Cellular Operators Association Of ... vs Telecom Regulatory Authority Of India ... on 11 May, 2016

Equivalent citations: AIR 2016 SUPREME COURT 2336, 2016 (4) ABR 230, 2016 (4) ADR 141, AIR 2016 SC (CIVIL) 1762, (2016) 4 MAD LJ 575, 2016 (7) SCC 703, (2016) 5 SCALE 137, 2016 (4) KCCR SN 493 (SC)

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Bench: R.F. Nariman, Kurian Joseph

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5017 OF 2016
(ARISING OUT OF S.L.P. (CIVIL) NO.6521 OF 2016)

CELLULAR OPERATORS ASSOCIATION
OF INDIA AND OTHERS ..APPELLANTS

VERSUS

TELECOM REGULATORY AUTHORITY
OF INDIA AND OTHERS ..RESPONDENTS

WITH

CIVIL APPEAL NO. 5018 OF 2016
(ARISING OUT OF S.L.P. (CIVIL) NO.6522 OF 2016)

J U D G M E N T

R.F. Nariman, J.

Leave granted.

This group of appeals before us is by various telecom operators who offer telecommunication

services to the public generally. Various writ petitions were filed in the Delhi High Court challenging the validity of the Telecom Consumers Protection (Ninth Amendment) Regulations, 2015 (hereinafter referred to as the "Impugned Regulation"), notified on 16.10.2015, (to take effect from 1.1.2016), by the Telecom Regulatory Authority of India. The aforesaid amendment was made purportedly in the exercise of powers conferred by Section 36 read with Section 11 of the Telecom Regulatory Authority of India Act, 1997. By the aforesaid amendment, every originating service provider who provides cellular mobile telephone services is made liable to credit only the calling consumer (and not the receiving consumer) with one rupee for each call drop (as defined), which takes place within its network, upto a maximum of three call drops per day. Further, the service provider is also to provide details of the amount credited to the calling consumer within four hours of the occurrence of a call drop either through SMS/USSD message. In the case of a post paid consumer, such details of amount credited in the account of the calling consumer were to be provided in the next bill.

A brief background is necessary in order to appreciate the controversy at hand. Under an Act of ancient vintage, namely, the Indian Telegraph Act, 1885, the Central Government or the Telegraph Authority is the licensing authority by which persons are licenced under Section 4(1) of the said Act for providing specified public telecommunication services. Given the fact that it is the Central Government or the Telegraph Authority who is the licensor in all these cases, the said licensor enters into what are described as licence agreements for the provision of Unified Access Services in the specified service areas. Various standard terms and conditions are laid down in these licences, some of which are described hereinbelow. Vide clause 2.1, such licences are granted to provide telecommunication services, as defined, on a non-exclusive basis in designated service areas. It is mandatory that the licensee provides such services of a good standard, by establishing a state of the art digital network. Licences are usually given for a period of 20 years at a time with a 10 year extension if the licensor so deems expedient. Under clause 5 of the aforesaid licence agreement, the licensor reserves the right to modify, at any time, the terms and conditions of license, if in its opinion it is necessary or expedient so to do in public interest, in the interest of security of the State, or for the proper conduct of telegraphs. Under condition 28, which is of some relevance to determine the question involved in these appeals, the licensee shall ensure that the quality of service standards as prescribed either by the licensor or the Telecom Regulatory Authority of India shall be adhered to. The licensee is made responsible for maintaining performance and quality of service standards and is to keep a record of the number of faults and rectification reports in respect of a particular service which is to be produced before the licensor/TRAI as and when desired. It is also important that the licensee be responsive to complaints lodged by its subscribers and rectify the same. Under clause 34, which deals with roll-out obligations, the licensee is to ensure that coverage of a district headquarters/town would mean that at least 90% of the area bounded by municipal limits should get the required street and in- building coverage. Interestingly, under clause 35, liquidated damages are also provided for, in case the licensee does not commission the service within 15 days of the expiry of the commissioning date and for certain other delays relatable to commissioning of service.

It may also be noted that right from September, 2005, TRAI has been lamenting the shortage and consequent distance of mobile towers from each other and both the Government as well as TRAI

have been writing to the Chief Secretaries of various State Governments to grant timely permissions for establishing telecom towers. In this behalf, we have been shown guidelines issued by DOT to the Chief Secretaries dated 1.8.2013. We have also been shown an amendment to the Quality of Service Regulations dated 21.8.2014 by which TRAI has noticed practical difficulties that are faced due to various reasons by which cable breakdowns and indoor faults take place, with the Authority requiring the striking of a balance between the problems faced by the licensees and the need to ensure quality of service to customers. We were also shown a letter from the Ministry of Communications written to Chief Ministers of all the States to permit installation of towers on Government buildings. This letter is dated 3.8.2015. Further, there is a constant tussle between cell phone operators and municipal authorities, landing cell phone operators in court against municipal authorities, who seek to restrict the setting up of cell phone towers, given the apprehension that radiation from these towers has a direct causal link with cancer in human beings. It is also important to note that by a Quality of Service Regulation dated 20.3.2009, issued under Section 11 read with Section 36 of the TRAI Act, TRAI has provided, insofar as cellular mobile phone services are concerned, for a call drop rate of 2% averaged over a period of one month. It has also provided for financial disincentives in case there is a failure to meet this parameter by enacting a second amendment to the Quality of Service Regulations dated 8.11.2012 by which a service provider is liable to pay, by way of financial disincentive, an amount not exceeding Rs.50,000/- per parameter that is contravened as the Authority may by order direct, and in the case of second or subsequent contravention, to pay an amount not exceeding Rs.1,00,000/- per parameter for each such contravention as the Authority may by order direct. One day before the Impugned Regulation, i.e., on 15.10.2015, this financial disincentive was raised from Rs.50,000/- to Rs.1,00,000/-, and Rs.1,00,000/- to Rs.1,50,000/- for the second consecutive contravention, and Rs.2,00,000/- for each subsequent consecutive contravention.

It is in this background that the impugned Ninth Amendment to the Telecom Consumers Protection Regulations of 2015 was made, on 16.10.2015. The Impugned Regulation reads as under:-

> TELECOM CONSUMERS PROTECTION (NINTH AMENDMENT) REGULATIONS, 2015 (9 OF 2015) No. 301/2015-F&EA ----- In exercise of the powers conferred by section 36, read with sub-clauses (i) and (v) of clause (b) of sub-section (1) of section 11, of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997), the Telecom Regulatory Authority of India hereby makes the following regulations further to amend the Telecom Consumers Protection Regulations, 2012 (2 of 2012), namely:-
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> (1) These regulations may be called the Telecom Consumers Protection (Ninth Amendment) Regulations, 2015.
>
> (2) They shall come into force from the 1st January, 2016.

2. In regulation 2 of the Telecom Consumers Protection Regulations, 2012 (hereinafter referred to as the principal regulations), after clause (ba), the following clauses shall be inserted, namely:--

"(bb) "call drop" means a voice call which, after being successfully established, is interrupted prior to its normal completion; the cause of early termination is within the network of the service provider;";

(bc) "calling consumer" means a consumer who initiates a voice call;";

After Chapter IV of the principal regulations, the following chapter shall be inserted, namely :-

"CHAPTER V"
RELIEF TO CONSUMERS FOR CALL DROPS
16. Measures to provide relief to consumers.- Every originating

|service provider providing Cellular Mobile Telephone Service shall, | |for each call drop within its network, | |(a) credit the account of the calling consumer by one rupee:| | | |Provided that such credit in the account of the calling consumer shall| |be limited to three dropped calls in a day (00:00:00 hours to 23:59:59| |hours); | |(b) provide the calling consumer, through SMS/USSD message, | |within four hours of the occurrence of call drop, the details of | |amount credited in his account; and | |(c) in case of post-paid consumers, provide the details of | |the credit in the next bill." | The explanatory memorandum to the aforesaid amendment makes interesting reading. In the first paragraph of the said memorandum, the 2009 Quality of Service Regulation referred to hereinabove, granting an allowance of an average of 2% call drops per month, is specifically referred to. Also, interestingly enough, the service providers have stated that they are meeting this benchmark completely with one or two minor exceptions. Despite this, the Authority has embarked on the Impugned Regulation, stating that consumers, at various fora, have raised the issue of call drops, complaining that in their experience, the quality of making voice calls has deteriorated. The Authority responded by issuing a consultation paper marked "Compensation to the Consumers in the event of dropped calls" dated 4.9.2015. Stakeholders were given till 21.9.2015 to submit their comments in writing with counter comments thereto being given one week thereafter, i.e., by 28.9.2015. The Authority records that written comments were received from 4 industry associations, 11 Cellular Mobile Telephone Service Providers, 2 consumer advocacy groups, 2 organizations, and 518 individual consumers. 5 counter comments were also received. The Authority notes that an open house discussion was held on 1.10.2015 in New Delhi with the stakeholders. According to the Authority, consumers wanted relief in the event of dropped calls under two broad heads – excess charging and inconvenience caused to them. In paragraphs 6 and 7, the arguments of service providers have been noted, in which service providers stated their difficulties in the matter of sealing/closing down existing sites for towers by municipal authorities and other related issues together with spectrum related issues. They specifically informed the Authority that a large proportion of call drops are beyond their control. In reply thereto, consumers spoke of the inconvenience caused to them by call drops. Some consumers also contended that the financial disincentive levied for failing to meet the benchmark for call drop rates should be revised upwards. (This was in fact done, as we have seen, just one day before the Impugned Regulation itself, i.e., on 15.10.2015). The Explanatory Memorandum then goes on to state:-

"18. Based on the above, it is clear that while all CMTSPs and the industry associations have argued that question for compensation to the consumers on call drops does not arise as it is neither justifiable nor practicable, most of the consumers and consumer advocacy groups have insisted that they should be compensated by the CMTSPs for the inconvenience caused to them.

19. After a careful analysis, the Authority has come to the conclusion that call drops are instances of deficiency in service delivery on part of the CMTSPs which cause inconvenience to the consumers, and hence it would be appropriate to put in place a mechanism for compensating the consumers in the event of dropped calls. The Authority is of the opinion that compensatory mechanism should be kept simple for the ease of consumer understanding and its implementation by the CMTSPs. While one may argue that amount of compensation should be commensurate to the loss/ suffering caused due to an event but in case of a dropped call it is difficult to quantity the loss/suffering/inconvenience caused to the consumers as it may vary from one consumer to another and also in accordance to their situations. Accordingly, the Authority has decided to mandate originating CMTSPs to credit one Rupee for a dropped call to the calling consumers as notional compensation. Similarly, the Authority has decided that such credit in the account of the calling consumer shall be limited to three dropped calls in a day (00:00:00 hours to 23:59:59 hours). The Authority is of the view that such a mandate would compensate the consumers for the inconvenience caused due to interruption in service by way of call drops, to a certain extent.

