Star India Private Limited vs Department Of Industrial Policy And ... on 30 October, 2018

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Author: R.F. Nariman

Bench: Navin Sinha, R.F. Nariman

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.7326-7327 OF 2018

STAR INDIA PRIVATE LIMITED …APPELLANT

VERSUS

DEPARTMENT OF INDUSTRIAL POLICY
AND PROMOTION & ORS. …RESPONDENTS

WITH

CIVIL APPEAL NOS.7328-7329 OF 2018

JUDGMENT

R.F. NARIMAN, J.

1. The present civil appeals raise a challenge to certain clauses of the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017 (hereinafter referred to as the "Regulation") notified on 3.3.2017 and the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017 (hereinafter referred to as the "Tariff Order") dated 3.3.2017 made under the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as the "TRAI Act"). Since regulations made under the TRAI Act were under challenge, a writ petition was filed before the Madras High Court in which the main issues that arose before the Division Bench were as follows:-

a. Whether the Telecom Regulatory Authority of India (hereinafter referred to as "TRAI") has the power to regulate only the 'means of transmission', viz. the 'carriage' aspect of broadcasting, and does not have the power to regulate the 'content' of the broadcast (i.e. the channel and/or its constituent programmes)?

b. Whether the impugned clauses, in fact, and in effect, regulate the content of the broadcast (i.e. the channel and/or its constituent programmes)?

c. Whether the impugned clauses have a direct effect on the pricing and marketing of a television channel by the broadcaster and hence is an illegal interference with the content of the broadcast (i.e. the channel and/or its constituent programmes)?

The appellants have contended that the impugned clauses have the effect of regulating programmes and television channels, their pricing and their marketing and manner of offering/ bundling in the following illustrative manner, which is beyond the scope of TRAI's jurisdiction of regulating "means of transmission":

a. TRAI has effectively fixed a uniform maximum retail price for each TV channel at INR 19/-;

b. TRAI has stipulated that a television channel, which is individually priced at more than INR 19/-

cannot be included in a collection of television channels (commonly referred to as a "bouquet") and can only be offered on an individual/ a-la-carte/ stand-alone basis;

c. TRAI has stipulated that the price of a bouquet of television channels shall not be less than 85% of the sum of a-la-carte prices of television channels comprised in the bouquet;

d. TRAI has stipulated that the sum of discount on television channels and the distribution fee paid by broadcasters to a distributor of television channels, cannot exceed 35% of the maximum retail price of the television channel;

e. Television channels cannot be priced differently for different distribution platforms;

f. Channels of one broadcaster cannot be offered by another broadcaster in their bouquet of television channels, even after obtaining due authorization;

g. Promotional schemes (i) can only be offered on a-la-carte prices for offering television channels and not on bouquet prices, (ii) cannot exceed 90 days at a time, and (iii) can be offered only twice in a year;

h. High definition and standard definition channels cannot be in the same bouquet of television channels;

i. Pay channels and free to air channels cannot be in the same bouquet.

2. The Division Bench consisting of M. Sundar, J. and Chief Justice Indira Banerjee differed in their conclusions. As per M. Sundar, J., it was held:-

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

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

3. Differing from M. Sundar, J., the learned Chief Justice held:-

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

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

the Judge before whom the matter may be placed."

4. The third Judge who therefore resolved the controversy in favour of the present respondents was M.M. Sundresh, J. After an exhaustive analysis of the arguments and the Acts in question, the third learned Judge sided with the Hon'ble Chief Justice and held:-

> "27.1. In her short, yet clear decision, the Hon'ble Chief Justice has held that there is sufficiency of the power under the TRAI Act as against the Indian Copyright Act, 1957. They travel in their respective paths, not intended to cross. The scope of the amendments made in the year 2012 along with Section 37 was correctly dealt with. This Court is of the view that the Copyright Act has rightly taken note of being the one which gives succour to the copyright holder as against the licensee, who may also be a BRR holder. It was rightly held that the provisions deal with the protection of the right of the copyright holder. It is rather pertinent to keep in mind the discussion on the Copyright Act, 1957, which is to be seen contextually qua the issue i.e., field being occupied. This Court also does not find anything wrong with the finding given on the so called concession given by the learned counsel for the TRAI being inconsequential, as the very jurisdiction of the Act itself was taken for consideration. The finding has to be seen contextually along with the other issues including the overall stand taken in the counter affidavit of respondents 1 to 4. Similarly the self imposed restrictions while invoking the extraordinary jurisdiction under Article 226 of the Constitution of India, deserves to be concurred with. 27.2. Though a submission has been made on the decision arrived at with respect to the fixation of cap at 15% discount on the MRP of the bouquet and the discounts given under the tariff order, the aforesaid decision cannot be a ground to hold that the ultimate conclusion arrived at on the other issues would necessarily follow suit. After all, as a reference Court, this Court is concerned with the views expressed by either of the learned Judges on the points of difference. Accordingly, the dissenting judgment stands concurred.
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> 28. In the result, this reference qua points of difference stands ordered concurring with the dissenting judgment. No costs."

5. Dr. A.M. Singhvi, learned Senior Advocate appearing on behalf of the appellants, has referred to several statutes and judgments in the course of his detailed submissions. According to the learned Senior Advocate, the TRAI Act was amended in 2000, as a result of which the TRAI Act was extended to broadcasting services which were undefined. By a Central Government notification dated 9.1.2004, the TRAI Act was expressly extended to broadcasting services, and certain functions were allocated to TRAI in addition to those contained in Section 11(1)(a) of the TRAI Act, as also to specify norms and periodicity of revision of rates of pay channels. According to the learned Senior Advocate, the definition of "telecommunication service" contained in Section 2(1)(k) of the TRAI Act only enables TRAI to regulate transmission or reception of broadcasting services, which essentially relates to regulatory measures taken for carriage of these signals.

According to the learned Senior Advocate, his clients, namely, broadcasters, do not have to obtain the permission of the Government of India for uplinking their programmes with a particular satellite at a particular frequency, after which permission has to be obtained for downlinking such channels.

At this point, the broadcaster, post downlinking, sends the signal to a multi-system operator (hereinafter referred to as an "MSO"), who in turn sends the signal to a cable TV operator from which it is beamed to the ultimate consumer watching the television programmes. For this, the broadcasters pay a distribution fee and a carriage fee for transportation of such signal, then send the signals to the MSO, who in turn sends it on to the cable TV operator, who beams the signal to the ultimate consumer. Distribution fee, carriage fee and networking capacity fee are all payable by the broadcaster, with which the broadcaster can have no quarrel. Equally, in a situation where direct to home services are provided, instead of the MSO one has persons, like, for example, TATA Sky, who then beam the signal directly to the consumer via satellite. TRAI under the TRAI Act cannot restrict pricing, bundling or packaging done by the broadcaster, as TRAI's functions kick in under the Cable Television Networks (Regulation) Act, 1995 (hereinafter referred to as the "Cable TV Act") only after the signal reaches the Cable TV operator. According to the learned Senior Advocate, at a stage anterior to the Cable TV operator beaming signals to the consumers, the broadcasters' rights are not covered by the TRAI Act, which regulates only carriage, but by the Copyright Act, 1957, which regulates content. Dr. Singhvi took us through the Statement of Objects and Reasons for the TRAI Act, the Preamble thereof, and in particular Sections 2(1)(k), 11 and 36, to contend that this Act is "carriage-centric", and is thus limited to regulation of service in transmission alone and does not extend to or include the subject matter or content of the transmission. The Copyright Act, on the other hand, is "content-centric" and deals with intellectual property rights which broadcasters have in the form of both copyright, as well as broadcast reproduction right inter alia under Section 37 of the Copyright Act. He relied heavily on the 2012 amendment to the Copyright Act, and in particular on Chapter 8 of the said Act. According to him, tariff, which relates to content, is governed by the Copyright Act and not by the TRAI Act, whereas transmission and delivery to the consumer, namely, carriage, alone pertains to TRAI's jurisdiction.

According to him, the impugned clauses of the Regulation as well as the Tariff Order impact and have the effect of regulating pricing and terms and conditions of licensing of TV channels, including their packaging, bundling and other manner of offering the said channels and their underlying programmes, being films, TV shows, etc., which are all aspects of intellectual property rights covered by the Copyright Act. He relied heavily upon the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, 2007 (hereinafter referred to as the "Sports Act"), by way of contrast, and stated that in this Act the definitions of "broadcaster", "broadcasting", "broadcasting service" and "content" made it clear that the reach of this Act was not merely confined to transmission of signal but extended to content as well, and argued that the difference therefore in the definitions contained in the Sports Act would show that the reach of the TRAI Act in contrast was limited and did not go to content. He also relied strongly upon the Cable TV Act and in particular on the definitions of "broadcaster" and "cable operator" therein, as well as Section 4A and 5 thereof, read with the Rules framed thereunder, which would show that "content" could certainly be regulated by TRAI under the Sports Act, but only in the manner provided by that Act and from the stage of the cable TV operator to the consumer and not before. It is thus clear that this being the case, the aforesaid regulations are outside the power of TRAI under the TRAI Act and must thus be struck down.

6. Shri P. Chidambaram, learned Senior Advocate appearing on behalf of some of the appellants, argued in support of Dr. Singhvi. He referred, in particular, to the definitions contained in Sections 2(dd) and 2(ff) of the Copyright Act and stated that "broadcast" would only mean keeping in readiness a set of TV channels, which may or may not be further carried by the MSO of the Cable TV Operator. According to him, in substance, the impugned Regulation and Tariff Order went beyond the jurisdiction of TRAI under the TRAI Act in that they sought to regulate "content" which would mean the original work such as a book, which could then be made into a film and finally broadcast by the appellants. Anything which impinges upon the aforesaid "content" in terms of making, buying, packaging or marketing, including licensing and assignment, would directly be covered by the Copyright Act and would, therefore, be outside the jurisdiction of the TRAI Act. He also strongly relied upon the judgment of this Court in Petroleum and Natural Gas Regulatory Board v. Indraprastha Gas Ltd., (2015) 9 SCC 209, to state that in a parallel fact circumstance, no tariff could be fixed by the Board for the commodity in question, but only for carriage of the said commodity through pipelines.

7. Shri Rakesh Dwivedi, learned Senior Advocate appearing on behalf of TRAI, countered each of these submissions.

According to the learned Senior Advocate, a reading of the TRAI Act, together with the Statement of Objects and Reasons, would show that it was an Act conceived in the public interest in order to protect the interests of both service providers like the broadcasters here, as well as the consumers. Interest of the consumers of broadcasting services is therefore one of the paramount considerations when one comes to the authority or jurisdiction of TRAI under the said Act. According to the learned Senior Advocate, from the stage of the teleport from which a TV channel is uplinked by a broadcaster to a satellite and then downlinked to an MSO, permissions of the Central Government have to be taken for both uplinking and downlinking, under guidelines issued, which he took us through.

The said guidelines would show that content is certainly regulated at this stage, as TV channels which are contrary to the security of the state, for example, would not be allowed to be beamed. According to him, regardless of whether the teleport from which the broadcaster's signal is uplinked to a satellite is owned by the broadcaster, or is beamed by a person other than the broadcaster, a licence under Section 4 of the Telegraph Act and Section 5 of the Wireless Telegraphy Act is a sine qua non for operating a teleport and that therefore it is wholly fallacious to say that broadcasters need not be licencees under the Telegraph Act when they broadcast signals, either from their own teleport, or in conjunction with the owner of a teleport, which reach the ultimate consumer in India. According to the learned Senior Advocate, therefore, a constricted reading of the TRAI Act would stultify the nature of the beneficial legislation contained therein, which is to look after consumer interests as well. It is clear therefore that the definition of "telecommunication service" in Section 2(1)(k) cannot be read in the manner suggested by Dr. Singhvi, and would include, when it comes to broadcasters, beaming and transmission of signals from the teleport onwards right up till the stage of the MSO and the cable TV operator thereafter. He stressed upon Section 11(1)(b) in particular and stated that in order to ensure effective interconnection between different service providers, it was necessary to lay down regulations made under Section 36 of the Act that balanced the interest of broadcasters with the interest of consumers. He was at pains to point out that at no stage does either the Regulation or the Tariff Order seek to regulate, directly or indirectly, the content of the matter contained in the television channel that is beamed. As an example, he stated that neither the Regulation nor the Tariff Order interferes with what could be beamed by the broadcaster, but only to the manner of such beaming, keeping the interest of both the broadcaster as well as the ultimate consumer in mind.

He also took us through the consultation papers which preceded the draft regulation which was framed, and pointed out that most of what was contained in the impugned Regulation and Tariff Order, was either requested by the broadcasters themselves or suggested by them to safeguard their interests, which TRAI has in principle followed. What is interesting to note is that it was only at a later stage, before the draft regulation was made, that references to content and the Copyright Act were made solely as an afterthought. He also relied upon the Cable TV Act and stated that it was important to note that it was the same regulator, namely, TRAI, who had to regulate the same signal from broadcaster to MSO, MSO to Cable TV operator and Cable TV operator to consumer. It would be extremely anomalous to find that from Cable TV operator onwards regulations such as those made by TRAI in the present case would pass muster, but not from the stage of broadcaster to MSO and MSO to Cable TV operator. He made it clear that the Sports Act would have no application in the present case as it dealt with the compulsory broadcast of certain sports events by broadcasters, which was why content was referred to in the said Act. He reiterated that at no stage does TRAI seek to or in fact regulate content of what is broadcasted so that any reference to this Act would be wholly irrelevant for the purpose of deciding this case. He also strongly relied upon Sections 3AA and 4 of the Telegraph Act to buttress his submission. According to him, since the Copyright Act operates in a distinct and separate field from the TRAI Act, equally the red herring of the Copyright Act would have no real relevance to the powers and functions of TRAI acting under the TRAI Act. He also cited certain decisions which will be referred to later in this judgment.

