheme of the Act read with the parliamentary debate and discussion with

reference to the specific speech of the Honourable Minister for Information and Broadcasting makes the position very clear.

25.10. Sections 37 and 39 also will not help the case of the petitioners. While there is no BRR involved under the TRAI Act, no right has been given to a television channel under Section 37 of the Copyright Act. Merely because, the television channel becomes a broadcaster, no independent right can be placed as against the "broadcasting" which may involve any work or a programme coming under the Act's purview. In this connection, the definition of TV Channel as adumbrated in the impugned regulations will have to be seen. While the copyright does not make any reference to a TV Channel, it has been referred accordingly as such, only after obtaining permission for downlinking under the impugned regulations. Therefore, the TV channel has been understood in a very restrictive manner under the impugned regulations. Needless to state that the Cable Television Networks (Regulation) Act, 1995, also deals with the television channel as against the Copyright Act.

25.11. This Court is of the considered view that having drawn the lines and fixed the goal post with the agreement of the parties, the issue as to whether the impugned Regulations and the Tariff Order deal with a content or a carriage as understood by the

petitioners is irrelevant. That the petitioners are affected by the impugned Regulations and Tariff Order is not in doubt. Therefore, the question which is appropriate shall be the existence of the power under the TRAI Act vis a vis the Copyright Act, 1957. Hence, the question of carriage or content has to be seen contextually through the enactments along with their objects. It is also to be seen under the TRAI Act from the point of view of the end user.

25.12. Since the learned counsel appearing for the petitioners repeatedly insisted to go into the said issue, it is reluctantly touched upon. A content has to be seen in the programme and not the channel. Merely identifying or categorising a channel either in a group or stand alone would not amount to interference in content. What is involved here is the reach of a particular channel in a specific way or mode, giving several options to choose qua a subscriber. A content in a programme is different from that of the channel. There is absolutely nothing to hold that the content in a broadcast or a programme is interfered with. Similarly, the content of a channel is absolutely preserved and taken as such. For example, a movie to be telecasted is not interfered with and so also the nature. It is nothing but an attempt to stop an unilateral thrust of unwarranted dust along with grain. Suffice it is to state that there is sufficient and ample power for

the creation of the impugned Regulations and the Tariff Order under the TRAI Act.

25.13. On considering the submissions and perusal of the documents an admitted fact can be seen. The petitioners though admitted and accepted several suggestions made by the TRAI during the consultation process, nonetheless for the reasons known, have challenged them. In specific terms, they have stated the following facts.

* TRAI must undertake a comprehensive review of the interconnect regulations, quality of service regulations etc.

* Transparent and non-discriminatory principles across all distribution platforms.

*TRAI must regulate price caps for mass genres like entertainment, movies & sports – Contrary to this, now after price forbearance given in respect of TV channels, the petitioners have performed a spectacular U-turn and are raising frivolous concerns regarding high cost of acquisition of content.

*The wholesale price cap must be fixed by TRAI at Rs.28/- to monetize flagship channel(hence, this concept of flagship

channel, driver channel etc was understood and described by the petitioner -during the course of the hearing however, they feigned ignorance)

* Transparency in Discounts

*Wholesale cap to be fixed on discounts at a maximum overall cap of 33%

* Conditions to regulate bouquets

*Maximum discount on multi-broadcaster retail bouquet to be capped at 33%

25.14. They have also requested the bundling of HD and SD channels not to be allowed. This could be seen from the following statement made by them before TRAI as recorded under the consideration paper dated 29.02.2016.

“ 3. Bundling of HD and SD channels should not be allowed, both at wholesale and retail levels;

4. Charging of access fee for HD channels should not be allowed at retail level;

5. DPOs free to sell HD channels as a-la-carte as well as bouquet(s) of HD channels;

6. Consumers and DPOs should have a choice to subscribe to only HD Channels or only SD channels or both combined but purchased separately.”