20. The Authority is also aware that communication to the consumers is important and therefore, the Authority has decided to mandate that, each originating CMTSP, within four hours of the occurrence of call drop within its network, inform the calling consumer, through SMS/USSD message the details of amount credited in his account for the dropped call, if applicable.

21. The Authority is conscious of the fact that for carrying out the afore-mentioned mandate, the CMTSPs would have to make suitable provisions in their systems, which would require time and efforts. Accordingly, the Authority has decided that the afore-mentioned mandate would become applicable on the CMTSPs with effect from the 1st January, 2016.

22. The Authority shall keep a close watch on the implementation of the mandate as well as the measures being initiated by the CMTSPs to minimize the problem of dropped calls as given in their submissions during the consultation process and may review after six months, if necessary." At this stage, it is necessary to refer to a technical paper issued by the very same Authority a few days after the Impugned Regulation. On 13.11.2015, TRAI issued a paper called "Technical Paper on call drops in cellular network". TRAI noticed that the consumer base in the country is growing very fast and that the mobile telecom infrastructure is not growing at the same pace.

This leads to a dip in the quality of service provided.

It is interesting to notice that TRAI specifically adverts to the fact that call drops can take place due to a variety of reasons. It pointed out that one of the reasons is due to the consumer's own fault, and that 36.9% of call drops are attributable to consumer faults. It further went on to notice that the benchmark set for call drops is 2%, and it is seen that only 3 out of 12 licensees are not adhering to the said benchmark – 2 of them being BSNL, who is not an appellant before us, the other one being Aircel. The Authority ultimately concluded:-

> "5.27. In light of the reasons discussed above about the increase in call drops, it must be realized that mobile towers do not have an unlimited capacity for handling the current network load. There is an urgent need to increase the number of the towers so as to cater to the demands of a growing subscriber base. At the same time, problems like removal of towers from certain areas by Authorities should be adequately addressed. This problem is particularly evident in urban areas. Moreover, with the increase in the usage of 3G networks, the growth rate of mobile towers supporting 2G networks has reduced. This must be addressed.

5.28. The previous sections highlighted some important countermeasures at the TSPs' end. Measures like Dynamic Channel Allocation, multiple call routing and optimized resource management can be employed by the TSP's besides usage of mobile signal boosters through the TSPs at users' buildings or premises. Some prioritization schemes like MBPS, CAC, Guard Channels, Handoff Queuing and Auxiliary Stations essentially need to be incorporated by TSPs to reduce call drops."

8. A Writ Petition, being Writ Petition (Civil) No.11596 of 2015, was filed before the Delhi High Court, together with various other petitions, in which the Ninth Amendment, being the Impugned Amendment to the Regulation pointed out hereinabove, was challenged. By the impugned judgment dated 29.2.2016, the Delhi High Court noticed the various arguments addressed on behalf of the various appellants, together with the reply given by Shri P.S. Narasimha, learned Additional Solicitor General of India appearing on behalf of TRAI. The High Court then went on to discuss the validity of the Impugned Regulation under two grounds – the ground of being ultra vires the parent Act, and the ground that the Regulation was otherwise unreasonable and manifestly arbitrary. The High Court repelled the challenge of the appellants on both the aforesaid grounds. The High Court first referred to BSNL v. Telecom Regulatory Authority of India, (2014) 3 SCC 222 in some detail, and then went on to hold that the power vested in TRAI under Section 36(1) to make regulations is wide and pervasive, and that as there can be no dispute that the Impugned Regulation has been made to ensure quality of service extended to the consumer by the service provider, it would fall within Section 36(1) read with Section 11(1)(b)(v). The High Court further held that the contention that the compensation provided under the Impugned Regulation amounts to imposition of penalty is liable to be rejected, since compensation as provided under the Impugned Regulation is only notional compensation to consumers who have suffered as a result of call drops. The High Court then went on to say that a transparent consultative process was followed by TRAI in making the Impugned Regulation, and that the technical paper on call drops issued on 13.11.2015 addressed all

issues that were sought to be raised in the present petitions. The contention that 100% performance is demanded under the Impugned Regulation was rejected as being factually incorrect and without any basis. It was further added that the impossibility of identification of the reason for the call drop was incorrect inasmuch as these reasons are network related, and that is something that has not been disputed by telecom equipment manufacturers like M/s. Nokia and M/s. Ericsson. It was further held that the Impugned Regulation attempted to balance the interest of consumers with the interest of service providers by limiting call drops that are to be compensated to only 3 and also mandating that only the calling consumer and not the receiving consumer was liable to be so compensated. In dealing with manifest arbitrariness, the High Court held that the 2% standard imposed by the Quality of Service Regulations is distinct and different from compensation provided to consumers for dropped calls. The High Court sought to make a distinction between the 2% tolerance limit as being a quality parameter for the entire network area, as against compensation provided which specifies an individual standard. On the plea that the difficulties faced by service providers in setting up mobile towers being something beyond their control, the High Court declined to enter into the said controversy since the High Court does not have the expertise to adjudicate on such rival claims. The validity of the Impugned Regulation was upheld and the Writ Petitions were dismissed.

9. At this stage, it would be important to notice the arguments made on behalf of the various appellants before us. We have heard learned senior advocates Shri Kapil Sibal, Dr. Abhishek Manu Singhvi, and Shri Gopal Jain. The arguments that were made by them can fall into four neat logical compartments. First and foremost, they argued that the Ninth Amendment to the Telecom Consumers Protection Regulations, 2015, is ultra vires Section 36 read with Section 11 of the Telecom Regulatory Authority of India Act, 1997. They argued that, in any event, these Regulations, being in the nature of subordinate legislation, were manifestly arbitrary and unreasonable, and therefore affected their fundamental rights under Article 14 and Article 19(1)(g) of the Constitution. They further went on to state that there was no power in the TRAI to interfere with their licence conditions which are contract conditions between the licensor and the licensee, and that the said Regulations in seeking to impose a penalty not provided for by the licence should be struck down as such. Fourthly, they argued that Section 11(4) of the said Act requires the Authority to be transparent in its dealings with the various stakeholders, and it has miserably failed in this also.

10. Under the broad head “ultra vires” learned counsel have argued that Regulations can only be made under Section 36(1) of the TRAI Act if they are consistent with and carry out the purposes of the Act. The present Regulations having purportedly been made under Section 11(1)(b)(i) and (v) of the Act are in fact de hors Section 11(1)(b)(i) and (v), and contrary to the Quality of Service Regulations already made by the same Authority under the self-same provision. They argued that the present Impugned Regulation has nothing to do with ensuring compliance of the terms and conditions of licence inasmuch as none of such terms and conditions empowers the Authority to levy a penalty based on No Fault Liability. They also argued that no standard of quality of service is prescribed by the Regulation at all, and therefore the so-called protection of the consumers is without laying down a standard of quality of service and is also directly contrary to the 2% standard already laid down. It was argued by them that as all of them met the 2% standard laid down by the 2009 standard of quality regulation, they could not be penalized as that would then amount to

substituting 98% with 100% as even one call drop would lead to a payment of penalty of rupee one. They also argued that such penalty was not authorized by either Section 36 or by Section 11, and, unlike Section 29 of the Act, no such authority is to be found in the said Sections.

11. Under the broad head "manifestly arbitrary", and "unreasonable restrictions" learned counsel for the appellants argued that without there being any fault on their part, they were foisted with a penal liability. This is not only contrary to any norm of law or justice, but directly contrary to Section 14 of the Act which speaks of adjudication taking place between a service provider and a group of consumers. The complaint of an individual consumer before a Consumer Disputes Redressal Forum would be dismissed on the ground that penal damages cannot be awarded without the establishment of fault in any adjudication for "inconvenience" as opposed to "loss caused". To lay down by way of subordinate legislation, a strict no fault penal liability would go contrary to the scheme of the TRAI Act, particularly when it is contrasted with the Electricity Act, 2003. We were shown Section 57 and certain other Sections of the said Act in which the Central and State Commissions for Electricity, unlike the TRAI, also have adjudicatory functions. If, as a result of the adjudicatory function, compensation for loss is decreed, the Commission under the Electricity Act could do so, but not TRAI, as it has no adjudicatory functions but only recommendatory, administrative, and legislative functions. It was argued by them that Sections 73 and 74 of the Contract Act were also breached as damages by way of penalty, which are not a genuine pre-estimate of loss, have been laid down by the Impugned Regulation, as it is admitted that no loss but only inconvenience has been caused to the consumers. It was further argued, based on the amended Preamble to the TRAI Act, that the Impugned Regulation only protects the interest of the consumers of the telecom sector, whereas a balancing of the interests of service providers and consumers is required by the said Preamble. Further, orderly growth of the telecom sector would also be directly affected if arbitrary penalties of this nature were to be inflicted upon service providers. It was also argued that having made the financial disincentive for a breach of the 2% benchmark even higher just one day before the Impugned Regulation, the Impugned Regulations were wholly uncalled for. Further, one hand of TRAI does not seem to know what the other hand is doing. A few days after the Impugned Regulation, the TRAI's own technical paper makes it clear that the TRAI has itself admitted that call drops are caused in many ways, most of which are not attributable to service providers. That being so, the impugned amendment is wholly arbitrary in that the assumption on which it is based, namely, that the service provider is at fault every time a call drop takes place, is wholly unfounded, as has been found by TRAI itself in the said technical paper.

12. The learned Counsel have also argued, based on Section 402 of the Companies Act, 1956 and Section 27(d) of the Competition Act, 2002, that no power is given by the TRAI Act for interference with licence conditions, which amount to a contract between licensor and licensee. They also referred to Section 11(1)(b)(ii) which uses the familiar "notwithstanding anything contained in the terms and conditions of the licence ....." which is missing from the other provisions of the TRAI Act. The argument, therefore, being that when the licence conditions/contract itself makes it clear that a no fault liability for call drops cannot be made, the impugned amendment would follow the terms and conditions of the licence between licensor and licensee and would be bad as a result.

13. Finally, it was argued that Section 11(4) of the Act was breached inasmuch as the transparency mandated by the Act in the framing of the regulations was wholly missing as no reason whatsoever has been given for negativing the objections of the service providers and laying down a no fault strict penal liability on them.