8. Shri Vikas Singh, learned Senior Advocate also appearing on behalf of TRAI, referred to Section 2(1)(k) of the TRAI Act in order to explain that the main provision and the proviso had to be harmonised in the manner suggested by the Delhi High Court in Star India Pvt. Ltd. v. TRAI, (2018) 146 DLT 455, and that, so harmonised, it is clear that the main provision did not include broadcasting services only for the time being. The proviso which was added by the Amendment Act of 2000 made it clear that the time had come to include broadcasting services as well. He further argued that the appellants in the present case had been taking contradictory stands throughout. As an example of such stand, he referred to an Order of the Competition Commission of India dated 27.2.2018, in which he referred to the stand of the appellants stating that the Competition Commission had no jurisdiction to look into pricing and the manner of offering TV channels, which lies in the domain of the sectoral regulator TRAI and is, therefore, an occupied field. He also referred to how the analogue system led to great leakages which led to less revenue and how the movement towards digitisation, therefore, gave broadcasters a great fillip in their revenue. He also referred to the consultations that went on between all stakeholders and consumers which led up to the impugned Regulation, which was a Regulation which balanced the interests of broadcasters and

consumers.

9. Shri K.V. Vishwanathan, learned Senior Advocate appearing on behalf of the multi-system operators, placed strong reliance on Regulations 3(1) and 3(2) of the impugned Regulation, which, according to him, have not been challenged by the appellants. These regulations make it clear that the broadcasters have to offer TV channels on a non-discriminatory basis. The only reason why pricing is referred to in the impugned Regulation is to fulfil Regulation 3(2), which is to ensure that the offer made is non-discriminatory and, therefore, the Regulation and the Tariff Order read as a whole would, in fact, not impact content at all but be regulations for carriage of the signals stricto senso. He relied on judgments which held that TRAI's regulatory powers are extremely wide. He also relied upon several provisions of the Copyright Act, including Section 52(1)(b), which made it clear that there would be no infringement of copyright, assuming the arguments of the appellants to be correct, when there is transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public.

10. Shri Shyam Divan, learned Senior Advocate, appeared on behalf of direct-to-home companies. He referred to and relied upon various provisions of the Copyright Act, in particular, Section 37 thereof, making it clear that the broadcast reproduction right referred to is born only after the broadcast which has passed down from the broadcaster through the MSO to the cable operator to the consumer and/or through the DTH service provider to the consumer is over. He stressed the fact that this right comes in only when a re-broadcast or a subsequent second broadcast takes place after the original broadcast, which would not be covered by the Regulation or the Tariff Order in the present case.

11. Shri Krishnan Venugopal, learned Senior Advocate appearing for some of the consumers, referred to the Standing Committee of Parliament, in which it was pointed out that digitisation of cable TV services, by switching from the older analogue system in phases from 2012 onwards, had greatly increased the revenue of broadcasters and stated that these benefits could not possibly be denied by the broadcasters. In addition, the selfsame broadcasters have been regulated throughout and are raising questions relating to jurisdiction only after the present Regulation and Tariff Order have been made largely with their consent. He also cited certain decisions on the reach of TRAI under the TRAI Act.

12. Having heard learned counsel for the parties, it is important to first deal with the TRAI Act. In Secretary, Ministry of Information & Broadcasting, Govt. of India & Ors. v.

Cricket Association of Bengal, (1995) 2 SCC 161, this Court referred to the pressing need to create a comprehensive enactment regulating airwaves, being public property. Public interest demanded that service providers be regulated and the usage of the airwaves through frequencies be regulated. A direction was thus issued to the Government of India to formulate a comprehensive enactment after noting the inadequacies that were felt in the Indian Telegraph Act, 1885.

This Court stated:

"Per Sawant, J.:

78. There is no doubt that since the airwaves/frequencies are a public property and are also limited, they have to be used in the best interest of the society and this can be done either by a central authority by establishing its own broadcasting network or regulating the grant of licences to other agencies, including the private agencies. What is further, the electronic media is the most powerful media both because of its audio-

visual impact, and its widest reach covering the section of the society where the print media does not reach. The right to use the airwaves and the content of the programmes therefore, needs regulation for balancing it and as well as to prevent monopoly of information and views relayed, which is a potential danger flowing from the concentration of the right to broadcast/telecast in the hands either of a central agency or of few private affluent broadcasters. That is why the need to have a central agency representative of all sections of the society free from control both of the Government and the dominant influential sections of the society. xxx xxx xxx

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

122. We, therefore, hold as follows:

[i] The airwaves or frequencies are a public property. Their use has to be controlled and regulated by a public authority in the interests of the public and to prevent the invasion of their rights. Since the electronic media involves the use of the airwaves, this factor creates an in-built restriction on its use as in the case of any other public property. [ii] The right to impart and receive information is a species of the right of freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution. A citizen has the fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose. However, this right to have an access to telecasting has limitations on account of the use of the public property, viz., the airwaves, involved in the exercise of the right and can be controlled and regulated by the public authority. This limitation imposed by the nature of the public property involved in the use of the electronic media is in addition to the restrictions imposed on the right to freedom of speech and expression under Article 19(2) of the Constitution.

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

Per Jeevan Reddy J.:

> 201.1.(b) Airwaves constitute public property and must be utilised for advancing public good. No individual has a right to utilise them at his choice and pleasure and for purposes of his choice including profit... 201.1.(c) Broadcasting media is inherently different from Press or other means of communication/ information. The analogy of press is misleading and inappropriate. This is also the view expressed by several Constitutional Courts including that of the United States of America.
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> xxx xxx xxx 201.4. The Indian Telegraph Act, 1885 is totally inadequate to govern an important medium like the radio and television, i.e., broadcasting media. The Act was intended for an altogether different purpose when it was enacted. This is the result of the law in this country not keeping pace with the technological advances in the field of information and communications. While all the leading democratic countries have enacted laws specifically governing the broadcasting media, the law in this country has stood still, rooted in the Telegraph Act of 1885.

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

13. Accordingly, the Government formulated a National Telecom Policy in 1994 and then decided to promulgate an ordinance which led to the enactment of the TRAI Act. The Statement of Objects and Reasons of this Act stressed:

> "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.
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> 2. In view of above, it was proposed to set up an independent Telecom Regulatory Authority as a non-statutory body and for that purpose the Indian Telegraph (Amendment) Bill, 1995 was introduced and then passed by Lok Sabha on 6th August, 1995.

At the time of consideration of the aforesaid Bill in Rajya Sabha, having regard to the sentiments expressed by the Members of Rajya Sabha and of the views of the Standing Committee on Communication which expressed a hope that steps will be taken to set up a Statutory Authority, it is proposed to set up the Telecom Regulatory Authority of India as a statutory authority.

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

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

> (i) ensuring technical compatibility and effective inter-relationship between different service providers;
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> (ii) regulation of arrangement amongst service providers of sharing their revenue derived from providing telecommunication service;
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> (iii) ensuring compliance of licence conditions by all service providers;
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> (iv) protection of the interest of the consumers of telecommunication service;
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> (v) settlement of disputes between service providers;
>
> (vi) fixation of rates for providing telecommunication service within India and outside India;
>
> (vii) ensuring effective compliance of universal service obligations.

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

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

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

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

9. The Bill seeks to replace the said Ordinance." (Emphasis supplied.)

14. The said Act was amended by Act 2 of 2000, which substituted the Preamble of the TRAI Act thus:

> "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" (Emphasis supplied.)

15. The Amendment Act of 2000 added a proviso to the definition of "telecommunication service" under Section 2(1)(k), permitting the Central Government to notify other services to be telecommunication services including broadcasting services.

The relevant provisions of the TRAI Act are, therefore, set out hereinbelow:

> "2(1) In this Act, unless the context otherwise requires,-
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> xxx xxx xxx
>
> (e) "licensee" means any person licensed under sub-section (1) of Section 4 of the Indian Telegraph Act, 1885 (13 of 1885) for providing specified public telecommunication services;
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> (ea) "licensor" means the Central Government or the telegraph authority who grants a licence under Section 4 of the Indian Telegraph Act, 1885; xxx xxx xxx
>
> (j) "service provider" means the Government as a service provider and includes a licensee;
>
> (k) "telecommunication service" means service of any description (including electronic mail, voice mail, data services, audio tax services, video tax services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electromagnetic means but shall not include broadcasting services.

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

xxx xxx xxx

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

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

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

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

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

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

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

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

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

(viii) efficient management of available spectrum;

(b) discharge the following functions, namely:—

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

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

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

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

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

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

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

(viii) keep register maintained under clause

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

(ix) ensure effective compliance of universal service obligations;

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

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

> Provided that the recommendations of the Authority specified in clause (a) of this sub-section shall not be binding upon the Central Government:
>
> Provided further that the Central Government shall seek the recommendations of the Authority in respect of matters specified in sub-clauses (i) and
>
> (ii) of clause (a) of this sub-section in respect of new licence to be issued to a service provider and the Authority shall forward its recommendations within a period of sixty days from the date on which that Government sought the recommendations:
>
> Provided also that the Authority may request the Central Government to furnish such information or documents as may be necessary for the purpose of making recommendations under sub-clauses (i) and
>
> (ii) of clause (a) of this sub-section and that Government shall supply such information within a period of seven days from receipt of such request:
>
> Provided also that the Central Government may issue a licence to a service provider if no recommendations are received from the Authority within the period specified in the second proviso or within such period as may be mutually agreed upon between the Central Government and the Authority: Provided also that if the Central Government, having considered that recommendation of the Authority, comes to a prima facie conclusion that such recommendation cannot be accepted or needs modifications, it shall refer the recommendation back to the Authority for its

reconsideration, and the Authority may, within fifteen days from the date of receipt of such reference, forward to the Central Government its recommendation after considering the reference made by that Government. After receipt of further recommendation if any, the Central Government shall take a final decision. (2) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the Authority may, from time to time, by order, notify in the Official Gazette the rates at which the telecommunication services within India and outside India shall be provided under this Act including the rates at which messages shall be transmitted to any country outside India:

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

(3) While discharging its functions under sub-

section (1), or sub-section (2) the Authority shall not act against the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.

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

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 fulfilment of which a copy of register may be obtained under sub-clause (viii) of clause (b) of sub-section (1) of Section 11;

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

16. The proviso to section 2(1)(k) was challenged in the Delhi High Court, which challenge was repelled by the Delhi High Court in Star India Private Limited v. TRAI & Ors., (supra.).

An SLP from the said judgment was also dismissed. Acting under Section 2(1)(k), the Central Government issued two notifications on 9.1.2004. S.O.44(E) reads as follows:-

> "S.O. 44(E). – In exercise of the powers conferred by the proviso to clause (k) of sub-section (1) of section 2 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997), the Central Government hereby notifies the broadcasting services and cable services to be telecommunication service.
>
> [Notification No. 39 issued by Ministry of communication and Information Technology dated 9 January 2004. S.O. No. 44(E) issued by TRAI, vide F.No. 13-1/2004]" S.O.45(E) reads as follows:-
>
> "S.O.45(E). – In exercise of the powers conferred by clause (d) of sub-clause (1) of section 11 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997) (hereinafter referred to as the Act), the Central Government hereby entrusts the following additional functions to the Telecom Regulatory Authority of India, established under Sub-section (1) of Section 3 of the Act, in respect of broadcasting services and cable services, namely:- (1) Without prejudice to the provisions contained in clause (a) of sub-section (1) of section 11 of the Act, to make recommendation regarding –
>
> (a) the terms and conditions on which the 'addressable systems' shall be provided to customers.

Explanation – For the purposes of this clause, 'addressable system' with its grammatical variation, means an electronic device or more than one electronic devices put in an integrated system through which signals of cable television network can be sent in encrypted or unencrypted form, which can be decoded by the device or devices at the premises of the subscriber within the limits of authorisation made, on the choice and request of such subscriber, by the cable operator for that purpose to the subscriber.

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

(2) Without prejudice to the provisions of sub- section (2) of section 11 of the Act, also to specify standard norms for, and periodicity of, revision of rates of pay channels, including interim measures. [Notification No. 39 issued by Ministry of Communication and Information Technology, dated 9 January 2004, S.O. No. 45(E) issued by TRAI, vide F.No. 13-1/2004]"

17. We are concerned with the impugned Regulation that was framed on 3.3.2017 under Section 36 of the Act together with the Tariff Order made on the same date. The regulations with which we are

directly concerned are set out hereunder:

> "3. General obligations of broadcasters.— (1) No broadcaster shall engage in any practice or activity or enter into any understanding or arrangement including exclusive contracts with any distributor of television channels that prevents any other distributor of television channels from obtaining signals of television channel of such broadcaster for distribution.
>
> (2) Every broadcaster shall, within sixty days of receipt of written request from a distributor of television channels for obtaining signals of television channel or within thirty days of signing of interconnection agreement with the distributor, as the case may be, provide, on non-discriminatory basis, the signals of television channel to the distributor or convey the reasons in writing for rejection of the request if the signals of television channel are denied to such distributor:
>
> Provided that imposition of any term or condition by the broadcaster, which is unreasonable, shall be deemed to constitute a denial of request: Provided further that this sub-regulation shall not apply to a distributor of television channels, who requests signals of a particular television channel from a broadcaster while at the same time demands carriage fee for distribution of that television channel or who is in default of payment to the broadcaster and continues to be in such default.
>
> (3) If a broadcaster, proposes or stipulates for, directly or indirectly, placing the channel in any specified position in the electronic programme guide or assigning a particular channel number, as a pre-

condition for providing signals, such pre-condition shall also amount to imposition of unreasonable condition.