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25.15. Thus a party, who approbates and reprobates should not be shown any indulgence by the Court. Certainly, the law governing "issue estoppel" would also come into play. It also applies to the declaration made by the Court on the basis of the stand taken by the

petitioners that it is a service provider under the TRAI Act.

25.16. Now let us see the decision relied upon by the learned counsels appearing for the petitioners. In **PETROLEUM AND NATURAL GAS REGULATORY BOARD V. INDRAPRASTHA GAS LIMITED AND OTHERS (2015) 9 Supreme Court Cases, 209**, the issue was with reference to the determination of network tariff and compression charges. A challenge was laid on the legislative competency. The Apex Court while considering the relevant provision viz., Sections 21 and 22 read with Section 11, which speaks of power and functions of the Board, held that there is no legislative intent apart from lack of jurisdiction. Accordingly, it was held that the operative words to Section 22 which dealt with only transportation tariff is subject to Section 11, which does not provide such a power to the Petroleum and Natural Gas Regulatory Board. Clearly the facts herein are totally different. There is no opening words as available in Section 22 of the Petroleum and Natural Gas Regulatory Board, 1956 nor Section 11 of the Act is *pari materia* to Section 11, which we are concerned with. The scope, provision and object of the enactments are also different. Therefore, on the settled principle of law that a decision is only an authority for what it decides and therefore, cannot be treated like a statute, it is accordingly held that the same has got no application.

**25.17. ESPN STAR SPORTS V. GLOBAL BROADCAST NEWS LTD.,
(2008) (38) PTC 477 (DEL.)**

“ 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.”

25.18. The aforesaid paragraph does not recognise a separate right of television channel under Section 37 of the Copyright Act. On the contrary, it clearly states that the copyright and broadcasting reproduction right would separately co-exist. The Court was merely dealing with the scope and extent of the power under Section 37. In other words, there is no express recognition of a right qua a television channel as against a broadcaster. Such a right is obviously confined to the broadcast made. At the cost of repetition, it has to be reiterated that Section 37 is broadcast centric and not television.

25.19. The three decisions relied upon by the Shri Dr. Abhishek Singhvi, also cannot help the case of the petitioners. They are dealing with a fact situation involving two private parties qua an analogue - non addressable system. Secondly, it does not involve either TRAI or

the element of public interest. Thirdly, the broadcast did take place which certainly gives right to a broadcaster. Therefore, this judgment cannot be pressed into service to hold that a BRR will have to be extended even before a broadcast takes place. After all, as discussed in length already, it does take place only when it results in the communication to the public as defined under Section 2 (ff) of the Copyright Act, 1957. Thus, the aforesaid judgments do not help.

25.20. From the above discussions, the contentions raised by the learned Senior Counsel for the petitioners are accordingly rejected. Consequently the issues are answered against the petitioners.

26. LEAD JUDGMENT:-

26.1. The other contentions raised by the learned counsels which have not been dealt already but discussed in the lead judgment are considered now. In the lead judgment, a conclusion has been arrived at on the basis that assortment of channels as bouquet is market driven. The petitioners are affected by the regulations. The counter affidavit acknowledges the factum of lack of jurisdiction over content. TRAI can act in public interest by making regulation only with respect to carriage alone. No third party has come forward to raise his grievance. Statutes are governed by different entries and therefore,

the source of powers are limited resulting in lack of jurisdiction under the TRAI Act. The amendment made to Rule 10 of the Cable Television Networks (Regulation) Act, 1995, has to be seen along with the amendment brought forth in the year 2012 to the Copyright Act, 1957. The impugned Regulations and Tariff Order do deal with the content.