14. The learned Attorney General, appearing on behalf of the Telecom Regulatory Authority of India, has countered these submissions and sought to defend the High Court judgment. According to the learned Attorney General, it is first necessary to see the Statement of Objects and Reasons of the Telecom Regulatory Authority of India Act, 1997. Paragraph one of the said statement was referred to in order to emphasize that the National Telecom Policy of 1994 provided for the meeting of customer's demands at a reasonable price, and the promotion of consumer interest by ensuring fair competition. When read in light of the Statement of Objects and Reasons, it is clear that the Impugned Regulation has been made bearing this object in mind. According to the learned Attorney General, Section 36 of the Act has to be read in a wide and expansive manner, as has been done in BSNL's judgment, and when so read, it is clear that the Impugned Regulation conforms to Section 11(1)(b)(i) and (v) and is otherwise not ultra vires the Act. Countering the submission as to arbitrariness and unreasonableness of the Impugned Regulation, he argued that the said Regulation was really framed keeping the small man in mind, and told us that 96% of consumers are pre-paid customers who recharge their account balance for an average of Rs.10/- at a time. The Impugned Regulation seeks to provide some solace to these persons for dropped calls. He further argued that members of the appellants have made huge profits from the aforesaid business and have pumped in very little funds for infrastructural development. He referred to funds pumped in in China, for example, which were ten times more than the funds in this country. He, therefore, submitted that if the revenues of service providers were computed at a rough average of approximately Rs.96,560 crores per annum, payments that they would have to make, according to a calculation made by him, for call drops under the Impugned Regulation, would amount to a sum of roughly only Rs.280 crores per annum, which would not therefore really affect the appellants' right to carry on business. He further argued that the Impugned Regulation is only an experimental measure and was liable to be revisited in six months. This being so, the appellants should not have rushed to court, but allowed the regulation to work, and if there were any shortfalls, these could be ironed out in the working of the Impugned Regulation. He countered the argument made on behalf of the appellants that it is not possible, technically speaking, to arrive at the cause of a call drop, and read manuals from some of the service providers to show that this was, in fact, possible, and that the reason for the call drop could ultimately be pinpointed to the service providers when they are at fault. He also refuted the submission made on behalf of the appellants that there were four broad reasons for call drops, three of which cannot be laid at the appellants door. He referred to the technical paper dated 13.11.2015, in particular, and to various other documents, to show that call drops occurred basically due to two reasons alone – those that can be said to be due to the fault of the service providers, and those that can be said to be due to the fault of the consumers. In particular, he referred to and relied upon a statistic showing that an average of 36.9% of call drops take place owing to the fault of the consumer – the rest take place because of the fault of the service provider, or the fact that it has not pumped in enough funds for technical advancements to prevent the cause for such call drops. According to him, with the provision of equipment, including boosters, call drops need not take place inside buildings with thick walls and/or lifts. In any case, the number of call drops that take place owing to such

reasons is itself minimal. According to him, therefore, the Impugned Regulation should be read down so that service providers are made to pay only for faults attributable to them, which would come to a rough figure of 63% of what is charged, for amounts payable to the consumers under the Impugned Regulation. The learned Attorney General has assured us that, in point of fact, the authorities will administer the Impugned Regulation in such a manner that service providers would only be made liable to pay for call drops owing to their own fault. He further argued that three documents, if read together, would make it clear that the Impugned Regulation cannot be said to be manifestly arbitrary or unreasonable, and that the consultation paper dated 4.9.2015, the Impugned Regulation dated 16.10.2015, and the technical paper dated 13.11.2015, should all be read together as being part of one joint exercise to alleviate the small consumers' inconvenience because of call drops. He further went on to argue that it is not correct to say that TRAI has contradicted itself in the technical paper of 13.11.2015, when compared to the Impugned Regulation, and stated that the Quality of Service Regulation which allowed a 2% average per month for call drops should not be confused with the Impugned Regulation. They are, according to him, a parallel set of regulations which have to be read separately, both having been framed by TRAI, in order to protect consumer interest. He also added that guess work is inherent in framing a regulation of the sort that is impugned, and further stated that three call drops per day mitigated the rigour of having to pay for more than 3 call drops per day, and that rupee one per call drop would really be payment or recompense for call drops which take place because the consumer has to incur an extra charge to connect with the person whose call dropped yet again and spend more money for the second call. He also added that only the consumer who dials the call which has dropped is paid and not the receiving consumer, thereby again mitigating the rigour of what could amount to a double payment for one call. He cited a number of judgments to buttress the aforesaid submissions, stating that the said judgments would show that the Court should not substitute its wisdom for that of the wisdom of legislative policy, and that TRAI being an active trustee for the common good has framed this regulation acting as such. He also refuted the submission that the licence conditions were illegally modified by the Impugned Regulation, and stated that the Explanatory Memorandum to the Impugned Regulation would show that the transparency required under Section 11(4) of the Act was duly and faithfully observed by TRAI.

15. In rejoinder, learned senior counsel for the appellants stoutly resisted the factual statements made by the learned Attorney General. They pointed out that the net debt of the various telecom operators before us, as on 31.12.2015, ran into approximately Rs.3,80,000/- crores and that this was because huge amounts had to be borrowed from banks in order to pay for both spectrum and infrastructure. They were at pains to point out that though service providers in India contributed to 13% of the world's telecommunication services, the revenue earned by them was only 2.7%, and even this was fast decreasing. According to the learned counsel, they have covered over 500,000 villages in India contributing to 6% of India's GDP, thus being amongst the highest contributors in foreign direct investment in this country in the last decade. They have also made the second large private sector investment in infrastructure amounting to Rs. 800,000/- crores despite the return on investment being only 1%. Contrary to what the learned Attorney General had to say, a vast number of towers have been set up – more than two lac sites in the last 15 months alone. When viewed with the gigantic net debt and return on investment, the figure of gross revenue given by the learned Attorney General is said to be a highly misleading figure. Also, the comparison with infrastructure

investment in China is wholly misplaced inasmuch as the Chinese Government has unlimited funds to pour into its telecom companies, over 70% of their share capital being held by the Government. Spectrum allocation to Chinese operators is at almost no cost, whereas in India, thousands of crores of rupees have to be spent as spectrum is now auctioned to the highest bidder. Also, the revenue of the top three Chinese telecom operators is more than six times the revenue of the top three Indian operators. In addition, it was argued that the facts and figures reeled out by the learned Attorney General are not based on the record of the case, and, in any case, have very little connection with the challenge to the Impugned Regulation in the present case.

16. We have also heard learned counsel appearing for various consumer groups. They supported the arguments of the learned Attorney General and went on to state that since the focus of the TRAI Act and the Impugned Regulation was for the small and impoverished consumers in India, this Court would be loathe to strike down the Impugned Regulation. They further argued that the doctrine of public trust would apply to the Impugned Regulation, as the Regulation was part of the overall social responsibility that the regulator TRAI has cast upon the service providers in favour of consumers. They also cited a few judgments dealing with the vires of subordinate legislation and with transparency in the context of the Impugned Regulation.

17. Having heard learned counsel for all the parties, it is first necessary to set out the relevant provisions of the Telecom Regulatory Authority of India Act, 1997.

18. The Statement of Objects and Reasons for the said Act is as follows:

> "1. In the context of the National Telecom Policy, 1994, which amongst other things, stresses on achieving the universal service, bringing the quality of telecom services to world standards, provisions of wide range of services to meet the customers demand at reasonable price, and participation of the companies registered in India in the area of basic as well as value added telecom services as also making arrangements for protection and promotion of consumer interest and ensuring fair competition, there is a felt need to separate regulatory functions from service providing functions which will be in keeping with the general trend in the world. In the multi-operator situation arising out of opening of basic as well as value added services in which private operator will be competing with Government operators, there is a pressing need for an independent telecom regulatory body for regulation of telecom services for orderly and healthy growth of telecommunication infrastructure apart from protection of consumer interest." The Preamble of the Telecom Regulatory Authority Act of 1997 reads as under:
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> "Preamble - An act to provide for the establishment of the Telecom Regulatory Authority of India to regulate the telecommunication services, and for matters connected therewith or incidental thereto." Section 11(n) read as under:-
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> Functions of Authority – (1) Notwithstanding anything contained in the Indian Telegraph Act, 1885, the functions of the Authority shall be to –

(n) settle disputes between service providers"

19. In 2000, the Act was amended. By the Amended Act, the adjudicatory function of the TRAI was taken away from it and was vested in an Appellate Tribunal. The relevant provisions of the Act as amended in 2000 are as follows:-

> "Preamble- An Act to provide for the establishment of the 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"
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> 11. Functions of Authority. (1) Notwithstanding anything contained in the Indian Telegraph Act, 1885, the functions of the Authority shall be to-

(b) discharge the following functions, namely:-

> (i) ensure compliance of terms and conditions of license;
>
> (ii) notwithstanding anything contained in the terms and conditions of the license granted before the commencement of the Telecom Regulatory Authority (Amendment) Ordinance,2000, fix the terms and conditions of inter-

connectivity between the service providers;

xx

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

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

12. Powers of Authority to call for information, conduct investigations, etc. — (4) The Authority shall have the power to issue such directions to service providers as it may consider necessary for proper functioning by service providers.

13. Power of Authority to issue directions.—The Authority may, for the discharge of its functions under sub-section (1) of Section 11, issue such directions from time to time to the service providers, as it may consider necessary:

Provided that no direction under sub-section (4) of Section 12 or under this section shall be issued except on the matters specified in clause (b) of sub-section (1) of Section 11.

14. Establishment of Appellate Tribunal.—The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to—

(a) adjudicate any dispute—

(i) between a licensor and a licensee;

(ii) between two or more service providers;

(iii) between a service provider and a group of consumers:

Provided that nothing in this clause shall apply in respect of matters relating to— (A) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of Section 5 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969);

(B) the complaint of an individual consumer maintainable before a Consumer Disputes Redressal Forum or a Consumer Disputes Redressal Commission or the National Consumer Redressal Commission established under Section 9 of the Consumer Protection Act, 1986 (68 of 1986);

(C) the dispute between telegraph authority and any other person referred to in sub-section (1) of Section 7-B of the Indian Telegraph Act, 1885 (13 of 1885);

(b) hear and dispose of appeals against any direction, decision or order of the Authority under this Act.

15. Civil Court not to have jurisdiction.—No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

25. Power of Central Government to issue directions.—(1) The Central Government may, from time to time, issue to the Authority such directions as it may think necessary in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.

(2) Without prejudice to the foregoing provisions, the Authority shall, in exercise of its powers or the performance of its functions, be bound by such directions on questions of policy as the Central

Government may give in writing to it from time to time:

> Provided that the Authority shall, as far as practicable, be given an opportunity to express its views before any direction is given under this sub-section.
>
> (3) The decision of the Central Government whether a question is one of policy or not shall be final.

29. Penalty for contravention of directions of Authority.—If a person violates directions of the Authority, such person shall be punishable with fine which may extend to one lakh rupees and in case of second or subsequent offence with fine which may extend to two lakh rupees and in the case of continuing contravention with additional fine which may extend to two lakh rupees for every day during which the default continues.

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

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

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

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

(c) ******

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

(e) levy of fee and lay down such other requirements on fulfillment of which a copy of register may be obtained under sub-clause (viii) of clause

(b) of sub-section (1) of Section 11;

(f) levy of fees and other charges under clause (c) of sub-section (1) of Section 11.

37. Rules and regulations to be laid before Parliament.—Every rule and every regulations made under this Act shall be paid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in tow or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or both Houses agree that the rule or regulation should not be made, the rule or

regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation." Parameters of Judicial Review of Subordinate Legislation

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:-

> "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).