Explanation: For removal of doubt, it is clarified that if a pay broadcaster offers discount, in non-discriminatory manner, through its reference interconnect offer on the maximum retail price of pay channel, within the limit as specified in sub- regulation (4) of regulation 7, to distributors of television channels for placing the channel in any specified position in the electronic programme guide or assigning particular channel number, such offer of discount shall not be considered a pre-condition. (4) No broadcaster shall propose, stipulate or demand for, directly or indirectly, packaging of the channel in any particular bouquet offered by the distributor of television channels to subscribers. (5) No broadcaster shall propose, stipulate or demand for, directly or indirectly, guarantee of a minimum subscriber base or a minimum subscription percentage for its channel or bouquet. Explanation: For removal of doubt, it is clarified that the subscription percentage of a channel or bouquet refers to the percentage of subscribers subscribing to a specific channel or bouquet out of average active subscriber base of a distributor. xxx xxx xxx

6. Compulsory offering of channels on a-la-carte basis. - (1) Every broadcaster shall offer all its television channels on a-la-carte basis to the distributors of television channels:

Provided that the broadcaster may also offer its pay channels, in addition to offering of pay channels on a-la-carte basis, in form of bouquet:

Provided further that such bouquet shall not contain—

(a) any 'free-to-air channel'; and

(b) High definition (HD) and Standard Definition (SD) variants of the same channel.

7. Publication of reference interconnection offer by broadcaster for pay channels.— (1) Every broadcaster shall publish, on its website, reference interconnection offer, in conformance with the regulations and the tariff orders notified by the Authority, for providing signals of all its pay channels to the distributor of television channels—

(a) within sixty days of commencement of these regulations; and

(b) before launching of a pay channel. and simultaneously submit, for the purpose of record, a copy of the same to the Authority. (2) The reference interconnection offer, referred to in sub-regulation (1), shall contain the technical and commercial terms and conditions relating to, including but not limited to, maximum retail price per month of pay channel, maximum retail price per month of bouquet of pay channels, discounts, if any, offered on the maximum retail price to distributors, distribution fee, manner of calculation of 'broadcaster's share of maximum retail price', genre of pay channel and other necessary conditions:

Provided that a broadcaster may include in its reference interconnection offer, television channel or bouquet of pay channels of its subsidiary company or holding company or subsidiary company of the holding company, which has obtained, in its name, the downlinking permission for its television channels from the Central Government, after written authorization by them. Explanation: For the purpose of these regulations, the definition of "subsidiary company" and "holding company" shall be the same as assigned to them in the Companies Act, 2013 (18 of 2013). (3) Every broadcaster shall declare a minimum twenty percent of the maximum retail price of pay channel or bouquet of pay channels, as the case may be, as the distribution fee:

Provided that the distribution fee declared by the broadcaster shall be uniform across all the distribution platforms.

(4) It shall be permissible to a broadcaster to offer discounts, on the maximum retail price of pay channel or bouquet of pay channels, to distributors of television channels, not exceeding fifteen percent of the maximum retail price:

Provided that the sum of distribution fee declared by a broadcaster under sub-regulation (3) and discounts offered under this sub-regulation in no case shall exceed thirty five percent of the maximum retail price of pay channel or bouquet of pay channels, as the case may be:

Provided further that offer of discounts, if any, to distributors of television channels, shall be on the basis of fair, transparent and non-discriminatory terms:

Provided also that the parameters of discounts shall be measurable and computable.

(5) Every broadcaster of pay channel shall mention in its reference interconnection offer the names of persons, telephone numbers, and e-mail addresses designated to receive request for receiving interconnection from distributors of television channels and grievance redressal thereof. (6) The terms and conditions mentioned in the reference interconnection offer shall include all necessary and sufficient provisions, which make it a complete interconnection agreement on signing by other party, for distribution of television channels. (7) The Authority, suo-motu or otherwise, may examine the reference interconnection offer submitted by a broadcaster and on examination if the Authority is of the opinion that the reference interconnection offer is not in conformance with the provisions of the regulations and the tariff orders notified by the Authority, it may, after giving an opportunity of being heard to such broadcaster, direct such broadcaster to modify the said reference interconnection offer and such broadcaster shall amend reference interconnection offer accordingly and publish the same within fifteen days of receipt of the direction.

(8) Any amendment to the reference interconnection offer shall be published in the same manner as provided under the sub-regulations (1), (2), (3), (4), (5) and (6) of this regulation.

(9) In the event of any amendment to the reference interconnection offer by a broadcaster under sub-

regulation (8), the broadcaster shall give an option to all distributors, with whom it has written interconnection agreements in place, within thirty days from the date of such amendment and it shall be permissible to such distributors to enter into fresh interconnection agreement in accordance with the amended reference interconnection offer, within thirty days from the date of receipt of such option, or continue with the existing interconnection agreement.

xxx xxx xxx

10. Interconnection agreement between broadcaster and distributor of television channels.— (1) No broadcaster shall provide signals of pay channels to a distributor of television channels without entering into a written interconnection agreement with such distributor of television channels.

(2) No distributor of television channels shall distribute pay channels of any broadcaster without entering into a written interconnection agreement with such broadcaster.

(3) It shall be mandatory for a broadcaster and a distributor of television channels to enter into written interconnection agreement on a-la-carte basis for distribution of pay channels.

xxx xxx xxx

11. Territory of interconnection agreement.— (1) The interconnection agreement signed between a broadcaster and a multi-system operator shall include the following details for describing the territory for the purpose of distribution of signals of television channels –

(a) the registered area of operation of the multi-system operator as mentioned in the registration granted by the Central Government;

(b) the names of specific areas for which distribution of signals of television channels has been agreed, initially, at the time of signing of the interconnection agreement; and

(c) the names of the corresponding states/ union territories in which such agreed areas as referred in clause (b) of this sub-regulation are located.

(2) It shall be permissible to the multi-system operator to distribute the channels beyond the areas agreed under sub-regulation (1), by giving a written notice to the broadcaster, after thirty days from the date of receipt of such written notice by the broadcaster and the said notice shall deemed to be an addendum to the existing interconnection agreement:

> Provided that such areas fall within—
>
> (a) the registered area of operation of the multi-system operator; and
>
> (b) the states or union territories in which the multi-system operator has been permitted to distribute the signals of television channels under the interconnection agreement. (3) Nothing contained in sub-regulation (2) shall apply if written objections with reasons from the broadcaster have been received by the multi-

system operator during the said thirty days notice period: Provided that any objection by the broadcaster, which is unreasonable, shall be deemed to constitute a denial of provisioning of signals beyond the areas agreed under the clause

(b) of sub-regulation (1).”

18. The relevant clauses of the Tariff Order with which we are directly concerned are set out hereunder:

> “3. Manner of offering of channels by broadcasters.--- (1) Every broadcaster shall offer all its channels on a-la-carte basis to all distributors of television channels.

(2) Every broadcaster shall declare ----

(a) the nature of each of its channel either as ‘free-to-air’ or ‘pay’; and

(b) the maximum retail price, per month, payable by a subscriber for each of its pay channel offered on a-la-carte basis:

Provided that the maximum retail price of a pay channel shall be more than ‘zero’:

Provided further that the maximum retail price of a channel shall be uniform for all distribution platforms.

(3) It shall be permissible for a broadcaster to offer its pay channels in the form of bouquet(s) and declare the maximum retail price(s), per month, of such bouquet(s) payable by a subscriber:

Provided that, while making a bouquet of pay channels, it shall be permissible for a broadcaster to combine pay channels of its subsidiary company or holding company or subsidiary company of the holding company, which has obtained, in its name, the downlinking permission for its television channels, from the Central Government, after written authorization by them, and declare maximum retail price, per month, for such bouquet of pay channels payable by a subscriber:

Provided that such bouquet shall not contain any pay channel for which maximum retail price per month is more than rupees nineteen: Provided further that the maximum retail price per month of such bouquet of pay channels shall not be less than eighty five percent of the sum of maximum retail prices per month of the a-la-carte pay channels forming part of that bouquet: Provided further that the maximum retail price per month of such bouquet of pay channels shall be uniform for all distribution platforms: Provided further that such bouquet shall not contain any free-to-air channel:

Provided also that such bouquet shall not contain both HD and SD variants of the same channel. Explanation: For the purpose of this Order, the definition of “subsidiary company” and “holding company” shall be the same as assigned to them in the Companies Act, 2013 (18 of 2013). (4) It shall be permissible for a broadcaster to offer promotional schemes on maximum retail price(s) per month of its a-la-carte pay channel(s):

Provided that period of any such scheme shall not exceed ninety days at a time:

Provided further that the frequency of any such scheme by the broadcaster shall not exceed twice in a calendar year:

Provided further that the price(s) of a-la-carte pay channel(s) offered under any such promotional scheme shall be considered as maximum retail price(s) during the period of such promotional scheme:

Provided also that the provisions of Regulations and Tariff Orders notified by the Authority shall be applicable on the price(s) of a-la-carte pay channel(s) offered under any such promotional scheme.

(5) Every broadcaster, before making any change in the nature of a channel or in the maximum retail price of a pay channel or in the maximum retail price of a bouquet of pay channels or in the composition of a bouquet of pay channels, as the case may be, shall follow the provisions of all the applicable Regulations and Orders notified by the Authority, including but not limited to the publication of Reference Interconnection Offer.

4. Declaration of network capacity fee and manner of offering of channels by distributors of television channels.--- (1) Every distributor of television channels shall declare network capacity fee, per month, payable by a subscriber for availing a distribution network capacity so as to receive the signals of television channels:

Provided that the network capacity fee, per month, for network capacity upto initial one hundred SD channels, shall, in no case, exceed rupees one hundred and thirty, excluding taxes:

Provided further that the network capacity fee, per month, for network capacity in the slabs of twenty five SD channels each, beyond initial one hundred channels capacity referred to in first proviso to sub- clause (1), shall, in no case, exceed rupees twenty excluding taxes:

Provided also that one HD channel shall be treated equal to two SD channels for the purpose of calculating number of channels within the distribution network capacity subscribed.

(2) Every distributor of television channels shall offer all channels available on its network to all subscribers on a-la-carte basis and declare distributor retail price, per month, of each pay channel payable by a subscriber:

Provided that the distributor retail price, per month, payable by a subscriber to a distributor of television channels for subscribing to a pay channel shall, in no case, exceed the maximum retail price, per month, declared by the broadcasters for such pay channel.

(3) Every distributor of television channels shall offer to all subscribers each bouquet of pay channels offered by a broadcaster, and for which interconnection agreement

has been signed with that broadcaster, without any alteration in its composition and declare the distributor retail price, per month, for such bouquet payable by a subscriber:

Provided that the distributor retail price, per month, payable by a subscriber to a distributor of television channels for subscribing to a bouquet of pay channels offered by the broadcaster shall in no case exceed the maximum retail price, per month, declared by the broadcasters for such bouquet of pay channels:

Provided further that such bouquet shall not contain any pay channel for which maximum retail price per month declared by the broadcaster is more than rupees nineteen:

Provided further that such bouquet shall not contain any free-to-air channel:

Provided also that such bouquet shall not contain both HD and SD variants of the same channel.

(4) It shall be permissible for a distributor of television channels to offer bouquet(s) formed from pay channels of one or more broadcasters and declare distributor retail price(s) , per month, of such bouquet(s) payable by a subscriber:

Provided that such bouquet shall not contain any pay channel for which maximum retail price per month declared by the broadcaster is more than rupees nineteen:

Provided further that the distributor retail price per month of such bouquet of pay channels shall not be less than eighty five percent of the sum of distributor retail prices per month of a-la-carte pay channels and bouquet(s) of pay channels forming part of that bouquet:

Provided further that the distributor retail price per month of a bouquet of pay channels offered by a distributor of television channels shall, in no case, exceed the sum of maximum retail prices per month of a-la-carte pay channels and bouquet(s) of pay channels, declared by broadcasters, forming part of that bouquet:

Provided further that such bouquet shall not contain any free-to-air channel:

Provided also that such bouquet shall not contain both HD and SD variants of the same channel. Explanation: For the removal of doubt it is hereby clarified that a distributor of television channels while forming bouquet under this clause shall not break a bouquet of pay channels offered by a broadcaster to form two or more bouquet(s) at distribution level.

(5) It shall be permissible for a distributor of television channels to offer bouquet(s) formed from free-to-air channels of one or more broadcasters. (6) No distributor of television channels shall charge any amount, other than the network capacity fee, from its subscribers for subscribing to free-to-air channels or bouquet(s) of free-to air channels. (7) Within the distribution network capacity subscribed, in addition to channels notified by Central Government to be mandatorily provided to all the subscribers, a subscriber shall be free to choose any free-to-air channel(s), pay channel(s), or bouquet(s) of channels offered by the broadcaster(s) or bouquet(s) of channels offered by distributors of television channels or a combination thereof:

Provided that if a subscriber opts for pay channels or bouquet of pay channels, he shall be liable to pay an amount equal to sum of distributor retail price(s) for such channel(s) and bouquets in addition to network capacity fee.

(8) Subject to sub-clause (1) of clause 4, a distributor of television channels shall not increase the network capacity fee for a period of six months from the date of such notification: Provided that a distributor of television channels, before making any change in the network capacity fee, shall at least thirty days prior to the scheduled change---

(a) inform the Authority; and

(b) inform the subscribers by running scroll on the channel."

19. In the judgment of Sundar,J., in the Division Bench of the Madras High Court, a useful table is set out which not only states the provisions that have been challenged, but the specific ground on which they have been challenged. We, therefore, reproduce this table in our judgment:-

"Provisions of the Interconnection Regulation which Regulate content Sl. Provision Ground No.

1. 6(1) All channels (pay Impinges upon broadcaster's channels and free-to-air ability to package a TV channels) to be offered channel. No such restriction on on a-la-carte basis. broadcaster under Copyright Act.

2. Second proviso to 6(1) Impinges upon broadcaster's

- Bouquet of pay ability to package a TV channels shall not have channel. No such restriction on free-to-air channels. broadcaster under Copyright

- HD and SD variant of Act.

same channel cannot be in same bouquet.

3. Proviso to 7(2) - Impinges upon broadcaster's Bundling of third party ability to package a TV channels prohibited. channel. No such restriction on broadcaster under Copyright Act.

4. 7(4) - Broadcaster can Directly regulates the pricing of offer discounts to a TV channel, thereby also distributor not exceeding regulating pricing of individual 15% of MRP. programmes.