26.2. It is to be noted that as discussed repeatedly, there is no need to go into the issue as to whether the impugned Regulations and the Tariff Order touch upon the content or carriage as contended by the petitioners. After all, it is the perspective of the parties. The learned Judge has specifically recorded the factum of scope of lis "by consent". The question as to whether the offering of the channels of a bouquet is market driven is totally irrelevant. We are not on the reason, logic and rationale behind the impugned regulations. It is the specific case of the TRAI that it is not market driven but the very market is driven by the broadcasters by making such offers, leaving no room for any choice to the end user-subscriber. According to it, it involves inflation of the prices, artificial adjustments, which may be called as smart business methodology but not helping the cause of the general public and the new entrants. Therefore, the premise on which the entire matter proceeded with due respect is not correct.

26.3. The decisions referred to supra would clearly show that the so called conflicting enactments stand apart from each other. They neither attract collision nor incidental overlapping. The scope of the provisions of the TRAI Act relating to the object has been dealt with extensively by the Courts already. This cannot be restricted to the so called carriage, which has got no factual or legal backing. It has also to be noted that the impugned regulations and the tariff order can never be introduced under the Copyright Act. There is no element of public interest therein. When once it is conceded that it is the duty of the TRAI to take care of the public interest, the presence of the public and the absence of any complaint become immaterial and irrelevant.

26.4. The counter affidavit filed was relied upon to a large extent. With respect, the counter affidavit proceeded on the basis that what is regulated is only a carriage. The other paragraphs in the counter affidavit also stated that even if, in a case of content, such a power is available though not relevant for the purpose of this case. Thus, the question that ought to have been answered is the existence of the power for the creation of the impugned Regulations and the Tariff Order.

26.5. It is to be noted that both the Cable Television Networks

(Regulation) Act, 1995, and the TRAI Act are coming under entry 31 of List I of VII schedule. Therefore, if once competency is attributable to the Cable Television Networks (Regulation) Act, 1995, it is axiomatic that the same has to be extended to the TRAI Act as well. On the same analogy, a power conferred under the aforesaid Act cannot be imported into the Copyright Act through the amendments made. Merely because the petitioners are affected, the impugned regulation and the amendment would not partake the character of content. While there is no material to support the conclusion on content, as contended by the petitioners, the judgments *inter se* governing the field have not been taken note of. The fact that similar tariff orders which may according to the petitioners would involve content have been in force unchallenged or failed in challenge from the year 2004 onwards was also not taken note of. The effect of the decision would in a way obliterate the very power of the TRAI to regulate. Thus, with due respect to my learned brother, I am unable to agree with the decision made, though it is a sheer pleasure to read.

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26.6. A contention has been made by the learned Senior counsel appearing for the fourth respondent that even the impugned tariff orders have been noted as a regulation. This Court is of the view that though the said submission appears to be true, it may not have any

impact on the ultimate decision, which is one of availability of the power under the TRAI Act, 1997 as against the Indian Copyright Act, 1957.

27. DISSENTING VIEW:

27.1. In her short, yet clear decision, the Hon'ble Chief Justice has held that there is sufficiency of the power under the TRAI Act as against the Indian Copyright Act, 1957. They travel in their respective paths, not intended to cross. The scope of the amendments made in the year 2012 along with Section 37 was correctly dealt with. This Court is of the view that the Copyright Act has rightly taken note of being the one which gives succour to the copyright holder as against the licensee, who may also be a BRR holder. It was rightly held that the provisions deal with the protection of the right of the copyright holder. It is rather pertinent to keep in mind the discussion on the Copyright Act, 1957, which is to be seen contextually qua the issue i.e., field being occupied. This Court also does not find anything wrong with the finding given on the so called concession given by the learned counsel for the TRAI being inconsequential, as the very jurisdiction of the Act itself was taken for consideration. The finding has to be seen contextually along with the other issues including the overall stand taken in the counter affidavit of respondents 1 to 4. Similarly the self

imposed restrictions while invoking the extraordinary jurisdiction under Article 226 of the Constitution of India, deserves to be concurred with.