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." [paras 15 and 16]

21. In the present case, the appellants have raised pleas under

> paragraphs (b), (d) and (f) of paragraph 15 of the said judgment. We now move on to consider their arguments.
>
> Ultra vires

22. The power to make the Impugned Regulation is traceable to Section 36(1) of the Telecom Regulatory Authority of India Act, 1997. This Court in BSNL v. Telecom Regulatory Authority of India, (2014) 3 SCC 222, after analyzing the aforesaid provision in the backdrop of the Act held as follows:-

> "We may now advert to Section 36. Under sub-section (1) thereof TRAI can make regulations to carry out the purposes of the TRAI Act specified in various provisions of the TRAI Act including Sections 11, 12 and 13. The exercise of power under Section 36(1) is hedged with the condition that the regulations must be consistent with the TRAI Act and the rules made thereunder. There is no other restriction on the power of TRAI to make regulations. In terms of Section 37, the regulations are required to be laid before Parliament which can either approve, modify or annul the same. Section 36(2), which begins with the words "without prejudice to the generality of the power under sub-section (1)" specifies various topics on which regulations can be made by TRAI. Three of these topics relate to meetings of TRAI, the procedure to be followed at such meetings, the transaction of business at the meetings and the register to be maintained by TRAI. The remaining two topics specified in clauses (e) and (f) of Section 36(2) are directly referable to Sections 11(1)(b)(viii) and 11(1)(c). These are substantive functions of TRAI. 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 TRAI under Section 36(1) or that Section 36(2) restricts the scope of Section 36(1)... Before parting with this aspect of the matter, we may notice Sections 33 and 37. A reading of the plain language of Section 33 makes it clear that TRAI can, by general or special order, delegate to any member or officer of TRAI or any other person such of its powers and functions under the TRAI Act except the power to settle disputes under Chapter IV or make regulations under Section 36. This means that the power to make regulations under Section 36 is non-delegable. The reason for excluding Section 36 from the purview of Section 33 is simple. The power under Section 36 is legislative as opposed to administrative. By virtue of Section 37, the regulations made under the TRAI Act are placed on a par with the rules which can be framed by the Central Government under Section 35 and being in the nature of subordinate legislations, the rules and regulations have to be laid before both the Houses of Parliament which can annul or modify the same. Thus, the regulations framed by TRAI can be made ineffective or modified by Parliament and by no other body.
>
> In view of the above discussion and the propositions laid down in the judgments referred to in the preceding paragraphs, we hold that the power vested in TRAI under Section 36(1) to make regulations is wide and pervasive. The exercise of this power is only subject to the provisions of the TRAI Act and the rules framed under Section 35 thereof. There is no other limitation on the exercise of power by TRAI under Section 36(1). It is not controlled or limited by Section 36(2) or Sections 11, 12 and 13." [paras 89, 98 – 100]

23. It will thus be seen that though the Regulation making power under the said Act is wide and pervasive, and is not trammeled by the provisions of Section 11, 12(4) and 13, it is a power that is non-delegable and, therefore, legislative in nature. The exercise of this power is hedged in with the condition that it must be exercised consistently with the Act and the Rules thereunder in order to carry out the purposes of the Act. Since the regulation making power has first to be consistent with the Act, it is necessary that it not be inconsistent with Section 11 of the Act, and in particular Section 11(1)(b) thereof. This is for the reason that the functions of the Authority are laid down by this Section, and that the Impugned Regulation itself refers to Section 11(1)(b)(i) and (v) as the source of power under which the Impugned Regulation has been framed. Since ensuring compliance with the terms and conditions of licence is the first thing that has been argued on behalf of the respondents, it is important to advert to the provisions of the licence between the service provider and the consumer. As has been mentioned above, two very important clauses of this licence refer to (i) the power to modify the licence conditions which is contained in clause 5 and (ii) the ensuring by the licensee that the quality of service shall be as prescribed by the licensor or TRAI by clause 28 thereof. Under clause 5, the licensor reserves the right to modify the terms and conditions of the licence if in the opinion of the licensor it is necessary or expedient so to do in public interest or in the interest of security of the State or for the proper conduct of telegraphs. It may be stated that no modification of the licence has in fact been attempted or has taken place in the facts of the present case. Therefore clause 5 need not detain us further. Clause 28 reads as follows:

> "28. Quality of Performance:
>
> 28.1 The LICENSEE shall ensure the Quality of Service (QoS) as prescribed by the LICENSOR or TRAI. The LICENSEE shall adhere to such QoS standards and provide timely information as required therein.
>
> 28.2 The LICENSEE shall be responsible for:-
>
> i) Maintaining the performance and quality of service standards.
>
> ii) Maintaining the MTTR (Mean Time To Restore) within the specified limits of the quality of service.
>
> iii) The LICENSEE will keep a record of number of faults and rectification reports in respect of the service, which will be produced before the LICENSOR/TRAI as and when and in whatever form desired.

28.3 The LICENSEE shall be responsive to the complaints lodged by his subscribers. The Licensee shall rectify the anomalies within the MTTR specified and maintain the history sheets for each installation, statistics and analysis on the overall maintenance status.

28.4 The LICENSOR or TRAI may carry out performance tests on LICENSEE's network and also evaluate Quality of Service parameters in LICENSEE's network prior to grant of permission for commercial launch of the service after successful completion of interconnection tests and/or at any

time during the currency of the License to ascertain that the network meets the specified standards on Quality of Service (QoS). The LICENSEE shall provide ingress and other support including instruments, equipments etc., for such tests.

28.5 The LICENSEE shall enforce and ensure QOS, as prescribed by the LICENSOR/TRAI, from the INFRASTRUCTURE PROVIDER(s) with whom it may enter into agreement/contract for leasing/hiring/buying or any such instrument for provision of infrastructure or provision of bandwidth. The responsibility of ensuring QOS shall be that of LICENSEE."

24. Under clause 28 it is a condition that the licensee shall ensure the quality of service as prescribed by the licensor or TRAI, and shall adhere to such standards as are provided. Another important thing to notice is that under clause 28.2 the licensee has to keep a record of the number of faults and rectification reports in respect of its service, which will be produced before the licensor/TRAI as and when desired. This being the case, it is clear that the Impugned Regulation cannot be said to fall under Section 11(1)(b)(i) at all inasmuch as it does not seek to enforce any term or condition of the licence between the service provider and the consumer. Coming to sub-para (v) of Section 11(1)(b), the Impugned Regulation would again have no reference to the said paragraph, inasmuch as it does not lay down any standard of quality of service to be provided by the service provider. In order that clause (v) be attracted, not only do standards of quality of service to be provided by the service providers have to be laid down, but standards have to be adhered to by the service providers so as to protect the interests of the consumers. We find that the Impugned Regulation is not referable to Section 11(1)(b)(i) and (v) of the Act inasmuch as it has not been made to ensure compliance of the terms and conditions of the licence nor has it been made to lay down any standard of quality of service that needs compliance. This being the case, the Impugned Regulation is de hors Section 11 but cannot be said to be inconsistent with Section 11 of the Act. This Court has categorically held in the BSNL judgment that the power under Section 36 is not trammeled by Section 11. This being so, the Impugned Regulation cannot be said to be inconsistent with Section 11 of the Act. However, what has also to be seen is whether the said Regulation carries out the purpose of the Act which, as has been pointed out hereinabove, under the amended Preamble to the Act, is to protect the interests of service providers as well as consumers of the telecom sector so as to promote and ensure orderly growth of the telecom sector. Under Section 36, not only does the Authority have to make regulations consistent with the Act and the Rules made thereunder, but it also has to carry out the purposes of the Act, as can be discerned from the Preamble to the Act. If, far from carrying out the purposes of the Act, a Regulation is made contrary to such purposes, such Regulation cannot be said to be consistent with the Act, for it must be consistent with both the letter of the Act and the purposes for which the Act has been enacted. In attempting to protect the interest of the consumer of the telecom sector at the cost of the interest of a service provider who complies with the leeway of an average of 2% of call drops per month given to it by another Regulation, framed under Section 11(1)(b)(v), the balance that is sought to be achieved by the Act for the orderly growth of the telecom sector has been violated. Therefore we hold that the Impugned Regulation does not carry out the purpose of the Act and must be held to be ultra vires the Act on this score.

Violation of Fundamental Rights

25. We have already seen that one of the tests for challenging the constitutionality of subordinate legislation is that subordinate legislation should not be manifestly arbitrary. Also, it is settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation – [See: Indian Express Newspapers v. Union of India, (1985) 1 SCC 641 at Para 75].

26. The test of "manifest arbitrariness" is well explained in two judgments of this Court. In Khoday Distilleries Ltd. v. State of Karnataka, (1996) 10 SCC 304, this Court held:

> "It is next submitted before us that the amended Rules are arbitrary, unreasonable and cause undue hardship and, therefore, violate Article 14 of the Constitution. Although the protection of Article 19(1)(g) may not be available to the appellants, the rules must, undoubtedly, satisfy the test of Article 14, which is a guarantee against arbitrary action. However, one must bear in mind that what is being challenged here under Article 14 is not executive action but delegated legislation. The tests of arbitrary action which apply to executive actions do not necessarily apply to delegated legislation. In order that delegated legislation can be struck down, such legislation must be manifestly arbitrary; a law which could not be reasonably expected to emanate from an authority delegated with the lawmaking power. In the case of Indian Express Newspapers (Bombay) Pvt. Ltd. and Ors. v. Union of India and Ors. [(1985) 1 SCC 641 : 1985 SCC (Tax) 121 : (1985) 2 SCR 287], this Court said that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. A subordinate legislation may be questioned under Article 14 on the ground that it is unreasonable;
>
> "unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary". Drawing a comparison between the law in England and in India, the Court further observed that in England the Judges would say, "Parliament never intended the authority to make such Rules; they are unreasonable and ultra vires". In India, arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. But subordinate legislation must be so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution." [para 13]

27. Also, in Sharma Transport v. Government of Andhra Pradesh, (2002) 2 SCC 188, this Court held:

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

judgment, depending on the will alone. ...”

28. When we come to Article 19(1)(g) of the Constitution, the tests for challenge to plenary legislation are well settled. First and foremost, a sea change took place with the 11-Judge Bench judgment in Rustom Cavasjee Cooper (Banks Nationalisation) v. Union of India, (1970) 1 SCC 248, in which the impact of State action upon fundamental rights was stated thus:

> “We have carefully considered the weighty pronouncements of the eminent Judges who gave shape to the concept that the extent of protection of important guarantees, such as the liberty of person, and right to property, depends upon the form and object of the State action, and not upon its direct operation upon the individual's freedom. But it is not the object of the authority making the law impairing the right of a citizen, nor the form of action taken that determines the protection he can claim: it is the effect of the law and of the action upon the right which attracts the jurisdiction of the Court to grant relief. If this be the true view and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual's rights.” [para 49]

29. Under Article 19(6) of the Constitution, the State has to conform to two separate and independent tests if it is to pass constitutional muster – the restriction on the appellants' fundamental right must first be a reasonable restriction, and secondly, it should also be in the interest of the general public. Perhaps the best exposition of what the expression “reasonable restriction” connotes was laid down in Chintaman Rao v. State of Madhya Pradesh, 1950 SCR 759, as follows:-

> “The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in article 19(1)(g) and the social control permitted by clause (6) of article 19, it must be held to be wanting in that quality.” [at p.763]

30. It is interesting to note that the original Constitution, while enumerating various rights under Article 19(1), when it referred to the right of freedom of speech in Article 19(1)(a), laid down in Article 19(2) that any law abridging the right to freedom of speech could only pass constitutional muster if it related to any of the subjects laid down in clause (2). What was conspicuous by its absence was the phrase “reasonable restriction”, which was only brought in by the first amendment to the Constitution.