5. First proviso to 7(4) - Directly regulates the pricing of Sum of discount under a TV channel, thereby also 7(4) and distribution fee regulating pricing of individual under 7(3) shall not programmes.

exceed 35% of MRP.

6. 10(3) r/w 6(1) - Impinges upon broadcaster's Mandatory to enter into freedom to offer pay channels agreement with DPO on only as a part of bouquet and an a-la-carte basis for not as a-la-carte. No such pay channels. restriction on broadcaster under Copyright Act.

7. 11(2) - Deemed Directly impinges the extension of broadcaster's right under 19(2) geographical territory. to designate the geographical territory of exploitation.

Provisions of the Tariff Order which regulate content Sl. Provision Ground No.

1. 3(1) - All channels to be Impinges upon broadcaster's offered on a-la-carte ability to package a TV basis channel. No such restriction on broadcaster under Copyright Act.

2. 3(2)(b) - Declaration of Impinges upon broadcaster's MRP of a-la-carte freedom to offer pay channels channel only as a part of bouquet and not as a-la-carte. No such restriction on broadcaster under Copyright Act.

3. Second proviso to Under Section 33A read with 3(2)(b) - MRP of all pay Rule 56 of the Copyright channels to be uniform Rules, 2013, broadcaster has across distribution the right to decide separate platforms. MRP for different category of audience.

4. First proviso to 3(3) - Impinges upon broadcaster's Bundling of third party ability to package a TV channels prohibited. channel. For example, third party channels cannot be part of the same bouquet. No such restriction on broadcaster under Copyright Act.

5. Second proviso to 3(3) - Directly regulates the pricing MRP of pay channel in of a TV channel, thereby also bouquet not to exceed regulating pricing of individual INR 19/- programmes.

6. Third proviso to 3(3) - Directly regulates the pricing Bouquet price shall not of a TV channel, thereby also be less than 85% of the regulating pricing of individual sum of a-la-carte prices programmes.

of individual channels in the bouquet.

7. Fourth proviso to 3(3) - Under Rule 56 of the MRP of all bouquets to Copyright Rules, 2013, be uniform across broadcaster has the right to distribution platforms. decide separate MRP for different category of audience.

8. Fifth proviso to 3(3) - Impinges upon broadcaster's Bouquet of pay channels ability to package a TV shall not have free-to-air channel. No such restriction channels. on broadcaster under Copyright Act.

9. Sixth proviso to 3(3) - Impinges upon broadcaster's HD and SD variant of ability to package a TV same channel cannot be channel. No such restriction in same bouquet. on broadcaster under Copyright Act.

10. 3(4) - Restriction on All these restrictions impinge promotion of bouquets, broadcaster's ability to restriction on time, commercially monetize his restriction on frequency. content.

11. 4(2) - Distributor to offer Indirectly impinges upon the all channels on a-la-carte broadcaster's right to offer his basis. channels to the customers only as a bouquet and not as a-la-carte."

20. Since the Regulation made under Section 36 of the said Act is under challenge, it must first be stressed that a restrictive meaning cannot be given to the words "regulation" or "regulate", as otherwise the very object of the Act would be stultified. In Deepak Theater v. State of Punjab, 1992 Supp (1) SCC 684, a case which related to the Punjab Cinemas (Regulation) Act, 1952 and Rules, this Court referred to the power of licensing and regulation under the said Act as follows:

> "5. Witnessing a motion picture has become an amusement to every person; a reliever to the weary and fatigued; a reveller to the pleasure seeker; an imparter of education and enlightenment enlivening to news and current events; disseminator of scientific knowledge; perpetuator of cultural and spiritual heritage, to the teeming illiterate majority of population. Thus, cinemas have become tools to promote welfare of the people to secure and protect as effectively as it may a social order as per directives of the State policy enjoined under Article 38 of the Constitution. Mass media, through motion picture has thus become the vehicle of coverage to disseminate cultural heritage, knowledge, etc. The passage of time made manifest this growing imperative and the consequential need to provide easy access to all sections of the society to seek admission into theatre as per his paying capacity.

Though the right to fix rates of admission is a business incident, the appellant having created an interest in the general public therein, it has become necessary for the State to step in and regulate the activity of fixation of maximum rates of admission to different classes, as a welfare weal. Thereby fixation of rates of admission became a legitimate ancillary or incidental power in furtherance of the regulation under the Act. Access to and admission into theatre is a facility and concomitant right to a cinegoing public. Classification of seats and fixation of rates of admission according to paying capacity of a cinegoer is also an integral power of regulation.

Power to fix rates of admission includes power to amend and revise the rates from time to time. The statute vests that power in the licensing authority subject to control by the State Government. The fixation of the rates of admission has thus become an integral and essential part of the power and regulation of exhibition of cinematograph." (Emphasis supplied.)

21. In BSNL v. TRAI, (2014) 3 SCC 222, this Court held:

> "80. After the Amendment of 2000, TRAI can either suo motu or on a request from the licensor make recommendations on the subjects enumerated in Sections 11(1)(a)(i) to (viii). Under Section 11(1)(b), TRAI is required to perform nine functions enumerated in sub-clauses (i) to (ix) thereof. In these clauses, different terms like "ensure", "fix", "regulate" and "lay down" have been used. The use of the term "ensure" implies that TRAI can issue directions on the particular subject. For effective discharge of functions under various clauses of Section 11(1)(b), TRAI can frame appropriate regulations. The term "regulate" contained in sub- clause (iv) shows that for facilitating arrangement amongst service providers for sharing their revenue derived from providing telecommunication services, TRAI can either issue directions or make regulations.
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> xxx xxx xxx
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> 83. In K. Ramanathan v. State of T.N. [K. Ramanathan v. State of T.N., (1985) 2 SCC 116 :
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> 1985 SCC (Cri) 162] , this Court interpreted the word "regulation" appearing in Section 3(2)(d) of the Essential Commodities Act, 1955 and observed: (SCC pp. 130-31, paras 18-20) "18. The word 'regulation' cannot have any rigid or inflexible meaning as to exclude 'prohibition'. The word 'regulate' is difficult to define as having any precise meaning. It is a word of broad import, having a broad meaning, and is very comprehensive in scope. There is a diversity of opinion as to its meaning and its application to a particular state of facts, some courts giving to the term a somewhat restricted, and others giving to it a liberal, construction. The different shades of meaning are brought out in Corpus Juris Secundum, Vol. 76 at p. 611:
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> '"Regulate" is variously defined as meaning to adjust; to adjust, order, or govern by rule, method, or established mode; to adjust or control by rule, method, or established mode, or governing principles or laws; to govern; to govern by rule; to govern by, or subject to, certain rules or restrictions; to govern or direct according to rule; to control, govern, or direct by rule or regulations.
>
> "Regulate" is also defined as meaning to direct; to direct by rule or restriction; to direct or manage according to certain standards, laws, or rules; to rule; to conduct; to fix or establish; to restrain; to restrict.' (See also Webster's Third New International Dictionary, Vol. 2, p. 1913 and Shorter Oxford Dictionary, Vol. 2, 3rd Edn., p. 1784.)

19. It has often been said that the power to regulate does not necessarily include the power to prohibit, and ordinarily the word 'regulate' is not synonymous with the word 'prohibit'. This is true in a general sense and in the sense that mere regulation is not the same as absolute prohibition. At the same time, the power to regulate carries with it full power over the thing subject to regulation and in absence of restrictive words, the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control, and involves the adoption of a rule or guiding principle to be followed, or the making of a rule with respect to the subject to be regulated. The power to regulate implies the power to check and may imply the power to prohibit under certain circumstances, as where the best or only efficacious regulation consists of suppression. It would therefore appear that the word 'regulation' cannot have any inflexible meaning as to exclude 'prohibition'. It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation, and the Court must necessarily keep in view the mischief which the legislature seeks to remedy.

20. The question essentially is one of degree and it is impossible to fix any definite point at which 'regulation' ends and 'prohibition' begins. We may illustrate how different minds have differently reacted as to the meaning of the word 'regulate' depending on the context in which it is used and the purpose and object of the legislation. In Slattery v. Naylor [(1888) LR 13 AC 446 (PC)] the question arose before the Judicial Committee of the Privy Council whether a bye-law by reason of its prohibiting internment altogether in a particular cemetery, was ultra vires because the Municipal Council had only power of regulating internments whereas the bye-law totally prohibited them in the cemetery in question, and it was said by Lord Hobhouse, delivering the judgment of the Privy Council: (AC p. 447) 'A rule or bye-law cannot be held as ultra vires merely because it prohibits where empowered to regulate, as regulation often involved prohibition.'" xxx xxx xxx

87. Reference in this connection can also be made to the judgment in U.P. Coop. Cane Unions Federations v. West U.P. Sugar Mills Assn. [(2004) 5 SCC 430] In that case, the Court interpreted the word "regulation" appearing in the U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 and observed: (SCC pp. 454-55, para 20) "20. ... 'Regulate' means to control or to adjust by rule or to subject to governing principles. It is a word of broad impact having wide meaning comprehending all facets not only specifically enumerated in the Act, but also embraces within its fold the powers incidental to the regulation envisaged in good faith and its meaning has to be ascertained in the context in which it has been used and the purpose of the statute."

88. It is thus evident that the term "regulate" is elastic enough to include the power to issue directions or to make regulations and the mere fact that the expression "as may be provided in the regulations" appearing in clauses (vii) and (viii) of Section 11(1)(b) has not been used in other clauses of that sub-section does not mean that the

regulations cannot be framed under Section 36(1) on the subjects specified in sub-clauses (i) to (vi) of Section 11(1)(b). In fact, by framing regulations under Section 36, TRAI can facilitate the exercise of functions under various clauses of Section 11(1)(b) including sub-clauses (i) to (vi).

89. 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)." (Emphasis supplied.)

22. However, learned counsel for the appellants relied upon Cellular Operators Assn. of India v. TRAI, (2016) 7 SCC 703 and, in particular, paragraph 41 thereof, which reads as follows:

"41. We find that the impugned Regulation is not referable to Sections 11(1)(b)(i) and (v) of the Act inasmuch as it has not been made to ensure compliance with 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 dehors Section 11 but cannot be said to be inconsistent with Section 11 of the Act. This Court has categorically held in BSNL [BSNL v. Telecom Regulatory Authority of India, (2014) 3 SCC 222] judgment that the power under Section 36 is not trammelled 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." (Emphasis supplied.)

23. What is important to note from this judgment is that the balance that was sought to be maintained between protecting the interest of service providers and consumers was destroyed by the impugned regulations. What is important from our point of view, however, is that under Section 36 of the TRAI Act, the Authority is empowered to carry out the purposes of the said Act as can be discerned from the Preamble to the Act. What is clear from the amended Preamble to the Act is that the interests of service providers and consumers are of paramount importance, both of which have a role to play when regulations are framed under Section 36.

24. Learned counsel for the appellants also relied upon Petroleum and Natural Gas Regulatory Board v.

Indraprastha Gas Ltd. (supra.). In this case, the Petroleum and Natural Gas Regulatory Board Act, 2006 was the subject matter of discussion by this Court. This Court, after construing the Act, held that where there is a cassus omissis, such lacuna cannot be filled up by the judicial interpretative process. Thus, entities which are neither "common carriers" nor "contract carriers" within the tariff regulating powers of the Board under the Act were not held amenable to regulation. Further, the reach of the Act, as is clear from a reading of Sections 20 to 22 would make it clear that transportation tariffs for common carriers and contract carriers alone could be regulated by the Board. This would naturally not include a regulation which will pertain to network tariff for city or local gas distribution network as such a network is neither a common carrier nor a contract carrier covered by the Act. Further, the laying down of the compression charge for CNG gas would also, therefore, be wholly outside the reach of the said Act. This judgment again has no application to the facts of the present case, given the fact that the Preamble read with Section 11(2) makes it clear that the Regulation and Tariff Order made thereunder would both be within the reach of TRAI under the TRAI Act.

25. At this stage, it is also important to set out some of the provisions of the Indian Telegraph Act, 1885. This Act was amended in 2004 to include Section 3(1AA). The relevant sections of this Act are set out hereinbelow:

"3.(1AA) "telegraph" means any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images, and sounds or intelligence of any nature by wire, visual or other electro magnetic emissions, Radio waves or Hertzian waves, galvanic, electric or magnetic means; Explanation.- "Radio waves" or "Hertzian waves" means electro magnetic waves of frequencies lower than 3,000 giga-cycles per second propagated in space without artificial guide.

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4. Exclusive privilege in respect of telegraphs, and power to grant licences.— (1) Within India, the Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs:

Provided that the Central Government may grant a license, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain, or work a telegraph within any part of India:

Provided further that the Central Government may, by rules made under this Act and published in the Official Gazette, permit, subject to such restrictions and conditions as it thinks fit, the establishment, maintenance and working—

(a) of wireless telegraphs on ships within Indian territorial waters and on aircrafts within or above India, or Indian territorial waters, and

(b) of telegraphs other than wireless telegraphs within any part of India.

Explanation.— The payments made for the grant of a licence under this sub-section shall include such sum attributable to the Universal Service Obligation as may be determined by the Central Government after considering the recommendation made in this behalf by the Telecom Regulatory Authority of India established under sub-section (1) of Section 3 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997).

(2) The Central Government may, by notification in the Official Gazette, delegate to the telegraph authority all or any of its powers under the first proviso to sub-section (1).

The exercise by the telegraph authority of any power so delegated shall be subject to such restrictions and conditions as the Central Government may, by the notification, think fit to impose."