27.2. Though a submission has been made on the decision arrived at with respect to the fixation of cap at 15% discount on the MRP of the bouquet and the discounts given under the tariff order, the aforesaid decision cannot be a ground to hold that the ultimate conclusion arrived at on the other issues would necessarily follow suit. After all, as a reference Court, this Court is concerned with the views expressed by either of the learned Judges on the points of difference. Accordingly, the dissenting judgment stands concurred.

28. In the result, this reference qua points of difference stands ordered concurring with the dissenting judgment. No costs.

सत्यमेव जयते

23.05.2018

Index:Yes/No

Note:issue order copy on 25.05.2018

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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.

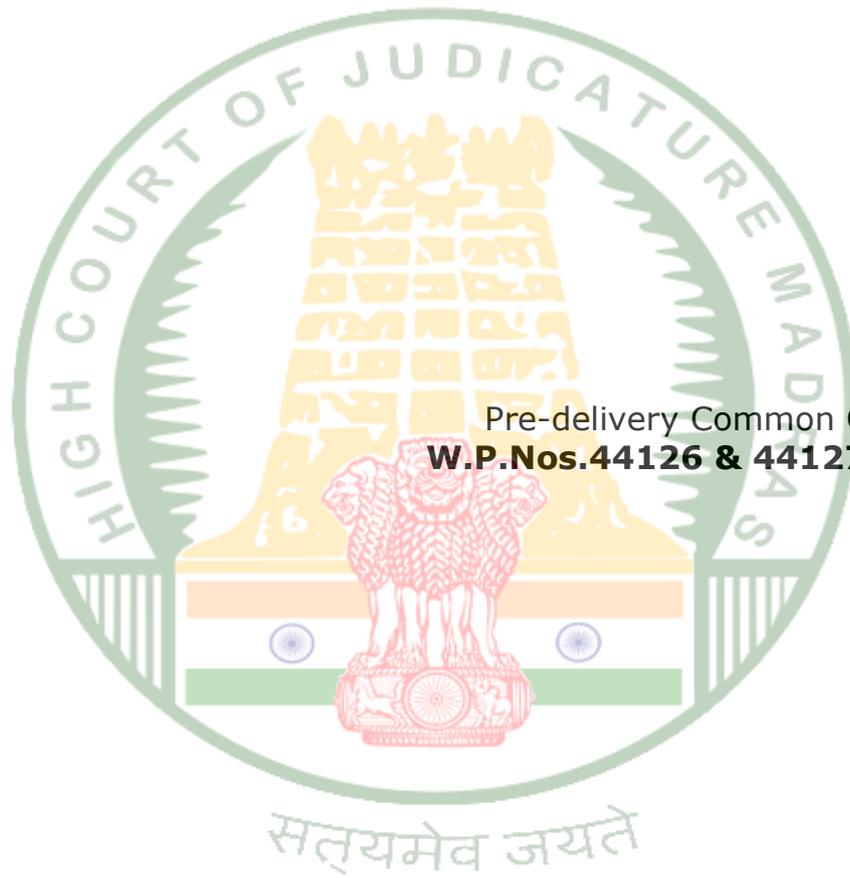
4. Telecom Regulatory Authority of India,
Mahanagar Doorsanchar Bhawan,
Jawahar Lal Nehru Marg,
(Old Minto Road), New Delhi-110 002.



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M.M.SUNDRESH, J.

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Pre-delivery Common Order in
W.P.Nos.44126 & 44127 of 2016

23.05.2018
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W.P.Nos.44126 & 44127 of 2016

M.M.SUNDRESH,J.

After pronouncing orders, Shri Sathish Parasaran, learned Senior Counsel representing the petitioners, sought for suspension for a period of four weeks to approach the Apex Court.

2. On instruction, Shri Wilson, learned Senior Counsel appearing for the TRAI, fairly submitted that status quo as on today shall be maintained for a period of two weeks.

3. The statement made by the learned Senior Counsel appearing for the TRAI stands recorded.

23.05.2018

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M.M.SUNDRESH, J.



W.P.Nos.44126 & 44127 of 2016

WEB COPY 23.05.2018