31. Similarly, the first amendment to the Constitution also amended Article 19(6), with which we are directly concerned, to provide for a State monopoly, which would not have to be tested on the ground of reasonable restrictions. Therefore, the first amendment to the Constitution of India has made it clear that reasonable restrictions, added in Article 19(2) and subtracted from Article 19(6) (insofar as State monopolies are concerned), point to the fact that this test is a test separate and distinct from the test of the law being in the interest of the general public. Why we are at pains to point this out is because the learned Attorney General's argument focused primarily on the Impugned Regulation being in the public interest. He referred to Delhi Science Forum v. Union of India, (1996) 2 SCC 405, for the proposition that TRAI, as an active trustee, has framed this Regulation for the common good. While accepting that TRAI may have done so, yet it is important to note that, apart from the common good in the form of consumer interest, the Regulation must also pass a separate and independent test of not being manifestly arbitrary or unreasonable. We cannot forget that when viewed from the angle of manifest arbitrariness or reasonable restriction, sounding in Article 14 and Article 19(1)(g) respectively, the Regulation must, in order to pass constitutional muster, be as a result of intelligent care and deliberation, that is, the choice of a course which reason dictates. Any arbitrary invasion of a fundamental right cannot be said to contain this quality. A proper balance between the freedoms guaranteed and the control permitted under Article 19(6) must be struck in all cases before the impugned law can be said to be a reasonable restriction in the public interest.

32. We find that it is not necessary to go in detail into many of the submissions made on either side as to the technical difficulties which may or may not lead to call drops. This is for the reason that even if we accept the demarcation of the cause of call drops to be what the learned Attorney General says it is, the Impugned Regulation must be held to be manifestly arbitrary and an unreasonable restriction on the appellants' fundamental rights to carry on business. According to the learned Attorney General, the cause for call drops is twofold – one owing to the fault of the consumer, and the other owing to the fault of the service provider. And, for this dichotomy, he has referred to the technical paper dated 13.11.2015, which shows that an average of 36.9% can be call drops owing to the fault of the consumer. If this is so, the Impugned Regulation's very basis is destroyed: the Regulation is based on the fact that the service provider is 100% at fault. This becomes clear from a reading of the text of the said Regulation together with the Explanatory Memorandum set out hereinabove. This being the case, it is clear that the service provider is made to pay for call drops that may not be attributable to his fault, and the consumer receives compensation for a call drop that may be attributable to the fault of the consumer himself, and that makes the Impugned Regulation a regulation framed without intelligent care and deliberation.

33. But it was said that the aforesaid Regulation should be read down to mean that it would apply only when the fault is that of the service provider. We are afraid that such a course is not open to us in law, for it is well settled that the doctrine of reading down would apply only when general words used in a statute or regulation can be confined in a particular manner so as not to infringe a constitutional right. This was best exemplified in one of the earliest judgments dealing with the doctrine of reading down, namely the judgment of the Federal Court in In Re: Hindu Women's Rights to Property Act, 1937, AIR 1941 FC 72. In that judgment, the word "property" in Section 3 of the Hindu Women's Rights to Property Act was read down so as not to include agricultural land,

which would be outside the central legislature's powers under the Government of India Act, 1935. This is done because it is presumed that the legislature did not intend to transgress constitutional limitations. While so reading down the word "property", the Federal Court held:

> "If the restriction of the general words to purposes within the power of the Legislature would be to leave an Act with nothing or next to nothing in it, or an Act different in kind, and not merely in degree, from an Act in which the general words were given the wider meaning, then it is plain that the Act as a whole must be held invalid, because in such circumstances it is impossible to assert with any confidence that the Legislature intended the general words which it has used to be construed only in the narrower sense: Owners of SS. Kalibia v. Wilson (1910) 11 CLR 689, Vacuum Oil Company Ltd. v. State of Queensland (1934) 51 CLR 677, R. v. Commonwealth Court of Conciliation and Arbitration (1910) 11 CLR 1 and British Imperial Oil Co. Ltd. v. Federal Commissioner of Taxation (1925) 35 CLR 422."

34. This judgment was followed by a Constitution Bench of this Court in Delhi Transport Corpn. v. D.T.C. Mazdoor Congress, 1991 Supp (1) SCC 600. In that case, a question arose as to whether a particular regulation which conferred power on an authority to terminate the services of a permanent and confirmed employee by issuing a notice terminating his services, or by making payment in lieu of such notice without assigning any reasons and without any opportunity of hearing to the employee, could be said to be violative of the appellants' fundamental rights. Four of the learned Judges who heard the case, the Chief Justice alone dissenting on this aspect, decided that the regulation cannot be read down, and must, therefore, be held to be unconstitutional. In the lead judgment on this aspect by Sawant,J., this Court stated:

> "It is thus clear that the doctrine of reading down or of recasting the statute can be applied in limited situations. It is essentially used, firstly, for saving a statute from being struck down on account of its unconstitutionality. It is an extension of the principle that when two interpretations are possible — one rendering it constitutional and the other making it unconstitutional, the former should be preferred. The unconstitutionality may spring from either the incompetence of the legislature to enact the statute or from its violation of any of the provisions of the Constitution. The second situation which summons its aid is where the provisions of the statute are vague and ambiguous and it is possible to gather the intentions of the legislature from the object of the statute, the context in which the provision occurs and the purpose for which it is made. However, when the provision is cast in a definite and unambiguous language and its intention is clear, it is not permissible either to mend or bend it even if such recasting is in accord with good reason and conscience. In such circumstances, it is not possible for the court to remake the statute. Its only duty is to strike it down and leave it to the legislature if it so desires, to amend it. What is further, if the remaking of the statute by the courts is to lead to its distortion that course is to be scrupulously avoided. One of the situations further where the doctrine can never be called into play is where the statute requires extensive additions and deletions. Not only it is no part of the court's duty to undertake such exercise, but it is

beyond its jurisdiction to do so." [para 255]

35. Applying the aforesaid test to the Impugned Regulation, it is clear that the language of the Regulation is definite and unambiguous – every service provider has to credit the account of the calling consumer by one rupee for every single call drop which occurs within its network. The Explanatory Memorandum to the aforesaid Regulation further makes it clear, in paragraph 19 thereof, that the Authority has come to the conclusion that call drops are instances of deficiency in service delivery on the part of the service provider. It is thus unambiguously clear that the Impugned Regulation is based on the fact that the service provider is alone at fault and must pay for that fault. In these circumstances, to read a proviso into the Regulation that it will not apply to consumers who are at fault themselves is not to restrict general words to a particular meaning, but to add something to the provision which does not exist, which would be nothing short of the court itself legislating. For this reason, it is not possible to accept the learned Attorney General's contention that the Impugned Regulation be read down in the manner suggested by him.

36. The other string to the bow of this argument is that the Impugned Regulation would be worked in such a manner that the service provider would be liable to pay only when it is found that it is at fault. This again falls foul of constitutional doctrine. In Collector of Customs v. Nathella Sampathu Chetty, (1962) 3 SCR 786, this Court held:

> "The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse must also follow that a statute which is otherwise invalid as being unreasonable cannot be saved by its being administered in a reasonable manner. The constitutional validity of the statute would have to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed. If so judged it passes the test of reasonableness, possibility of the powers conferred being improperly used is no ground for pronouncing the law itself invalid and similarly if the law properly interpreted and tested in the light of the requirements set out in Part III of the Constitution does not pass the test it cannot be pronounced valid merely because it is administered in a manner which might not conflict with the constitutional requirements." [at pp.825 – 826]

37. This statement of the law applies on all fours to the facts of the present case, and is a complete answer to the Attorney General's contention that the Impugned Regulation would be administered so that the service provider would be liable under it only when it is at fault for call drops.

38. The learned Attorney General has argued that the Impugned Regulation accords with the Statement of Objects and Reasons of the TRAI Act, 1997. As has been pointed out by us, the original Act was amended in the year 2000, in which its Preamble was substituted. The substitution indicates that the policy of the 1997 Act, as amended by the 2000 Act, is to protect the interests of service providers and consumers of the telecom sector together, so that the orderly growth of the telecom sector is ensured thereby. We are afraid that the orderly growth of the telecom sector cannot be ensured or promoted by a manifestly arbitrary or unreasonable regulation which makes a service provider pay a penalty without it being necessarily at fault.

39. We were then told that the Impugned Regulation was framed keeping in mind the small consumer, that is, a person who has a pre-paid SIM Card with an average balance of Rs.10/- at a time, and that the Regulation goes a long way to compensate such person. The motive for the Regulation may well be what the Attorney General says it is, but that does not make it immune from Article 14 and the twin tests of Article 19(6). The Authority framing the Regulation must ensure that its means are as pure as its ends – only then will regulations made by it pass constitutional muster.

40. We were also told that huge profits were made by the service providers, and that the amount they would have to pay would not even be a flea bite compared to the profits they make, viewed in the background that they are not pouring in enough funds for infrastructure development. This was stoutly resisted by the appellants, pointing out that the so called huge profits earned is misleading, as the figure of net debt is far greater than that of revenue earned, and that huge sums had been pumped in for infrastructure development. Without going into the factual controversy thus presented, there are two answers to this submission. First and foremost, whether the service providers make profits or losses cannot be said to be relevant for determining whether the Impugned Regulation is otherwise arbitrary or unreasonable. If the Attorney General were correct, then the converse proposition would also be true – namely, that even if all the service providers were suffering huge losses, then such regulation, since it makes them fork out crores of rupees and add to their losses, would have to be held to be unconstitutional. Assuming that six out of the twelve service providers make profits, and the other six make losses, the Impugned Regulation cannot be held to be constitutional so far as those making a profit, and unconstitutional qua those making losses. And what if the same service provider makes a profit in one year and a loss in the succeeding year. Is the Impugned Regulation unconstitutional in the first year and constitutional in the succeeding year? Obviously not. Secondly, it is always open to the Authority, with the vast powers given to it under the TRAI Act, to ensure, in a reasonable and non-arbitrary manner, that service providers provide the necessary funds for infrastructure development and deal with them so as to protect the interest of the consumer. Consequently, this submission is also without substance.