26. Sections 2(2) and 5 of the Indian Wireless Telegraphy Act, 1933 are also set out hereinbelow:

"2(2) "wireless telegraphy apparatus" means any apparatus, appliance, instrument or material used or capable of use in wireless communication, and includes any article determined by rule made under Section 10 to be wireless telegraphy apparatus, but does not include any such apparatus, appliance, instrument or material commonly used for other electrical purposes, unless it has been specially designed or adapted for wireless communication or forms part of some apparatus, appliance, instrument or material specially so designed or adapted, nor any article determined by rule made under Section 10 not to be wireless telegraphy apparatus; xxx xxx xxx

5. Licenses.—The telegraph authority constituted under the Indian Telegraph Act, 1885 (13 of 1885), shall be the authority competent to issue licenses to possess

> wireless telegraphy apparatus under this Act, and may issue licenses in such manner, on such conditions and subject to such payments as may be prescribed."

27. It is clear that only a person who is licensed under Section 5 of the Indian Wireless Telegraphy Act can use a teleport from India from which a TV channel is to be uplinked to a satellite. Equally, to be uplinked to a satellite and thereafter downlinked from such satellite to an MSO, permission would be required from the Central Government. This would be clear from a reading of the separate guidelines for uplinking and downlinking channels issued by the Government of India.

28. So far as the uplinking guidelines are concerned, on 5.12.2011, the Ministry of Information and Broadcasting (Broadcasting Wing) set out detailed conditions by which the uplinking of TV channels may be made. Under Clause 5.9 of the said guidelines, the Government of India shall have the right to suspend the permission of a company for a specified period in the public interest, or in the interest of national security, to prevent misuse.

29. Similarly, insofar as the policy guidelines for downlinking of TV channels is concerned, the Ministry has given detailed guidelines of the same date, i.e., 5.12.2011. Among other things, it is stated:-

> "2.4. No News and Current Affairs channel shall be permitted to be downlinked if it does not meet the following additional conditions:
>
> 2.4.1. That it does not carry any advertisements aimed at Indian viewers;
>
> 2.4.2. That it is not designed specifically for Indian audiences;
>
> 2.4.3. That it is a standard international channel; 2.4.4. That it has been permitted to be telecast in the country of its uplinking by the regulatory authority of that country;

Provided that the Government may waive/modify the condition under clause 2.4.1 on a case-by-case basis.

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5. BASIC CONDITIONS/OBLIGATIONS 5.1. The Company permitted to downlink registered channels shall comply with the Programme and Advertising Code prescribed under the Cable Television Networks (Regulation) Act, 1995.

5.2. The company shall ensure compliance of the provisions of Sports Broadcasting Signals (Mandatory sharing with Prasar Bharati) Act 11 of 2007 and the Rules, Guidelines, Notifications issued thereunder.

5.3. The applicant company shall adhere to any other Code/Standards guidelines/restrictions prescribed by Ministry of Information & Broadcasting, Government of India for regulation of content on TV channels from time to time. 5.4. The applicant company shall submit audited annual accounts of its commercial operations in India.

5.5. The applicant company shall obtain prior approval of the Ministry of Information and Broadcasting before undertaking any upgradation, expansion or any other changes in the downlinking and distribution system/network configuration. 5.6. The applicant company shall provide Satellite TV Channel signal reception decoders only to MSO/Cable Operators registered under the Cable Television Networks (Regulation) Act 1995 or to a DTH operator registered under the DTH guidelines issued by Government of India or to an Internet Protocol Television (IPTV) Service Provider duly permitted under their existing Telecom License or authorized by Department of Telecommunications or to a HITS operator duly permitted under the policy guidelines for HITS operators issued by Ministry of Information and Broadcasting, Government of India to provide such service. 5.7. The applicant company shall ensure that any of its channels, which is unregistered or prohibited from being telecast or transmitted or re-transmitted in India, under the Cable Television Networks (Regulation) Act 1995 or the DTH guidelines or any other law for the time being in force, cannot be received in India through encryption or any other means.

5.8. The Union Government shall have the right to suspend the permission of the company/registration of the channel for a specified period in public interest or in the interest of National security to prevent the misuse of the channel. The company shall immediately comply with any direction issued in this regard.

5.9. The applicant company seeking permission to downlink a channel shall operationalise the channels within one year from the date of the permission being granted by the Ministry of Information and Broadcasting failing which the permission will liable to be withdrawn without any notice in this regard. However, the company shall be afforded a reasonable opportunity of being heard before such a withdrawal.

5.10. The company/channel shall adhere to the norms, rules and regulations prescribed by any regulatory authority set up to regulate and monitor the Broadcast Services in the country, 5.11. The applicant company shall give intimation to Ministry of Information and Broadcasting regarding change in the directorship, key executives or foreign direct investment in the company, within 15 days of such a change taking place. It shall also obtain security clearance for such changes in its directors and key executives.

5.12. The applicant company shall keep a record of programmes downlinked for a period of 90 days and to produce the same before any agency of the Government as and when required.

5.13. The applicant company shall furnish such information as may be required by the Ministry of Information and Broadcasting from time to time. 5.14. The applicant company shall provide the necessary monitoring facility at its own cost for monitoring of programmes or content by the representative of the Ministry of Information and Broadcasting or any other Government agency as and when required.

5.15. The applicant company shall comply with the obligations and conditions prescribed in the downlinking guidelines issued by the Ministry of Information and Broadcasting, and the specific downlinking permission agreement and registration of each channel.

5.16. In the event of any war, calamity/national security concerns, the Government shall have the power to prohibit for a specified period the downlinking/reception/transmission and re-transmission of any or all channels. The Company shall immediately comply with any such directions issued in this regard."

30. We are of the view that the provisions of the TRAI Act have to be viewed in the light of protection of the interests of both service providers and consumers. This being so, it is clear that no constricted meaning can be given to the provisions of this Act. It is important to remember that under Section 11(1)(a)(iv), one of the functions of the Authority, though recommendatory, is to facilitate competition and promote efficiency in the operation of telecommunication services (which includes broadcasting services) so as to facilitate growth in such services. What is also clear from Section 11(1)(b), is that terms and conditions of interconnectivity between different service providers have to be fixed, which necessarily includes terms that relate not only to carriage simpliciter as submitted by Dr. Singhvi, but to all terms and conditions of interconnectivity between broadcaster, MSO, Cable TV operator and the ultimate consumer, so as to ensure that the object of the Act is carried out, namely, that both broadcasters and consumers get a fair deal. Towards this end, Section 11(2) makes it clear that the Authority may, from time to time, notify the rates at which telecommunication services, including broadcasting services, within India and outside India, shall be provided under this Act.

Dr. Singhvi argued that the literal language of this sub-section, which would undoubtedly bring in rates laid down in the Tariff Order, would have to be constricted by the language of the last part of the provision, viz., "including the rates at which messages shall be transmitted to any country outside India".

We are afraid that this is against basic canons of construction, as the expression "including" would only refer to a part of what precedes the expression and cannot therefore constrict the part that has gone before. The plain literal language of Section 11(2) makes it clear that rates at which broadcasting services are offered within and outside India can be fixed by TRAI. It is clear therefore that when rates are fixed after several rounds of consultations between various service providers and consumers, looking to the interest of each, it is impossible to say that any broadcaster's rights have been impinged upon.

Shri Dwivedi is absolutely right in saying that at no stage is content of a TV channel sought to be regulated, and that pricing relating to TV channels laid down in the Regulation and Tariff Order is a balancing act between the rights of broadcasters and the interests of consumers, which we may hasten to add has not been impugned on the ground that any right or fundamental right is violated, but only on the ground that the Regulation as well as the Tariff Order are outside the "jurisdiction" of TRAI.

Dr. Singhvi's argument on this score must therefore fail.

31. In fact, in Avishek Goenka v. Union of India, (2012) 5 SCC 275, this Court has already held:

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

32. We must also hasten to add that the power under Section 36(1) of the Act is very wide and not constricted by the provisions of Section 11, as was held in BSNL v. TRAI (supra.).

33. Equally, in Hotel & Restaurant Assn. v. Star India (P) Ltd., (2006) 13 SCC 753, this Court has held:-

> "24. Section 11 of the TRAI Act provides for the functions of TRAI. Clause (a) of sub-section (1) of Section 11 of the TRAI Act empowers TRAI to make recommendations either suo motu or on the request from the licensor, on the matters enumerated therein. Clause (b) thereof empowers it inter alia to fix the terms and conditions of interconnectivity between the service providers.
>
> 25. Sub-section (2) of Section 11 of the TRAI Act contains a non obstante clause providing that TRAI may frame from time to time by order(s) notified in the Official Gazette the rates at which the telecommunication services within India and outside India shall be provided under the said Act including the rates at which messages shall be transmitted to any country outside India. Proviso appended to sub-

section (2) thereof empowers TRAI to notify different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid TRAI shall record the reasons therefor.

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

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

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

34. It is interesting to note, as has been stated by Shri Dwivedi, that in Star India's response to the consultative paper of 29.1.2016, Star India itself has requested that the Regulation and Tariff Order be fixed on the basis of the principles that are now contained therein. For example, Star India's response to whether a reasonable wholesale price cap can be ensured for mass genres, was as follows:-

> "Reasonable wholesale price cap to be ensured for the mass genres • Channels need to be incentivized for creating diverse and innovative content • Incumbent flagship channels have been suffering from legacy price and bouquet freeze.
>
> • All channels should earn fair share of consumers' ARPU.
>
> • Our research findings reveal that basis current ARPUs, share of viewership of flagship channels, and existing revenue share of the broadcasters in the addressable market, the value attributed by the market to the flagship channels is significantly more than the existing wholesale list prices of these channels. • Accordingly, the retail value ascribed to flagship entertainment channels by consumers, translate into a wholesale price of Rs.11/- to Rs.28/-. For details refer to Annexure A. • Therefore, the wholesale cap should be Rs.28/- to allow for optimum monetization of the flagship channels. If the channel values are allowed to be corrected basis consumer demand the share of the channel in the ARPUs shall be realigned to reflect their true value proposition without leading to any arbitrary or perverse price hikes. Further the proposed discount cap will effectively eliminate pricing distortions.
>
> • However, in the interest of enabling a smooth and seamless transition to full addressability without creating any unnecessary chaos we are proposing the following caps, in the transition phase. Any lower cap will not only stifle investments in innovative content but also continue to restrict incumbent channels whose rates were frozen in 2003-2004 from realizing their real value.

Mass Genre	Proposed Price Cap (Rs.)
General Entertainment (Hindi & Regional)	12.00
Movies (Hindi & Regional)	10.00

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Sports                              18.00
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• These caps should be subject to automatic annual revision, basis inflation.” While answering whether broadcasters should offer wholesale discounts to distribution platform operators (hereinafter referred to as a “DPO”) which should be transparently available as part of the reference interconnect offer (hereinafter referred to as “RIO”), Star India has stated:

“Wholesale discounts to be subject to a maximum overall cap of 33% • As explained above, there are wide variety of parameters that a single broadcaster may want to drive basis various business requirements • 33% discount will be sufficient to effectively drive only a few business requirements • Any discounting cap lower than 33% will render the discounting structure ineffective/unworkable.” Similarly, so far as high definition channels are concerned, Star India had this to say:

“1. HD channels offer a viewer experience that is distinctly different from SD channels

- The production, transmission and re- transmission of HD channels entail substantial investments.

- HD channels offer distinctly superior audio and video quality to the viewers through cutting edge technology used right from shooting of content, production, post-production, transmission & re-transmission. For detailed explanation refer to Annexure B.

- The consumption of HD channel requires significant investment by the consumer in an HD TV and HD set-top box. As such, these channels are aspirational and for affluent audiences who demand better content & quality offering and have the capacity to pay for it.

2. Price forbearance for HD channels should continue

- HD channel can be subscribed by only those subscribers who can afford specialized HD set-top box as well as HD TV, which comes at a premium.

- The HD channel market has witnessed a robust growth and has allowed broadcasters to invest in quality and innovative content. Over the last four years market forces have enabled the channels to discover their real prices and desired penetration.

- This has been possible because of the laudable decision of the Authority to keep HD channels outside the regulatory purview. With upcoming 3D, 4D and virtual reality it would indeed be a regressive step if the Authority were to now regulate HD channels thereby sending out a negative signal to potential investments in these technologies.

- Hence we recommend that the Authority should continue to keep HD channels outside the regulatory ambit.

- In order to protect the interest of subscribers and to foster further growth in this segment, we recommend that HD channels should adhere to twin conditions and discounting caps at the wholesale and retail.

- Discount on wholesale prices should be capped at 33% to ensure a viable a-la-carte fallback option for DPOs.

- Retail a-la-carte prices should be linked to wholesale prices (same linkage multiplier as used for SD channels).

- Discount at retail level also to be limited to 33% to ensure a viable a-la-carte fallback option for consumer.

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

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

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

6. Consumers and DPOs should have a choice to subscribe to only HD channels or only SD channels or both combined but purchased separately.” Equally, insofar as whether free to air and pay channel bouquets are concerned, Star India itself stated that they should not be bundled together thus:-

> “FTA and Pay channels should not be bundled together
>
> - As has been highlighted in the Preamble, we believe that FTA channels should be free to consumer.
>
> - Pay and FTA channels should not be bundled in the same bouquet.
>
> - The declaration of a-la-carte rate is only with regard to pay channels, as per existing regulations. Allowing a-la-carte pricing of FTA channels is thus not in accordance with the extent regulatory constructs.
>
> - Pricing FTA channels at retail level and bundling them with Pay channels leads to price distortions by bloating the bouquet size and price, which is not in consumer

interest.

□Creating separate pay bouquets will ensure consumers are provided true visibility of pay channel pricing."

35. It is only when TRAI issued a second consultation paper dated 4.5.2016 that Star India submitted its response in June, 2016 where it raised for the first time the issue relating to the Copyright Act as an afterthought. What is important to notice is that even in this response, Star India reiterated that discount caps should be provided for as this checks discriminatory behavior during negotiation and will facilitate designing of discount criteria based on intelligible differentia which will help serve the diverse needs of consumers. In a third response to the draft regulations and tariff order, Star India raised jurisdictional issues of TRAI.