41. The learned Attorney General strongly relied upon a passage from a Constitution Bench judgment in Prag Ice & Oil Mills v. Union of India, (1978) 3 SCC 459, to the following effect:-

> "The Parliament having entrusted the fixation of prices to the expert judgment of the Government, it would be wrong for this Court, as was done by common consent in Premier Automobiles [20 L Ed 2d 312] to examine each and every minute detail pertaining to the Governmental decision. The Government, as was said in Permian Basin Area Rate cases, is entitled to make pragmatic adjustments which may be called for by particular circumstances and the price control can be declared unconstitutional only if it is patently arbitrary, discriminatory or demonstrably irrelevant to the policy which the legislature is free to adopt. The interest of the producer and the investor is only one of the variables in the "constitutional calculus of reasonableness" and courts ought not to interfere so long as the exercise of Governmental power to fix fair prices is broadly within a "zone of reasonableness". If we were to embark upon an examination of the disparate contentions raised before us on behalf of the contending parties, we have no doubt that we shall have exceeded

our narrow and circumscribed authority.

> Before closing, we would like to mention that the petitioners rushed to this Court too precipitately on the heels of the Price Control Order. Thereby they deprived themselves of an opportunity to show that in actual fact, the Order causes them irreparable prejudice. Instead, they were driven through their ill-thought haste to rely on speculative hypothesis in order to buttress their grievance that their right to property and the right to do trade was gone or was substantially affected. A little more patience, which could have been utilised to observe how the experiment functioned, might have paid better dividends." (para 71).

42. The observations made in the aforesaid judgment are wholly distinguishable. In the present case, if the appellants had not gone to court when they did, the Regulation would have affected their fundamental rights on and from 1.1.2016. Further, they would have been denied interim and/or other relief on the ground that they have not moved the Court without undue delay. Also, to say that the Impugned Regulation is only an experimental measure that would last in its present form for six months is again wholly incorrect. The Impugned Regulation begins to tick on and from 1.1.2016, in which case three rupees per day, for call drops made not exclusively owing to the fault of the service provider, would have to be paid. Further, it is only the Explanatory Memorandum which says that the Authority may review the aforesaid Regulation after working of the said Regulation after six months, and that too only if found to be necessary. Obviously, this would not mean that the aforesaid Regulation would necessarily be reviewed at all, even after six months. We are, therefore, unable to subscribe to the aforesaid submission.

43. We now come to a very important part of the submissions made on behalf of the appellants. The appellants have strongly contended that a 2% allowance of call drops on the basis of averaging call drops per month has been allowed to them by the Quality of Service Regulations already referred to hereinabove. This would amount to the Authority penalizing the service provider even when it complies with another regulation made under the same source of power, and for this reason alone, the Impugned Regulation must be held to be bad as being manifestly arbitrary. The learned Attorney General refuted this submission in two ways. First, he argued that Quality of Service Regulations and regulations made to benefit consumers must be viewed separately, as they are distinct regulations in parallel streams. He also argued that the 2% average allowance for call drops is different and distinct from paying compensation for call drops inasmuch as, conceivably, in a given set of facts, call drops may take place extensively in a given sector but not in other sectors so that an average of 2% per month is yet maintained, but the service provider would be penalized as it has not been able to maintain a 3% standard laid down qua deficiency of service in individual towers leading to call drops. However, the persons who suffer in the sector in which call drops are many and frequent would then have no protection. We are afraid neither of these reasons avails the Authority. First and foremost, the 2009 Quality of Service Regulation is made under Section 11(1)(b)(v), which is the very Section which is claimed to be the source of the Impugned Regulation. Secondly, both regulations deal with the same subject matter – namely, call drops, and both regulations are made in the interest of the consumer. If an average of 2% per month is allowable to every service provider for call drops, and it is the admitted position that all service providers before

us, short of Aircel, and that too in a very small way, have complied with the standard, penalizing a service provider who complies with another Regulation framed with reference to the same source of power would itself be manifestly arbitrary and would render the Regulation to be at odds with both Articles 14 and 19(1)(g).

44. In this regard, it would be of assistance to note what this Court held in The Lord Krishna Sugar Mills Ltd. and Anr. v. Union of India and Anr., [1960] 1 SCR 39:

> "It is, however, contended that though one can look at the surrounding circumstances, it is not open to the Court to examine other laws on the subject, unless those laws be incorporated by reference. In our opinion, this is a fallacious argument. The Court in judging the reasonableness of a law, will necessarily see, not only the surrounding circumstances but all contemporaneous legislation passed as part of a single scheme. The reasonableness of the restriction and not of the law has to be found out, and if restriction is under one law but countervailing advantages are created by another law passed as part of the same legislative plan, the Court should not refuse to take that other law into account." [at para 56]

45. In view of the aforesaid, it is clear that the Quality of Service Regulations and the Consumer Regulations must be read together as part of a single scheme in order to test the reasonableness thereof. The countervailing advantage to service providers by way of the allowance of 2% average call drops per month, which has been granted under the 2009 Quality of Service Regulations, could not have been ignored by the Impugned Regulation so as to affect the fundamental rights of the appellants, and having been so ignored, would render the Impugned Regulation manifestly arbitrary and unreasonable.

46. Secondly, no facts have been shown to us which would indicate that a particular area would be filled with call drops thanks to the fault on the part of the service providers in which consumers would be severely inconvenienced. The mere ipse dixit of the learned Attorney General, without any facts being pleaded to this effect, cannot possibly make an unconstitutional regulation constitutional. We, therefore, hold that a strict penal liability laid down on the erroneous basis that the fault is entirely with the service provider is manifestly arbitrary and unreasonable. Also, the payment of such penalty to a consumer who may himself be at fault, and which gives an unjustifiable windfall to such consumer, is also manifestly arbitrary and unreasonable. In the circumstances, it is not necessary to go into the appellants' submissions that call drops take place because of four reasons, three of which are not attributable to the fault of the service provider, which includes sealing and shutting down towers by municipal authorities over upon they have no control, or whether they are attributable to only two causes, as suggested by the Attorney General, being network related causes or user related causes. Equally, it is not necessary to determine finally as to whether the reason for a call drop can technologically be found out and whether it is a network related reason or a user related reason.

47. In Shree Bhagwati Steel Rolling Mills v. Commissioner of Central Excise, (2016) 3 SCC 643, Rules 96 –ZO, ZP and ZQ of the Central Excise Rules, 1994, which consisted inter alia of penalty

provisions, were struck down by this Court. One of the reasons for striking down the aforesaid Rules is that a mandatory penalty became leviable despite the fact that fault on the part of assessee could not be established. This Court held:

> "It is also correct in saying that there may be circumstances of force majeure which may prevent a bona fide assessee from paying the duty in time, and on certain given factual circumstances, despite there being no fault on the part of the assessee in making the deposit of duty in time, a mandatory penalty of an equivalent amount of duty would be compulsorily leviable and recoverable from such assessee. This would be extremely arbitrary and violative of Article 14 for this reason as well. Further, we agree with the High Court in stating that this would also be violative of the appellant's fundamental rights under Article 19(1)(g) and would not be saved by Article 19(6), being an unreasonable restriction on the right to carry on trade or business. Clearly the levy of penalty in these cases of a mandatory nature for even one day's delay, which may be beyond the control of the assessee, would be arbitrary and excessive." [at para 35]

48. In the present case, also, a mandatory penalty is payable by the service provider for call drops that may take place which are not due to its fault, and may be due to the fault of the recipient of the penalty, which is violative of Articles 14 and 19(1)(g).

49. The reason given in the Explanatory Memorandum for compensating the consumer is that the compensation given is only notional. The very notion that only notional compensation is awarded, is also entirely without basis. A consumer may well suffer a call drop after 3 or 4 seconds in a voice call. Whereas the consumer is charged only 4 or 5 paise for such dropped call, the service provider has to pay a sum of rupee one to the said consumer. This cannot be called notional at all. It is also not clear as to why the Authority decided to limit compensation to three call drops per day or how it arrived at the figure of Re.1 to compensate inconvenience caused to the consumer. It is equally unclear as to why the calling party alone is provided compensation because, according to the Explanatory Memorandum, inconvenience is suffered due to the interruption of a call, and such inconvenience is suffered both by the calling party and the person who receives the call. The receiving party can legitimately claim that his inconvenience when a call drops, is as great as that of the calling party. And the receiving party may need to make the second call, in which case he receives nothing, and the calling party receives Re.1 for the additional expense made by the receiving party. All this betrays a complete lack of intelligent care and deliberation in framing such a regulation by the Authority, rendering the Impugned Regulation manifestly arbitrary and unreasonable.

50. However, the learned Attorney General referred to a recent judgment being DSC-Viacon Ventures Pvt. Ltd. (Now Known as DSC Ventures Pvt. Ltd) v. Lal Manohar Pandey and Ors., (Civil Appeal Nos. 6781-6782 of 2015, decided on August 27, 2015). He referred to paragraph 21 in order to show that a certain amount of guess work is unavoidable in matters of this nature.

51. The context in which this statement occurs in paragraph 21 is very different from the present context. This Court held that a toll can only be collected for maintaining a road. The patches in which the road is not properly maintained should reduce proportionately the amount of toll that is to be paid. As there was no data in that case to indicate the extent of road length and the resultant inconvenience to users of the road, a certain amount of guess work was said to be unavoidable. The present is a case in which we are not informed as to how rupee one is computed, how three call drops per day has been arrived at, or why the calling party alone is provided compensation. These matters go out of mere guess work, and into the realm of unreasonableness, as obviously, as has been held by us, there was no intelligent care and deliberation before any of these parameters have been fixed.

52. We have already seen that the Impugned Regulation is dated 16.10.2015, which was to come into force only on 1.1.2016. We have been shown a technical paper issued by the same Authority on 13.11.2015 i.e. a few days after the Impugned Regulation, in which the Authority has itself recognised that 36.9% of call drops take place because of the fault at the consumer's end. Instead of having a relook at the problem in the light of the said technical paper, the Authority has gone ahead with the Impugned Regulation, which states that the said Regulation has been brought into force because of deficiency of service in service providers leading to call drops. The very basis of this statement contained in the Explanatory Memorandum to the Impugned Regulation is found by the self-same Authority to be incorrect only a few days after publishing the Impugned Regulation. This itself shows the manifest arbitrariness on the part of the TRAI, which has not bothered to have a relook into the said problem. For all the aforesaid reasons, we find that the Impugned Regulation is manifestly arbitrary and therefore violative of Article 14, and is an unreasonable restriction on the right of the appellants' fundamental right under Article 19(1)(g) to carry on business, and is therefore struck down as such.