36. Pursuant to these and other inputs, TRAI has in its explanatory memorandum given reasons for the Tariff Order as follows:-

"64. The Authority has noted that at present the uptake of channels on a-la-carte basis is negligible as compared to the bouquet subscriptions. Analysis yields that the prime reason for such poor uptake of a-la-carte channels is that the a-la-carte rates of channels are disproportionately high as compared to the bouquet rates and further, there is no well defined relationship between these two rates. As per data available with TRAI, some bouquets are being offered by the distributors of television channels at a discount of upto 80%-90% of the sum of a-la-carte rates of pay channels constituting those bouquets. These discounts are based on certain eligibility criteria/conditions to be fulfilled by the distributor of television channels in order to avails those discounts from broadcasters. Such high discounts force the subscribers to take bouquets only and thus reduce subscriber choice. As a result, while technically, a-la-carte rates of channels are declared, these are illusive and subscribers are left with no choice but to opt for bouquets. Bouquets formed by the broadcasters contain only few popular channels. The distributors of television channels are often asked to take the entire bouquet as otherwise they are denied the popular channels altogether or given such popular channels at RIO rates. To make the matters worse, the distributors of television channels have to pay as if all the channels in the bouquet are being watched by the entire subscriber base, when in fact only the popular channels will have high viewership. In such a scenario, at the retail end, the distributors of television channels somehow push these channels to maximum number of subscribers so as to recover costs. This marketing strategy based on bouquets essentially results in 'perverse pricing' of bouquets vis-à-vis the individual channels. As a result, the customers are forced to subscribe to bouquets rather than subscribing to a-la-carte channels of their choice. Thus, in the process, the public, in general, end up paying for "unwanted" channels and this, in effect, restricts subscriber choice. Bundling of large number of unwanted channels in bouquets also result in artificial occupation of distributors' network capacity. This acts as an entry barrier for newer TV channels.

65. In order to facilitate subscribers to exercise their options in line with intention of lawmakers to choose individual channels, in the new framework the broadcasters will declare to customers/subscribers the MRP of their a-la-carte channels and bouquets of pay channels. In order to ensure that prices of the a-la-carte channels are kept reasonable, the maximum discount permissible in formation of a bouquet has been linked with the sum of the a-la-

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

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

Channel Discount Discount Discount Discount Discount 75% 60% 45% 30% 15% Channel 1 a-la-carte price 19 19 19 19 19 Channel 2 a-la-carte price 10 10 10 10 10

Channel 3 a-la-carte price 12 12 12 12 12 Sum of a-la-carte prices of 5 50 50 50 50 50 driver pay channels Sum of a-la-carte prices of 30 30 30 30 30 30 non-driver pay channels (@ Re 1) Total price of 35 a-la-carte 80 80 80 80 80 pay channels Price of bouquet of 35 pay 20 32 44 56 68 channels (with discount on sum of a-la-carte prices) The above table clearly indicates that in case the amount of discount offered by the broadcaster, over the sum of a-la-carte prices of pay channels, while forming the bouquet of those pay channels is very high (75%), the price of bouquet becomes much lower than the sum of a-la-carte prices to the extent that it is almost equal to a-la-carte price of one driver channel. Such amount of discount is anti customer/subscriber as it discourages a-la-carte selection of channels. As the amount of discount on formation of bouquet decreases, the difference between the prices of bouquet and the sum of a-la- carte prices also decreases. In case the amount of discount is fixed at 15%, the price of bouquet becomes higher than the sum of a-la-carte prices of driver channels; thereby encouraging a subscriber to choose a-la-carte channels of his choice.

67. In the present regulatory framework incidences have come to the knowledge where discount upto 90% on the declared RIO prices has been given by broadcasters. Obviously such efforts kill competition and reduce a-la-carte choice which is anti- subscriber. Accordingly, the Authority has prescribed a discount of 15% to be provided by broadcasters at wholesale level and further 15% to be provided by distributors at retail level. The net effect to subscribers at retail level will be a discount of approximately 30% on the bouquets of channels. Therefore flexibility of formation of bouquet has been given to broadcasters and MSOs both to such an extent that total permissible discount does not kill the a-la-carte choice. The Authority has been careful in prescribing a framework which does not encourage non-driver channel to be pushed to subscribers against their choice. Non-driver channels which are provided as part of bouquets not only kill choice of the ala-carte channels but also eat away the channel carrying capacity available with distributors which may result in artificial capacity constraints at distribution platforms for launch of new/competitive channels. Such restrictions are anti-subscriber and have to be carefully handled. Accordingly, the Authority has consciously decided the present framework of prescribing relationship between a-la-carte and bouquet prices to protect interest of customers/viewers and as well as those of service providers. However, the Authority will keep a watch on the developments in the market and may review the maximum permissible discount while offering a bouquet, in a time period of about two years.

68. A broadcaster is free to offer its pay channels in the form of bouquet(s) to customers. While subscribing to bouquet, a customer may not be aware of the price of each channel forming the bouquet. Abnormal high price of a pay channel may result in higher price of a bouquet leading to adverse impact on subscribers' interests. It is an established fact that bundling of channels complicates and obscures their pricing. Prices are obscured because subscribers do not always understand the relationship between the bundle price and a price for each component. However, the bundling of channels offers convenience to the subscribers as well as services providers in subscription management. Keeping in view these realties and to protect the interests of subscribers, the Authority has prescribed a ceiling of Rs. 19/- on the MRP of pay channels which can be provided as part of a bouquet. Therefore, any pay channel having MRP of more than Rs. 19/- cannot become

part of any bouquet. The amount of Rs. 19/- has been prescribed keeping in view the prevailing highest genre wise ceilings of Rs. 15.12 for all addressable systems between broadcaster & DPOs at wholesale level and further enhancing it 1.25 times to account for DPOs distribution fee. Broadcasters also have complete freedom to price their pay channels which do not form part of any bouquet and offered only on a-la-carte basis. Similar conditions will also be applicable to DPOs for formation of the bouquets. However, the Authority will keep a watch on the developments in the market and may review the manner in which a channel can be provided as part of a bouquet, in a time period of about two years." (Emphasis supplied.)

37. It can thus be seen that both the Regulation as well as the Tariff Order have been the subject matter of extensive discussions between TRAI, all stake holders and consumers, pursuant to which most of the suggestions given by the broadcasters themselves have been accepted and incorporated into the Regulation and the Tariff Order. The Explanatory Memorandum shows that the focus of the Authority has always been the provision of a level playing field to both broadcaster and subscriber. For example, when high discounts are offered for bouquets that are offered by the broadcasters, the effect is that subscribers are forced to take bouquets only, as the a-la-

carte rates of the pay channels that are found in these bouquets are much higher. This results in perverse pricing of bouquets vis-à-vis individual pay channels. In the process, the public ends up paying for unwanted channels, thereby blocking newer and better TV channels and restricting subscribers' choice. It is for this reason that discounts are capped. While doing so, however, full flexibility has been given to broadcasters to declare the prices of their pay channels on an a-la-carte basis. The Authority has shown that it does not encroach upon the freedom of broadcasters to arrange their business as they choose. Also, when such discounts are limited, a subscriber can then be free to choose a-la-carte channels of his choice.

Thus, the flexibility of formation of a bouquet, i.e., the choice of channels to be included in the bouquet together with the content of such channels, is not touched by the Authority. It is only efforts aimed at thwarting competition and reducing a-la-

carte choice that are, therefore, being interfered with. Equally, when a ceiling of INR 19 on the maximum retail price of pay channels which can be provided as a part of a bouquet is fixed by the Authority, the Authority's focus is to be fair to both the subscribers as well as the broadcasters. INR 19 is an improvement over the erstwhile ceiling of INR 15.12 fixed by the earlier regulation which nobody has challenged. To maintain the balance between the subscribers' interests and broadcasters' interests, again the Authority makes it clear that broadcasters have complete freedom to price channels which do not form part of any bouquet and are offered only on an a-la-

carte basis. As market regulator, the Authority states that the impugned Regulation and Tariff Order are not written in stone but will be reviewed keeping a watch on the developments in the market. We are, therefore, clearly of the view that the Regulation and the Tariff Order have been made keeping the interests of the stakeholders and the consumers in mind and are intra vires the regulation power contained in Section 36 of the TRAI Act. Consequently, we agree with the conclusion of the learned Chief Justice and the third learned Judge of the Madras High Court that these writ petitions deserve to be dismissed.

38. Since submissions have been made by Dr. Singhvi on the reach of various other Acts, it is a little important to deal with the same.

39. Dr. Singhvi relied heavily upon the Sports Act. The Statement of Objects and Reasons of this Act makes it clear that the distribution of broadcasting signals of sporting events of public interest is not disseminated to persons who do not have access to satellite and Cable TV, most of whom are in rural areas. Since the downlinking and uplinking policy guidelines of the Government have been challenged in courts as lacking statutory sanction, it has become necessary that sporting events of national importance reach the general public on a free to air basis. It is for this reason that the definitions of “broadcaster”, “broadcasting”, etc. refer to content. The following are certain relevant terms as defined under the Sports Act:

> “2.(1)(a) “broadcaster” means any person who provides a content broadcasting service and includes a broadcasting network service provider when he manages and operates his own television or radio channel service;
>
> (b) “broadcasting” means assembling and programming any form of communication content, like signs, signals, writing, pictures, images and sounds, and either placing it in the electronic form on electro-magnetic waves on specified frequencies and transmitting it through space or cables to make it continuously available on the carrier waves, or continuously streaming it in digital data form on the computer networks, so as to be accessible to single or multiple users through receiving devices either directly or indirectly; and all its grammatical variations and cognate expressions;
>
> (c) “broadcasting service” means assembling, programming and placing communication content in electronic form on the electro-magnetic waves on specified frequencies and transmitting it continuously through broadcasting network or networks so as to enable all or any of the multiple users to access it by connecting their receiver devices to their respective broadcasting networks and includes the content broadcasting services and the broadcasting network services;
>
> (d) “broadcasting networks service” means a service, which provides a network of infrastructure of cables or transmitting devices for carrying broadcasting content in electronic form on specified frequencies by means of guided or unguided electro-magnetic waves to multiple users, and includes the management and operation of any of the following:
>
> (i) Teleport/Hub/Earth Station;
>
> (ii) Direct-to-Home (DTH) Broadcasting Network,

(iii) Multi-system Cable Television Network,

(iv) Local Cable Television Network,

(v) Satellite Radio Broadcasting Network,

(vi) any other network service as may be prescribed by the Central Government; xxx xxx xxx

(h) "content" means any sound, text, data, picture (still or moving), other audio-visual representation, signal or intelligence of any nature or any combination thereof which is capable of being created, processed, stored, retrieved or communicated electronically;

(i) "content broadcasting service" means the assembling, programming and placing content in electronic form and transmitting or retransmitting the same on electro-magnetic waves on specified frequencies, on a broadcasting network so as to make it available for access by multiple users by connecting their receiving devices to the network, and includes the management and operation of any of the following:

(i) terrestrial television service,

(ii) terrestrial radio service,

(iii) satellite television service,

(iv) satellite radio service,

(v) cable television channel service,

(vi) community radio service,

(vii) any other content broadcasting services as may be prescribed by the Central Government." The heart of the Sports Act is contained in Sections 3 and 5 thereof, which state as follows:-

"3. Mandatory sharing of certain sports broadcasting signals.—(1) No content rights owner or holder and no television or radio broadcasting service provider shall carry a live television broadcast on any cable or Direct-to-Home network or radio commentary broadcast in India of sporting events of national importance, unless it simultaneously shares the live broadcasting signal, without its advertisements, with the Prasar Bharati to enable them to re-transmit the same on its terrestrial networks and Direct-to-Home networks in such manner and on such terms and conditions as may be specified.

(2) The terms and conditions under sub-section (1) shall also provide that the advertisement revenue sharing between the content rights owner or holder and the Prasar Bharati shall be in the ratio of not less than 75:25 in case of television coverage and 50:50 in case of radio coverage.

(3) The Central Government may specify a percentage of the revenue received by the Prasar Bharati under sub-section (2), which shall be utilised by the Prasar Bharati for broadcasting other sporting events.

xxx xxx xxx

5. Power of the Central Government to issue Guidelines.—The Central Government shall take all such measures, as it deems fit or expedient, by way of issuing Guidelines for mandatory sharing of broadcasting signals with Prasar Bharati relating to sporting events of national importance:

Provided that the Guidelines issued before the promulgation of the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Ordinance, 2007 (Ord. 4 of 2007) shall be deemed to have been issued validly under the provision of this section."

40. Shri Dwivedi is therefore right that the object of the Sports Act has nothing to do with the validity of the Regulation and Tariff Order made by TRAI under the TRAI Act. Content is referred to in the Sports Act only for the reason stated in the Objects and Reasons. Secondly, as has correctly been argued by Shri Dwivedi and as has been held by us above, the TRAI Act, as well as the Regulation and Tariff Order, do not in any manner affect the content of the TV channels that are broadcast by the broadcasters in these cases.

41. Dr. Singhvi then relied upon the Cable TV Act as follows:

"2.(a-i) "Authority" means the Telecom Regulatory Authority of India established under sub-section (1) of Section 3 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997);

(a-ii) "Broadcaster" means a person or a group of persons, or body corporate, or any organisation or body providing programming services and includes his or its authorised distribution agencies; (a-iii) "cable operator" means any person who provides cable service through a cable television network or otherwise controls or is responsible for the management and operation of a cable television network and fulfils the prescribed eligibility criteria and conditions;

(b) "cable service" means the transmission by cables of programmes including re-transmission by cables of any broadcast television signals;

(c) "cable television network" means any system consisting of a set of closed transmission paths and associated signal generation, control and distribution equipment, designed to provide cable service for reception by multiple subscribers;

xxx xxx xxx 4-A. (3) If the Central Government is satisfied that it is necessary in the public interest so to do, and if not otherwise specified by the Authority, it may direct the Authority to specify, by notification in the Official Gazette, one or more free-to-air channels to be included in the package of channels forming basic service tier and any one or more such channels may be specified, in the notification, genre-wise for providing a programme mix of entertainment, information, education and such other programmes and fix the tariff for basic service tier which shall be offered by the cable operators to the consumers and the consumer shall have the option to subscribe to any such tier:

Provided that the cable operator shall also offer the channels in the basic service tier on a la carte basis to the subscriber at a tariff specified under this sub- section.