53. Viewed at from a slightly different angle it is clear that if an individual consumer were to go to the consumer forum for compensation for call drops, he would have to prove that the call drop took place due to the fault of the service provider. He would further have to prove that he has suffered a monetary loss for which he has to be compensated, which the Explanatory Memorandum itself says is impossible to compute. Thus, the Impugned Regulation completely avoids the adjudicatory process, and legislatively lays down a penal consequence to a service provider for a call drop taking place without the consumer being able to prove that he is not himself responsible for such call drop and without proof of any actual monetary loss. Whereas individual consumers, either before the Consumer Forum, or in a dispute as a group with service providers before the TRAI, would fail in an action to recover compensation for call drops, yet a statutory penalty is laid down, applicable legislatively, and without any adjudication. This again makes the Impugned Regulation manifestly arbitrary and unreasonable.

54. We have seen that the 2000 Amendment has taken away adjudicatory functions from the TRAI, leaving it with administrative and legislative functions. By Section 14 of the Act, adjudicatory functions have been vested in an Appellate Tribunal, where disputes between a group of consumers and the service providers are to be adjudicated by the Appellate Tribunal. In stark contrast, under the scheme of the Electricity Act, 2003, the Central Electricity Regulatory Commission and the

various State Electricity Regulatory Commissions have to discharge legislative, administrative, and quasi-judicial functions. This is clear on a reading of Section 79(1)(f) and Section 86(1)(f) of the Electricity Act, which are set out hereinbelow:-

> "Section 79. Functions of Central Commission: --- (1) The Central Commission shall discharge the following functions, namely:-
>
> (f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to
>
> (d) above and to refer any dispute for arbitration;

Section 86. Functions of State Commission: --- (1) The State Commission shall discharge the following functions, namely: -

> (f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration."

55. Secondly, as part of the adjudicatory process, compensation can be paid to an affected person if a licensee fails to meet standards prescribed without prejudice to any penalty which may be imposed or prosecution which may be initiated. This takes place under Section 57 of the said Act, which reads as under:-

> "Section 57. Consumer Protection: Standards of performance of licensee: (1) The Appropriate Commission may, after consultation with the licensees and persons likely to be affected, specify standards of performance of a licensee or a class of licensees.
>
> (2) If a licensee fails to meet the standards specified under sub-section (1), without prejudice to any penalty which may be imposed or prosecution be initiated, he shall be liable to pay such compensation to the person affected as may be determined by the Appropriate Commission: Provided that before determination of compensation, the concerned licensee shall be given a reasonable opportunity of being heard.
>
> (3) The compensation determined under sub-section (2) shall be paid by the concerned licensee within ninety days of such determination."

56. Obviously, when such compensation is to be paid to a person who is affected by breach of a standard of quality required under the Act, such compensation can only be for actual loss suffered, and only as a result of fault of the service provider being established before a quasi judicial Tribunal. This may be notwithstanding the fact that the service provider otherwise meets the average of 2% call drops per month allowed to him by the 2009 Quality of Service Regulation. This is for the reason that once fault and actual loss suffered are established before a quasi judicial Tribunal, it would not be open to plead, on the facts of an individual case, that an overall standard of

performance has been met. For this reason also, a legislatively pre determined penalty, without fault or loss being established by evidence before a quasi judicial authority, and where the cause of a call drop may be because of the consumer himself, renders the Impugned Regulation manifestly arbitrary and unreasonable.

Modification of licence condition by Impugned Regulation

57. The appellants have also argued that the Impugned Regulation seeks to modify the licence conditions, and the licence conditions being a contract between the service provider and the consumer, such conditions can be modified only where the statute contains language by which an Authority is empowered to disregard an agreement between the parties. It will be seen that Section 11(1)(b)(ii), which has been set out hereinabove, expressly contains such language and therefore states that terms and conditions of interconnectivity between the service providers may be fixed notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the TRAI Amendment Act, 2000.

58. The same kind of language is contained in Section 402(d) of the Companies Act, 1956, which reads as follows:-

> "Section 402. POWERS OF TRIBUNAL ON APPLICATION UNDER SECTION 397 OR 398.
>
> Without prejudice to the generality of the powers of the Tribunal under section 397 or 398, any order under either section may provide for –
>
> (d) the termination, setting aside or modification of any agreement, howsoever arrived at, between the company on the one hand, and any of the following persons, on the other, namely :
>
> (i) the managing director,
>
> (ii) any other director,
>
> (iii) and (iv) [***]
>
> (v) the manager, upon such terms and conditions as may, in the opinion of the Tribunal be just and equitable in all the circumstances of the case."

59. The said Section is now contained in Section 242(2)(e) of the Companies Act, 2013.

"242. Powers of the Tribunal.

(2) Without prejudice to the generality of the powers under sub-section (1), an order under that sub-section may provide for—

(e) the termination, setting aside or modification, of any agreement, howsoever arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case."

60. We were also referred to Section 27(d) of the Competition Act, 2002, in this behalf which reads as follows:

> "27. Orders by Commission after inquiry into agreements or abuse of dominant position. Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:—
>
> (d) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;."

61. In Union of India v. Assn. of Unified Telecom Service Providers of India, (2011)10 SCC 543, this Court held:

> "A Constitution Bench of this Court in State of Punjab v. Devans Modern Breweries Ltd. [(2004) 11 SCC 26] relying on Har Shankar case [(1975) 1 SCC 737] and Panna Lal v. State of Rajasthan [(1975) 2 SCC 633] has held in para 121 at p. 106 that issuance of liquor licence constitutes a contract between the parties. Thus, once a licence is issued under the proviso to sub-section (1) of Section 4 of the Telegraph Act, the licence becomes a contract between the licensor and the licensee." (para 40).

62. Having regard to the above, it is clear that the licence conditions, which are a contract between the service providers and consumers, have been amended to the former's disadvantage by making the service provider pay a penalty for call drops despite there being no fault which can be traceable exclusively to the service provider, and despite the service provider maintaining the necessary standard of quality required of it – namely, adhering to the limit of an average of 2% of call drops per month. We have already seen that condition 28 of the licence requires the licensee to ensure that the quality of service standards, as prescribed by TRAI, are adhered to, and that the Impugned Regulation does not lay down quality of service standards. This being so, it is clear that the laying down of a penalty de hors condition 28, which, as we have seen, also requires establishing of fault of the service provider when it does not conform to a quality of service standard laid down by TRAI, would amount to interference with the licence conditions of the service providers without authority of law. On this ground also, therefore, the Impugned Regulation deserves to be struck down.

Transparency

63. Section 11(4) of the Act requires that the Authority shall ensure transparency while exercising its powers and discharging its functions. "Transparency" has not been defined anywhere in the Act.

However, we find, in a later Parliamentary Enactment, namely, the Airports Economic Regulatory Authority of India Act, 2008, that Section 13 deals with the functions of the Airports Economic Regulatory Authority, (which is an Authority which has legislative and administrative functions). "Transparency" is defined, by sub-section (4), as follows:-

> "THE AIRPORTS ECONOMIC REGULATORY AUTHORITY OF INDIA ACT, 2008
>
> 13. Functions of Authority.
>
> (4) The Authority shall ensure transparency while exercising its powers and discharging its functions, inter alia,—
>
> (a) by holding due consultations with all stake-holders with the airport;
>
> (b) by allowing all stake-holders to make their submissions to the authority; and
>
> (c) by making all decisions of the authority fully documented and explained."

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

65. In fact, a judgment of the Court of Appeal in England, being Regina v. North and East Devon Health Authority, Ex parte Coughlan, [2001] QB 213, puts the meaning of "consultation" rather well as follows:-

> "It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken."

66. No doubt in the facts of the present case, the Authority did hold due consultations with all stakeholders and did allow all stakeholders to make their submissions to the Authority. However, we find no discussion or reasoning dealing with the arguments put forward by the service providers, that call drops take place for a variety of reasons, some of which are beyond the control of the service provider and are because of the consumer himself. Consequently, we find that the conclusion that service providers are alone to blame and are consequently deficient in service when it comes to call drops is not a conclusion which a reasonable person can reasonably arrive at. We are cognizant of the fact that ordinarily legislative functions do not require that natural justice be followed. However, it has been recognised in some of the judgments dealing with this aspect that natural justice need not be followed except where the statute so provides.

67. In Union of India v. Cynamide India Ltd., (1987) 2 SCC 720, this Court held:

> "The second observation we wish to make is, legislative action, plenary or subordinate, is not subject to rules of natural justice. In the case of Parliamentary legislation, the proposition is self-evident. In the case of subordinate legislation, it may happen that Parliament may itself provide for a notice and for a hearing — there are several instances of the legislature requiring the subordinate legislating authority to give public notice and a public hearing before say, for example, levying a municipal rate — in which case the substantial non-observance of the statutorily prescribed mode of observing natural justice may have the effect of invalidating the subordinate legislation. The right here given to rate payers or others is in the nature of a concession which is not to detract from the character of the activity as legislative and not quasi-judicial. But, where the legislature has not chosen to provide for any notice or hearing, no one can insist upon it and it will not be permissible to read natural justice into such legislative activity." [para 5]

68. Similarly, in M.R.F. Ltd. v. Inspector Kerala Govt., (1998) 8 SCC 227, this Court held:

> "Learned counsel for the appellants contended that before raising the national and festival holidays from their original number under the Parent Act to the number of days contemplated by the Amending Act, the industries or their representatives should have been given an opportunity of a hearing. This argument is wholly untenable. The principles of natural justice cannot be imported in the matter of legislative action. If the legislature in exercise of its plenary power under Article 245 of the Constitution, proceeds to enact a law, those who would be affected by that law cannot legally raise a grievance that before the law was made, they should have been given an opportunity of a hearing.
>
> This principle may, in limited cases, be invoked in the case of subordinate legislation specially where the main legislation itself lays down that before the subordinate legislation is made, a public notice shall be given and objections shall be invited as is usually the case, for example, in the making of municipal bye-laws. But the principle of natural justice, including the right of hearing, cannot be invoked in the making of law either by Parliament or by the State Legislature." [paras 23 – 24]

69. The question of transparency raises a more fundamental question, namely, that of openness in governance. We find that the Right to Information Act of 2005 has gone a long way to strengthen democracy by requiring that the Government be transparent in its actions, so that an informed citizenry is able then to contain corruption, and hold Governments and their instrumentalities accountable to the people of India. The preamble to the said Act, in ringing terms, states:-

> "WHEREAS the Constitution of India has established democratic Republic;

> AND WHEREAS democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;
>
> AND WHEREAS revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;
>
> AND WHEREAS it is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal;
>
> Now, THEREFORE, it is expedient to provide for furnishing certain information to citizens who desire to have it."

70. We find that under Section 4(1) every public authority is not only to maintain all its records duly catalogued and indexed but is to publish, within 120 days from the enactment of the said Act, the procedure followed by it in its decision making process, which includes channels of supervision and accountability. Section 4(1)(b)(iii) states:

> "4. Obligations of public authorities. —(1) Every public authority shall—
>
> (b) publish within one hundred and twenty days from the enactment of this Act,—
>
> (iii) the procedure followed in the decision making process, including channels of supervision and accountability."