(4) The Central Government or the Authority may specify in the notification referred to in sub-section (3), the number of free-to-air channels to be included in the package of channels forming basic service tier for the purposes of that sub-section and different numbers may be specified for different States, cities, towns or areas, as the case may be.

xxx xxx xxx Explanation.—For the purposes of this section—

(a) "addressable system" means an electronic device (which includes hardware and its associated software) or more than one electronic device put in an integrated system through which signals of cable television network can be sent in encrypted form, which can be decoded by the device or devices, having an activated Conditional Access System at the premises of the subscriber within the limits of authorisation made, through the Conditional Access System and the subscriber management system, on the explicit choice and request of such subscriber, by the cable operator to the subscriber;

(b) "basic service tier" means a package of free-to-air channels to be offered by a cable operator to a subscriber with an option to subscribe, for a single price to subscribers of the area in which his cable television network is providing service;

(c) "encrypted", in respect of a signal of cable television network, means the changing of such signal in a systematic way so that the signal would be unintelligible without use of an addressable system and the expression "unencrypted" shall be construed accordingly;

(d) "free-to-air channel", in respect of a cable television network, means a channel for which no subscription fee is to be paid by the cable operator to the broadcaster for its re-

transmission on cable;

(e) "pay channel", in respect of a cable television network, means a channel for which subscription fees is to be paid to the broadcaster by the cable operator and due authorisation needs to be taken from the broadcaster for its re-transmission on cable;

(f) "subscriber management system" means a system or device which stores the subscriber records and details with respect to name, address and other information regarding the hardware being utilised by the subscriber, channels or bouquets of channels subscribed to by the subscriber, price of such channels or bouquets of channels as defined in the system, the activation or deactivation dates and time for any channel or bouquets of channels, a log of all actions performed on a subscriber's record, invoices raised on each subscriber and the amounts paid or discount allowed to the subscriber for each billing period.

xxx xxx xxx

5. Programme code.—No person shall transmit or re-transmit through a cable service any programme unless such programme is in conformity with the prescribed programme code:

> [***]"
>
> 42. He then referred to Rule 6 of the Cable Television Networks Rules, 1994, as follows:-
>
> "6. Programme Code. – (1) No programme should be carried in the cable service which:-
>
> (a) Offends against good taste or decency:
>
> (b) Contains criticism of friendly countries;
>
> (c) Contains attack on religions or communities or visuals or words contemptuous of religious groups or which promote communal attitudes;
>
> (d) Contains anything obscene, defamatory, deliberate, false and suggestive innuendos and half truths;
>
> (e) Is likely to encourage or incite violence or contains anything against maintenance of law and order or which promote-anti-national attitudes;
>
> (f) Contains anything amounting to contempt of court;
>
> (g) Contains aspersions against the integrity of the President and Judiciary;
>
> (h) Contains anything affecting the integrity of the Nation;

(i) Criticises, maligns or slanders any individual in person or certain groups, segments of social, public and moral life of the country ;

(j) Encourages superstition or blind belief;

(k) Denigrates women through the depiction in any manner of the figure of a women, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to women, or is likely to deprave, corrupt or injure the public morality or morals;

(l) Denigrates children;

(m) Contains visuals or words which reflect a slandering, ironical and snobbish attitude in the portrayal of certain ethnic, linguistic and regional groups;

(n) Contravenes the provisions of the Cinematograph Act, 1952.

(o) is not suitable for unrestricted public exhibition Provided that no film or film song or film promo or film trailer or music video or music albums or their promos, whether produced in India or abroad, shall be carried through cable service unless it has been certified by the Central Board of Film Cetification (CBFC)) as suitable for unrestricted public exhibition in India.

Explanation – For the purpose of this clause, the expression “unrestricted public exhibition” shall have the same meaning as assigned to it in the Cinematograph Act, 1952 (37 of 1952);

(2) The cable operator should strive to carry programmes in his cable service which project women in a positive, leadership role of sobriety, moral and character building qualities. (3) No cable operator shall carry or include in his cable service any programme in respect of which copyright subsists under the Copyright Act, 1972 (14 of 1972) unless he has been granted a licence by owners of copyright under the Act in respect of such programme.

(4) Care should be taken to ensure that programmes meant for children do not contain any bad language or explicit scenes of violence. (5) Programmes unsuitable for children must not be carried in the cable service at times when the largest numbers of children are viewing. (6) No cable operator shall carry or include in his cable service any television broadcast or channel, which has not been registered by the Central Government for being viewed within the territory of India PROVIDED that a cable operator may continue to carry or include in his cable service any Television broadcast or channel, whose application for registration to the Central Government was made on or before 11th May, 2006 and is under consideration, for a period upto 31st May, 2008 or till such registration has been granted or refused, whichever is earlier PROVIDED further that channels uplinking from India, in accordance permission for uplinking granted before 2nd December, 2005, shall be treated as registered television channels and can be carried or included in the cable service.”

43. The argument of Dr. Singhvi is that since this Act regulates content downstream from the Cable TV operator to the consumer, its absence in the TRAI Act is eloquent testimony to the fact that content cannot be the subject matter of the TRAI Act. As has been held by us hereinabove, the same answer must obtain, namely, that this Act is also irrelevant in the present case as the TRAI Act does not, as has been held by us above, regulate the content of the TV channels that are broadcasted by the broadcaster.

44. The main thrust of the arguments of both Dr. Singhvi and Mr. Chidambaram were also by copious reference to the Copyright Act, 1957, which, according to them, showed that once the Copyright Act steps in, TRAI must necessarily step out. They referred to certain provisions of this Act stage-wise.

The Copyright Act, 1957 as originally enacted stated in its Objects and Reasons that: “it is necessary to enact an independent self-contained law on the subject of copyright in the light of growing public consciousness of the rights and obligations of authors and in the light of experience gained in the working of the existing law during the last forty years. New and advanced means of communications like broadcasting, litho-photography, etc., also call for certain amendments in the existing law”, as a result of which certain rights akin to copyright are conferred on broadcasting authorities in respect of programmes broadcast by them. In this Act, as originally enacted, Section 2(v) defined “radio-diffusion” as follows:

> “2(v). “radio-diffusion” includes communication to the public by any means of wireless diffusions whether in the form of sounds or visual images or both.”

45. Section 37, as originally enacted, recognised a broadcast reproduction right by radio-diffusion only by the Government or any other Authority of Government as follows:

> “37. Broadcast Reproduction Right (1) Where any programme is broadcast by radio-

diffusion by the Government or any other broadcasting authority, a special right to be known as “broadcast reproduction right” shall subsist in such programme.

(2) The Government or other broadcasting authority, as the case may be, shall be the owner of the broadcast reproduction right and such right shall subsist until twenty-five years from the beginning of the calendar year next following the year in which the programme is first broadcast.

(3) During the continuance of a broadcast reproduction right in relation to any programme, any person, who,-

(a) without the licence of the owner of the right-

(i) rebroadcasts the programme in question or any substantial part thereof or

(ii) causes the programme in question or any substantial part thereof to be heard in public; or

(b) without the licence of the owner of the right to utilise the broadcast for the purpose of making a record recording the programme in question or any substantial part thereof, makes any such record, shall be deemed to infringe the broadcast reproduction right."

46. Section 38, as originally enacted prescribed as under :

> "38. Other provisions of this Act to apply to broadcast reproduction rights.
>
> (1) Sections 18, 19, 30, 53, 55, 58, 64, 65 and 66 shall, with any necessary adaptations and modifications, apply in relation to the broadcast reproduction right in any programme as they apply in relation to the copyright in a work :
>
> xxx xxx xxx"

47. Sections 18 and 19 of the Copyright Act deal with assignment of copyright and royalty or other consideration payable to the owner for such assignment. Section 30 of the Copyright Act refers to the right to licence any interest in copyright by the author or his duly authorised agent.

48. By the 1983 amendment to the Copyright Act, Section 2(v) defining radio-diffusion was deleted and instead Section 2(dd) was inserted defining "broadcast" as follows:

> "2(dd). "broadcast" means communication to the public –
>
> (i) By means of wireless diffusion, whether in any one or more of the forms or signs, sounds or visual images; or
>
> (ii) By wire, and includes re-broadcast."

49. Section 2(ff) was also inserted, defining "communication to the public" as follows:

> "2(ff) "communication to the public" means communication to the public in whatever manner, including communication through satellite."

50. Consequently, Section 37 was also amended so as to replace the expression "radio-diffusion" with the expression "broadcast".

51. In 1994, consequent to treaty obligations imposed upon India, broadcast reproduction rights were expanded to include private broadcasting organisations. The Statement of Objects and Reasons for the aforesaid amendment made it clear that:

> "... The law relating to copyright and related rights has been under comprehensive review of the Government for some time, taking into account the difficulties expressed by different groups of copyright owners and others, the experience gained from the administration of the existing law and the situation created by various

technological developments that have taken place.

2. The Copyright Act, 1957 amended and consolidated the law relating to copyright in India. It was further amended by the Copyright (Amendment) Acts of 1983 and 1984 and certain improvements were effected. By the Copyright (Amendment) Act, 1992 the term of copyright was further extended by a period of ten years. Now, it is considered appropriate to further amend the provisions of the Copyright Act, 1957-

xxx xxx xxx to further clarify the law in respect of cable, satellite and other means of simultaneous communication of works to more than one household or private place of residence, including the residential rooms of a hotel or hostel.

xxx xxx xxx to further improve the functioning of the Copyright Board;

to simplify and improve the law relating to copyright and related rights, in the interests of the general public, and in particular of the users as well as the owners of such rights."

52. Section 2(ff) defining "communication to the public" was substituted with a more comprehensive definition as follows:

"2(ff) "communication to the public" means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available. Explanation: For the purpose of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms or any hotel or hostel shall be deemed to be communication to the public."

53. Section 37 was entirely recast as follows :

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

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

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

(a) re-broadcasts the broadcast; or

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

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

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

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

54. Section 38 was substituted with a new Section 39A as follows:

"39A. Other provisions applying to broadcast reproduction right and performer's right.

(1) Sections 18, 19, 30, 53, 55, 58, 64, 65 and 66 shall, with any necessary adaptations and modifications, apply in relation to the broadcast reproduction right in any broadcast and the performers' right in any performance as they apply in relation to copyright in a work:

xxx xxx xxx"

55. Sections 33 and 33A, which have been relied upon by the learned counsel for the appellants, read as follows:

"33. Registration of copyright society.— (1) No person or association of persons shall, after coming into force of the Copyright (Amendment) Act, 1994 commence or, carry on the business of issuing or granting licences in respect of any work in which copyright subsists or in respect of any other rights conferred by this Act except under or in accordance with the registration granted under sub-section (3):

Provided that an owner of copyright shall, in his individual capacity, continue to have the right to grant licences in respect of his own works consistent with his obligations as a member of the registered copyright society:

Provided further that the business of issuing or granting licence in respect of literary, dramatic, musical and artistic works incorporated in a cinematograph films or sound recordings shall be carried out only through a copyright society duly registered under this Act:

Provided also that a performing rights society functioning in accordance with the provisions of Section 33 on the date immediately before the coming into force of the Copyright (Amendment) Act, 1994 shall be deemed to be a copyright society for the purposes of this Chapter and every such society shall get itself registered within a period of one year from the date of commencement of the Copyright (Amendment) Act, 1994.

(2) Any association of persons which fulfils such conditions as may be prescribed may apply for permission to do the business specified in sub-

section (1) to the Registrar of Copyrights who shall submit the application to the Central Government. (3) The Central Government may, having regard to the interests of the authors and other owners of rights under this Act, the interest and convenience of the public and in particular of the groups of persons who are most likely to seek licences in respect of the relevant rights and the ability and professional competence of the applicants, register such association of persons as a copyright society subject to such conditions as may be prescribed:

Provided that the Central Government shall not ordinarily register more than one copyright society to do business in respect of the same class of works.

(3-A) The registration granted to a copyright society under sub-section (3) shall be for a period of five years and may be renewed from time to time before the end of every five years on a request in the prescribed form and the Central Government may renew the registration after considering the report of Registrar of Copyrights on the working of the copyright society under Section 36:

Provided that the renewal of the registration of a copyright society shall be subject to the continued collective control of the copyright society being shared with the authors of works in their capacity as owners of copyright or of the right to receive royalty: Provided further that every copyright society already registered before the coming into force of the Copyright (Amendment) Act, 2012 shall get itself registered under this Chapter within a period of one year from the date of commencement of the Copyright (Amendment) Act, 2012.

(4) The Central Government may, if it is satisfied that a copyright society is being managed in a manner detrimental to the interest of the authors and other owners of right concerned, cancel the registration of such society after such inquiry as may be prescribed.

(5) If the Central Government is of the opinion that in the interest of the authors and other owners of right concerned or for non-compliance of Section 33-A, sub-section (3) of Section 35 and Section 36 or any change carried out in the instrument by which the copyright society is established or incorporated and registered by the Central Government without prior notice to it, it is necessary so to do, it may, by order,

suspend the registration of such society pending inquiry for such period not exceeding one year as may be specified in such order under sub-section (4) and that Government shall appoint an administrator to discharge the functions of the copyright society.

33A. Tariff scheme by copyright societies.— (1) Every copyright society shall publish its tariff scheme in such manner as may be prescribed. (2) Any person who is aggrieved by the tariff scheme may appeal to the Appellate Board and the Board may, if satisfied after holding such inquiry as it may consider necessary, make such orders as may be required to remove any unreasonable element, anomaly or inconsistency therein:

> Provided that the aggrieved person shall pay to the copyright society any fee as may be prescribed that has fallen due before making an appeal to the Appellate Board and shall continue to pay such fee until the appeal is decided, and the Board shall not issue any order staying the collection of such fee pending disposal of the appeal:
>
> Provided further that the Appellate Board may after hearing the parties fix an interim tariff and direct the aggrieved parties to make the payment accordingly pending disposal of the appeal."

56. Equally, Section 39, as substituted by the amending Act of 1994, reads as follows:

> "39. Acts not infringing broadcast reproduction right or performer's right.— No broadcast reproduction right or performer's right shall be deemed to be infringed by—
>
> (a) the making of any sound recording or visual recording for the private use of the person making such recording, or solely for purposes of bona fide teaching or research; or
>
> (b) the use, consistent with fair dealing, of excerpts of a performance or of a broadcast in the reporting of current events or for bona fide review, teaching or research; or
>
> (c) such other acts, with any necessary adaptations and modifications, which do not constitute infringement of copyright under Section 52."

57. The 2012 amendment to the Copyright Act was relied upon and placed with great emphasis by learned counsel appearing on behalf of the appellants. The Statement of Objects and Reasons of this amendment Act stated as follows :

> "The Copyright Act, 1957 was enacted to amend and consolidate the law relating to copyrights in India. To meet with the national and international requirements and to keep the law updated, the Act has been amended five times since then, once each in

> the years 1983, 1984, 1992, 1994 and 1999. The 1994 amendment was a major one which harmonized the provisions of the Act with the Rome Convention, 1961 by providing protection to the rights of performers, producers of phonographs and broadcasting organizations. It also introduced the concept of registration of Copyright Societies for collective management of the rights in each category of copyrighted works. The last amendment in 1999 introduced a few minor changes to copy with the obligations under the Trade Related Aspects of Intellectual Property Rights (TRIPS).
>
> 2. The Act is now proposed to be amended with the object of making certain changes for clarity, to remove operational difficulties and also to address certain newer issues that have emerged in the context of digital technologies and the Internet. The two World Intellectual Property Organisation (WIPO) Internet Treaties, namely, WIPO Copyright Treaty (WCT), 1996 and WIPO Performances and Phonograms Treaty (WPPT), 1996 have set the international standards in these spheres. The WCT and the WPPT were negotiated in 1996 to address the challenges posed to the protection of Copyrights and Related Rights by digital technology, particularly with regard to the dissemination of protected material over digital networks such as the Internet. The member countries of the WIPO agreed on the utility of having the Internet treaties in the changed global technical scenario and adopted them by consensus. In order to extend protection of copyright material in India over digital networks such as internet and other computer networks in respect of literary, dramatic, musical and artistic works, cinematograph films and sound recordings works of performers, it is proposed amend the Act to harmonise with the provisions of the two WIPO Internet Treaties, to the extent considered necessary and desirable. The WCT deals with the protection for the authors of literary and artistic works such as writings, computer programmes;

original databases; musical works; audiovisual works; works of fine art and photographs. The WPPT protects certain “related rights” which are the rights of the performers and producers of phonograms. However, India has not yet signed the above-mentioned two treaties. Moreover, the main object to make amendments to the Act is that it is considered that in the knowledge society in which we live today, it is imperative to encourage creativity for promotion of culture of enterprise and innovation so that creative people realize their potential and it is necessary to keep pace with the challenges for a fast growing knowledge and modern society. xxx xxx xxx (xvii) make provision for formulation of a tariff scheme by the copyright societies subject to scrutiny by the Copyright Board.”

58. By this amendment, Section 2(ff) defining “communication to the public” was replaced as follows:-

> “2(ff) “communication to the public” means making any work or performance available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies of it, whether

simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available.

Explanation: For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms or any hotel or hostel shall be deemed to be communication to the public."

59. Certain amendments were made to Section 37(3)(e).

Section 39A was amended to extend the provisions of Sections 33 and 33A to owners of the broadcast reproduction rights as follows:-

"39A. Other provisions applying to broadcast reproduction right and performer's right.

(1) Sections 18, 19, 30, 30A, 33, 33A, 34, 35, 36, 53, 55, 58, 63, 64, 65, 65A, 65B and 66 shall, with any necessary adaptations and modifications, apply in relation to the broadcast reproduction right in any broadcast and the performers' right in any performance as they apply in relation to copyright in a work.

xxx xxx xxx"

60. A reading of the aforesaid provisions, according to the learned Senior Advocates for the appellants, makes it clear that broadcasters may, in fact, be the owners of the original copyright of a work – for example, if they themselves have produced a serial. They may also be the copyright owners of the broadcast of this serial which is a separate right under the Copyright Act which they are able to exploit, and if there is a re-

broadcast of what has already been copyrighted, this again is protected by Chapter VIII of the Copyright Act. The argument, therefore, is that content that is carried by transmission from the broadcasters to the ultimate consumer is, therefore, regulated only by the Copyright Act and any royalties that can be charged for exploitation of the three rights as aforesaid are governed only by the Copyright Act. Further, the right to band themselves into a society is by virtue of Section 33, which mutatis mutandis applies to broadcasters alone. The tariff, therefore, that may be charged under Section 33A of the Copyright Act read with Rule 56 of the Copyright Rules is nothing but compensation that is payable to broadcasters for parting with their copyright in the manner indicated above.

This being the case, when TRAI fixes rates and/or interferes with content, it is trespassing into the exclusive domain set out by Parliament under the Copyright Act. Since the TRAI Act and the Copyright Act, both being Acts passed by Parliament, have to be harmonised, such harmony can only be maintained if TRAI is kept out altogether from the domain covered by the Copyright Act.

Learned counsel for the appellants also strongly relied upon the observations contained in Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd., (2008) 13 SCC 30, in which this Court explained as under:

> "125. Are the terms "royalty" and "compensation" not synonymous? "Royalty" means the remuneration paid to an author in respect of the exploitation of a work, usually referring to payment on a continuing basis (e.g. 10% of the sale price) rather than a payment consisting of a lump sum in consideration of acquisition of rights. It may also be applied to payment to performers. [See World Copyright Law, (2nd Edn.) by J.A.L. Sterling.]
>
> 126. The word "compensation", however, must have been used keeping in view the fact that if it is a statutory grant; it is a case of statutory licence. We are not unmindful of the fact in cases of other statutory licences, the word "royalty" has been used.

Even the word "usually" has been used. Mr Divan himself has referred to Rule 11-A and Form II-A appended to the Rules of 1958. Clauses (10) and (11) of the form which have validly been made used the word "royalty".

"10. Rate of royalty, which the applicant considers reasonable, to be paid to the copyright owner.

11. Means of the applicant for payment of the royalty."

127. The legislature therefore for all intent and purport equates "compensation" with "royalty". In the context of the Act, royalty is a genus and compensation is a species. Where a licence has to be granted, it has to be for a period. A "compensation" may be paid by way of annuity. A "compensation" may be held to be payable on a periodical basis, as apart from the compensation, other terms and conditions can also be imposed. The compensation must be directed to be paid with certain other terms and conditions which may be imposed."

61. Rule 56 of the Copyright Rules, 2013, also relied upon, is set out hereunder:

> "56. Tariff Scheme.— (1) As soon as may be, but in no case later than three months from the date on which a copyright society has become entitled to commence its copyright business, it shall frame a scheme of tariff to be called the "Tariff Scheme" under section 33A of the Act setting out the nature and quantum of royalties which it proposes to collect in respect of the right or the set of rights in the specific categories of works administered by it. (2) Every copyright society shall display its Tariff Scheme by posting it on its website.
>
> (3) The Tariff Scheme shall indicate the separate rates for-
>
> (a) different categories of users;

(b) different media of exploitation, such as telephone, broadcast or internet;

(c) different types of exploitation whether by an individual or by groups or whether single or multiple use or for advertising;

(d) different durations of use and territory; and

(e) any other differentiation factor indicated by the society, as it may deem fit.

(4) While fixing the tariff the copyright society shall follow the guidelines issued by any Court or the Board, if any, and may consult the user groups. (5) The copyright society shall collect the royalties from a licensee in advance where the Tariff Scheme provides for lump sum payment of royalties. In cases where the Tariff Scheme provides for payments in installments, each installment shall be collected in advance. However, in cases where the Tariff Scheme provides for the payment of royalties based on actual use, the copyright society may collect an advance at the time of issue of licence and settle the final payment based on actual use at the end of the period for which the licence is issued or granted.

Provided that the copyright society shall not receive any payment in the nature of minimum guarantee from a licensee whose royalty payments are based on actual use which are to be settled with the society at the end of the licence period except where, any exceptional circumstances are specifically included in the Tariff Scheme and the individual case has been approved by the Governing Council.

(6) The copyright society may revise the Tariff Scheme periodically but not earlier than a period of twelve months by following the rules. It shall publish the date of coming into of the revised Tariff Scheme at least before two months in advance and the same shall be posted on its website."

62. At this juncture, it is of a little importance to compare and contrast Section 2(dd) of the Copyright Act with "broadcasting services" as defined in the impugned Regulation and Tariff Order. By Clause 2(j) of the impugned Regulation, "broadcasting services" is defined as follows:

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

63. When the definitions of "broadcast" in Section 2(dd) of the Copyright Act and of "broadcasting services" in Clause 2(j) of the impugned Regulation are compared, what is clear is that the words "intended to be received by the general public either directly or indirectly" are completely missing from the definition of "broadcast" contained in the Copyright Act. Also, Section 52(1)(b) of the Copyright Act indicates that transient or incidental storage of a work or performance purely in the

technical process of electronic transmission or communication to the public is not an act that would constitute infringement of copyright. Section 52(1)(b) reads as follows:

> "52. Certain acts not to be infringement of copright.- (1) The following acts shall no constitute an infringement of copyright, namely:-
>
> xxx xxx xxx
>
> (b) the transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public;"

64. The picture that, therefore, emerges is that copyright is meant to protect the proprietary interest of the owner, which in the present case is a broadcaster, in the "work", i.e. the original work, its broadcast and/or its re-broadcast by him. The interest of the end user or consumer is not the focus of the Copyright Act at all. On the other hand, the TRAI Act has to focus on broadcasting services provided by the broadcaster that impact the ultimate consumer. The focus, therefore, of TRAI is that of a regulatory authority, which looks to the interest of both broadcaster and subscriber so as to provide a level playing field for both in which regulations can be laid down which affect the manner and carriage of broadcast to the ultimate consumers.

Once the relative scope of both the enactments is understood as above, there can be no difficulty in stating that the two Acts operate in different fields. We do not find on a reading of the impugned Regulation as well as the Tariff Order made that TRAI has transgressed into copyright land. This is for the reason, as has been stated hereinabove, that regulations which allegedly impact packaging TV channels, pricing of TV channels and the broadcaster's right to arrange his business as he pleases, all have to be viewed with the lens of a regulatory authority, which is to provide a level playing field between broadcaster and subscriber. We have also noted how the broadcaster is free to provide whatever content he chooses for the TV channels that he chooses to transmit to the ultimate consumer. We have also noted how the broadcaster is free to arrange pricing of his TV channels so long as they are non-

discriminatory and do not otherwise have the effect of unreasonably restricting the choice of a subscriber to choose bouquet or a-la-carte channels as has been held hereinabove.

We are satisfied that the impugned Regulation and Tariff Order have been passed by a regulatory authority after applying its mind to the objections of the various stakeholders involved after which the Regulation and Tariff Order have been laid down which have, by and large, been initially acceded to by the broadcasters themselves. In this view of the matter, we are of the view that the Copyright Act will operate within its own sphere, the broadcaster being given full flexibility to either individually or in the form of a society charge royalty or compensation for the three kinds of copyright mentioned hereinabove. TRAI, while exercising its regulatory functions under the TRAI Act, does not at all, in substance, impinge upon any of these rights, but merely acts, as has been stated hereinabove, as a regulator, in the public interest, of broadcasting services provided by broadcasters and availed of by the ultimate consumer.

65. As Dr. Singhvi has repeatedly stressed that fixation of rates under Section 11(2) would directly impinge upon compensation payable for copyright to the broadcasters, it is important to note that both the Copyright Act as well as the TRAI Act are central enactments which do not expressly provide that the one overrides the other. In this situation, a basic principle of interpretation of statutes is that both Acts be harmonized in the event of any clash/conflict between the two so that both may be given effect to. In fact, Section 38 of the TRAI Act reads as under:-

> "38. Application of certain laws. – The provisions of this Act shall be in addition to the provisions of the Indian Telegraph Act, 1885 (13 of 1885) and the Indian Wireless Telegraphy Act, 1933 (17 of 1933) and, in particular, nothing in this Act shall affect any jurisdiction, powers and functions required to be exercised or performed by the Telegraph Authority in relation to any area falling within the jurisdiction of such Authority."

66. Since the Telegraph Authority, acting under the Telegraph Act and the Indian Wireless Telegraphy Act, is required to act in public interest, the jurisdiction of the said Authority is left untrammeled by the provisions of the TRAI Act. It can thus be seen that TRAI and the Telegraph Authority both act in public interest. The TRAI Act, the Telegraph Act and the Indian Wireless Telegraphy Act, being statutes in pari materia, form a Code, insofar as wireless telegraphy and broadcasting is concerned.

67. We are, therefore, clearly of the view that if in exercise of its regulatory power under the TRAI Act, TRAI were to impinge upon compensation payable for copyright, the best way in which both statutes can be harmonized is to state that, the TRAI Act, being a statute conceived in public interest, which is to serve the interest of both broadcasters and consumers, must prevail, to the extent of any inconsistency, over the Copyright Act which is an Act which protects the property rights of broadcasters. We are, therefore, of the view that, to the extent royalties/compensation payable to the broadcasters under the Copyright Act are regulated in public interest by TRAI under the TRAI Act, the former shall give way to the latter. As there is no merit in these appeals, the same are, therefore, dismissed.

...............................J. (R.F. Nariman) ....J. (Navin Sinha) New Delhi;

October 30, 2018.