71. Under Section 8, there is no obligation to give to any citizen information disclosure of which would prejudicially affect the sovereignty and integrity of India, the security of the State etc. Subject, therefore, to well-defined exceptions, openness in governance is now a legislatively established fact. In fact, in Chief Information Commissioner v. State of Manipur, (2011) 15 SCC page 1, this Court had occasion to deal with the aforesaid Act in the following terms:

> "Before dealing with the controversy in this case, let us consider the object and purpose of the Act and the evolving mosaic of jurisprudential thinking which virtually led to its enactment in 2005.
>
> As its Preamble shows, the Act was enacted to promote transparency and accountability in the working of every public authority in order to strengthen the core constitutional values of a democratic republic. It is clear that Parliament enacted the said Act keeping in mind the rights of an informed citizenry in which transparency of information is vital in curbing corruption and making the Government and its instrumentalities accountable. The Act is meant to harmonise the conflicting interests of the Government to preserve the confidentiality of sensitive information

with the right of citizens to know the functioning of the governmental process in such a way as to preserve the paramountcy of the democratic ideal. The Preamble would obviously show that the Act is based on the concept of an open society.

On the emerging concept of an "open Government", about more than three decades ago, the Constitution Bench of this Court in State of U.P. v. Raj Narain [(1975) 4 SCC 428 : AIR 1975 SC 865] speaking through Mathew, J. held: (SCC p. 453, para 74) "74. ... The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing.The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. [Ed.: See New York Times Co. v. United States, 29 L Ed 2d 822 : 403 US 713 (1971).] To cover with veil of secrecy, the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired." (AIR p. 884, para 74) (emphasis supplied) Another Constitution Bench in S.P. Gupta v. Union of India [1981 Supp SCC 87 : AIR 1982 SC 149] relying on the ratio in Raj Narain [(1975) 4 SCC 428:

AIR 1975 SC 865] held: (S.P. Gupta case [1981 Supp SCC 87 : AIR 1982 SC 149] , SCC p. 275, para 67) "67. ... The concept of an open Government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest." (AIR p. 234, para 66) (emphasis supplied) It is, therefore, clear from the ratio in the above decisions of the Constitution Bench of this Court that the right to information, which is basically founded on the right to know, is an intrinsic part of the fundamental right to free speech and expression guaranteed under Article 19(1)(a) of the Constitution. The said Act was, thus, enacted to consolidate the fundamental right of free speech.

In Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal [(1995) 2 SCC 161] this Court also held that right to acquire information and to disseminate it is an intrinsic component of freedom of speech and expression. (See p. 213, para 43 of the Report.) Again in Reliance Petrochemicals Ltd. v. Indian Express Newspapers Bombay (P) Ltd. [(1988) 4 SCC 592] this Court recognised that the right to information is a fundamental right under Article 21 of the Constitution.

This Court speaking through Sabyasachi Mukharji, J., as His Lordship then was, held: (SCC p. 613, para 34) "34. ... We must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to know is a

basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our Constitution. That right has reached new dimensions and urgency. That right puts greater responsibility upon those who take upon themselves the responsibility to inform." In People's Union for Civil Liberties v. Union of India [(2004) 2 SCC 476] this Court reiterated, relying on the aforesaid judgments, that right to information is a facet of the right to freedom of "speech and expression" as contained in Article 19(1)(a) of the Constitution of India and also held that right to information is definitely a fundamental right. In coming to this conclusion, this Court traced the origin of the said right from the Universal Declaration of Human Rights, 1948 and also Article 19 of the International Covenant on Civil and Political Rights, which was ratified by India in 1978. This Court also found a similar enunciation of principle in the Declaration of European Convention for the Protection of Human Rights (1950) and found that the spirit of the Universal Declaration of 1948 is echoed in Article 19(1)(a) of the Constitution. (See paras 45, 46 and 47 at pp. 494-95 of the Report.) The exercise of judicial discretion in favour of free speech is not only peculiar to our jurisprudence, the same is a part of the jurisprudence in all the countries which are governed by the rule of law with an independent judiciary. In this connection, if we may quote what Lord Acton said in one of his speeches:

> "Everything secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion and publicity." It is, therefore, clear that a society which adopts openness as a value of overarching significance not only permits its citizens a wide range of freedom of expression, it also goes further in actually opening up the deliberative process of the Government itself to the sunlight of public scrutiny.
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> Frankfurter, J. also opined:
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> "The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilisation. 'We live by symbols.' The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution." Actually the concept of active liberty, which is structured on free speech, means sharing of a nation's sovereign authority among its people. Sovereignty involves the legitimacy of governmental action. And a sharing of sovereign authority suggests intimate correlation between the functioning of the Government and common man's knowledge of such functioning. (Active Liberty by Stephen Breyer, p. 15.)" [paras 5 – 16]

72. In another context also this Court has emphasized the importance of openness of governance. In Global Energy Ltd. V. Central Electricity Regulatory Commission, (2009) 15 SCC 570 at 589, this Court stated:

> "The law sometimes can be written in such a subjective manner that it affects the efficiency and transparent function of the Government. If the statute provides for pointless discretion to agency, it is in essence demolishing the accountability strand within the administrative process as the agency is not under obligation from an objective norm, which can enforce accountability in decision-making process. All law-making, be it in the context of delegated legislation or primary legislation, has to conform to the fundamental tenets of transparency and openness on one hand and responsiveness and accountability on the other. These are fundamental tenets flowing from due process requirement under Article 21, equal protection clause embodied in Article 14 and fundamental freedoms clause ingrained under Article 19. A modern deliberative democracy cannot function without these attributes."

73. We have been referred to the U.S. Administrative Procedure Act, Section 553 of which states as follows:-

> 5 USCA § 553 § 553 - Rule making
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> (a)This section applies, according to the provisions thereof, except to the extent that there is involved— (1) a military or foreign affairs function of the United States; or (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b)General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include— (1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply— (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d)The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except— (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." In Corpus Juris Secundum (March 2016 Update) it is stated:

> "Under the informal rulemaking requirements of the Federal Administrative Procedure Act, after a federal administrative agency considers the relevant matter presented, it must incorporate in the rules adopted a concise general statement of their basis and purpose. The purpose of the requirement is to enable courts, which have the duty to exercise review, to be aware of the legal and factual framework underlying the agency's actions. The requirement is a means of holding an agency accountable for administering the laws in a responsible manner, free from arbitrary conduct. The statement is not intended to be an abstract explanation addressed to an imaginary complaint but is intended, rather, to respond in a reasoned manner to the comments received, to explain how the agency resolved the significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule. The statement must identify what major issues of policy were ventilated and why the agency reacted to them as it did and should enable a reviewing court to ascertain such matters. The statement must respond to the major comments received, explain how they affected the regulation, and, where an old regulation is being replaced, explain why the old regulation is no longer desirable.
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> Agencies have a good deal of discretion in expressing the basis of a rule. The requirement is not to be interpreted over literally, but it should not be stretched into a mandate to refer to all specific issues raised in the comments on the proposed regulations. Although an agency must genuinely consider comments it receives from interested parties, there is no requirement that an agency discuss in great detail all comments, especially those which are frivolous or repetitive. Although the agency need not address every comment received, it must respond in a reasoned manner to those that raise significant problems, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule. Conclusory statements will not fulfill the administrative agency's duty to incorporate in adopted rules a concise general statement of their basis and purpose. The agency must articulate a satisfactory explanation for its action, including a rational connection between the facts it found and the choices it made. Under some circumstance, agencies must identify specific studies or data that they rely upon in arriving at their decision to adopt a rule.

> Regulations which lack a statement of basis and purpose may be upheld if the basis and purpose and obvious. Moreover, the failure of an agency to incorporate the statement does not render a rule ineffective as to parties to litigation who had knowledge of the rule.
>
> Despite the statutory language mandating that the statement of basis of purposes be "incorporate[d] in the rules adopted," the statement of basis and purpose does not have to be published at precisely the same moment as the rules. Rather, the rules and statement need only be published close enough together in time so that there is no doubt that the statement accompanies, rather than rationalizes, the rules."

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

75. In the present case, we find that the High Court judgment is flawed for several reasons. The judgment is not correct when it says that there can be no dispute that the Impugned Regulation has been made to ensure quality of service extended to consumers by service providers. As has been pointed out hereinabove, the Impugned Regulation does not lay down any quality of service – what it does is to penalise service providers even though they conform to the 2% standard laid down by the Quality of Service Regulations, 2009. In holding that the Impugned Regulation therefore conforms to Section 11(1)(b)(v), the judgment is plainly incorrect. Similarly, the finding that notional compensation is given, and that therefore no penalty is imposed, is also wrong and set aside for the reasons given by us hereinabove. The finding that a transparent process was followed by TRAI in making the Impugned Regulation is only partly correct. While it is true that all stakeholders were consulted, but unfortunately nothing is disclosed as to why service providers were incorrect when they said that call drops were due to various reasons, some of which cannot be said to be because of the fault of the service provider. Indeed, the Regulation, in assuming that every call drop is a deficiency of service on the part of the service provider, is plainly incorrect. Further, the High Court judgment, when it speaks of the technical paper of 13.11.2015, seems to have mixed it up with the consultation paper dated 4.9.2015 referred to in the Explanatory Memorandum to the

Impugned Regulation. The judgment has entirely missed the fact that the technical paper of 13.11.2015 unequivocally states that the causes for call drops are many and are often beyond the control of service providers and attributable to the extent of 36.9% to the consumers themselves. The judgment is also incorrect when it says that 100% performance is not demanded from service providers when call drops are made. We have already pointed out that the 2% standard has admittedly been met by almost all the service providers, and this being so, even if the very first call drop and all other subsequent call drops are made within the network of a service provider and are within the parameters of 2%, yet the penal consequence of the amended regulation must follow. The judgment is also incorrect in stating that the Impugned Regulation has attempted to balance the interest of service providers by limiting call drops to be compensated to only three and by limiting compensation to only the calling and not the receiving consumer. We have already pointed out that a penalty that is imposed without any reason either as to the number of call drops made being three, and only to the calling consumer, far from balancing the interest of consumers and service providers, is manifestly arbitrary, not being based on any factual data or reason. We also find that when the service provider argued that it was being penalised despite being within the tolerance limit of 2%, the answer given by the High Court is disingenuous, to say the least, when the High Court says that 2% is a quality parameter for the entire network as opposed to payment of compensation to an individual consumer. We are unable to appreciate the aforesaid reasoning. As has been held by us above, the two sets of Regulations have to be considered together when the Impugned Regulation is being tested on the ground of violation of fundamental rights. Also, the High Court did not advert to a large number of other submissions made by the appellants before them and/or answer them correctly in law. As a result, therefore, we set aside the judgment of the High Court and allow these appeals, declaring that the Impugned Regulation is ultra vires the TRAI Act and violative of the appellant's fundamental rights under Articles 14 and 19(1)(g) of the Constitution.

.....J. (Kurian Joseph) .....J. (R.F. Nariman) New Delhi;

May 11, 2016.