
(2012) 07 DEL CK 0390

In the Delhi High Court

Case No : Writ Petition (C) 8529 of 2011 and CM Application 19296 of 2011

Telecom Watchdog

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 13-07-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1), 19(1)(a), 19(1)(a)
Telecom Regulatory Authority of India Act, 1997 — Section 11, 11(1)(b)(v), 36

Citation : (2012) 07 DEL CK 0390

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Prashant Bhushan and Mr. Pranav Sachdeva, for the Appellant;
Sumeet Pushkarna, Advocate for UOI. Mr. Meet Malhotra with Mr. Saket Singh
and Mr. Kumar Rajan Mishra, Advocates for TRAI, for the Respondent

Final Decision : Disposed Off

Judgement

A.K. Sikri, Acting Chief Justice

1. Section 36 of the Telecom Regulatory Authority Act, 1997 (hereinafter referred to as "the Act") gives power to the Telecom Regulatory Authority of India (TRAI) to frame Regulations of the nature specified in the said Section. Exercising powers under that provision read with sub-clause (v) of clause (b) of sub-section (1) of section 11 and clause (c) of sub section (1) of Section 11 of the Act, the TRAI has framed Regulations, known as "The Telecom Commercial Communications Customer Preference (Sixth Amendment) Regulations, 2011 (hereinafter referred to as the Regulations). Some amendments are made to the earlier Regulations framed in 2010. We are here concerned with amendment at Sl. No. 8 (c) of the said Regulations which reads as under:-

8. In sub-regulation (2) of regulation 20 of the principal regulations,...

(a) xxxx

(b) xxxx

(c) after clause(k), the following clauses shall be inserted, namely:-

(ka) no Access Provider shall permit sending of more than one hundred SMS per day per SIM: Provided that in case of post paid telephone number the Access Provider shall not permit more than three thousand SMS per SIM per month. Provided further that in case of post paid telephone number the Access Provider shall not permit sending of more than one hundred SMS per day per SIM from a date to be notified by the Authority; (kb) the Authority may by direction, from time to time, specify the category of SMS which shall be excluded from the limit of one hundred SMS per day per SIM: Provided that before permitting a customer to send specified category of SMS beyond the limit of one hundred SMS per day per SIM, the Access Provider shall obtain an undertaking from such customer that he shall not use such telephone number for sending any commercial communications: Provided further that the Access Provider shall enter, in the list maintained in the National Telemarketer Register, the telephone number, name and address of the customer, category of exempted SMS and date of permitting sending of SMS beyond limit of one hundred SMS per day per SIM and the said list shall be updated every Monday.

As is clear from the reading of the aforesaid amended provision, no Access Provider is permitted to send more than 100 SMS per day, per SIM, which is increased to 200 SMS per day vide Amendment @ 8th Amendment.

2. The petitioner by way of present petition, filed in Public Interest, has challenged the validity of the aforesaid provision insofar as it puts limit on the number of SMSs can be sent by a person in a day. According to the petitioner, this restriction is arbitrary, wholly unnecessary, violates fundamental freedom of citizens and is against democratic norms. The petitioner accepts that the reason for making this provision was that nuisance of large number of telecom marketing calls which were unsolicited i.e. receiving party does not want to receive such calls or messages. Unrestricted Unsolicited Commercial Communications (UCC) by telemarketers were interfering with the personal lives of the individuals as often they would call them up for selling their products. The petitioner, however, states that under the garb of controlling UCC, the TRAI has barred common users from sending more than 200 Short Message Service (SMS) per day thereby impinging upon the freedom of speech and expression of the citizens. On this ground prayer is made to quash the provision imposing this condition as unconstitutional.

3. In order to appreciate this submission of the petitioner, it would be necessary to trace out the history leading to the incorporation of this provision.

4. Prior to September 27, 2011 there was no such cap on the SMS which a person can send. However, TRAI found that unrestricted UCC calls and SMSs were interfering with the personal lives of the individuals as often telemarketers would call them up for selling their products. Telemarketing had emerged as one of the simplest and cost efficient tool for marketing of products. A large number

of these "telemarketing" calls and SMSs were unsolicited i.e. the receiving party does not want to receive such calls or messages. Such messages disturb the recipients, intrude into their privacy, and impose a cost in terms of the time and effort. The respondent No. 2 had been making several attempts since 2007 to control UCC. For the first time, on June 5, 2007, the respondent issued "the Telecom Unsolicited Commercial Communications Regulations, 2007". However, these regulations were very weak and could not act as deterrent to such UCC calls and SMSs. The penalty for default was meager amount of Rs. 500, which was increased to maximum of Rs. 5000 for the 1st violation and Rs. 20,000 for the 2nd subsequent violations.

5. The respondent No. 2 then had attempted to make the regulations more stringent for the defaulters. It invited suggestions on its consultation paper issued on May 11, 2010 which was titled as "Consultation Paper on Review of Telecom Unsolicited Commercial Communications Regulations". It proposed various suggestions to curb the menace of UCC. This included even proposal of putting cap on the number of calls as well as SMS. The relevant part of the consultation a paper is reproduced below:-

2.12 Effective control on Telemarketing calls/SMS/MMS.

1.12.1 Voice calls and SMSs from telemarketers can be effectively controlled if some automatic control can be inbuilt in the system. The possibility of allocation of separate number level to telemarketers was considered by a committee earlier, which expressed the view that allocation of separate number level may not be feasible as it will result in inefficient utilization of telecom numbering resources.

1.12.2 Unsolicited commercial voice calls can be drastically controlled if telemarketers use only National Do Call Registry(NDCR) data. Since NDCR data will be provided to all registered telemarketers, there is high possibility that such telemarketers will make calls only to subscribers willing to receive such calls. Unregistered telemarketers may still arrange subscriber data base and make UCC calls even to those subscribers who are not registered with NDCR. They are likely to use either fixed line or mobile phones to make telemarketing calls. Number of calls likely to be made by such telemarketers per day will be high. It may technically be possible to restrict maximum number of calls per day from a telephone number. Such restriction may be sufficiently high so that normal user is not affected. These restrictions may be removed for high usage subscriber on submitting an affidavit declaring that - These telecom resources are not used for any telemarketing purpose. Details of calls from these numbers can effectively be used to control UCC calls. Such restrictions on maximum number of calls per day will make use of telephone unsuitable for telemarketing purpose will encourage them to register as telemarketer with DoT. Once registered as telemarketer, there will be no restrictions on number of calls per day. This may help to effectively restrict operation of unregistered telemarketers.

1.12.3 Unsolicited commercial SMSs can be controlled using second screening at SMSC. Service providers can be mandated to use NDCR data to ensure that content aggregators send bulk SMS to only those customers registered on NDCR. All bulk SMSs addressed to those not registered on NDCR may be dropped. A maximum limit of SMSs per day can also be fixed to ensure normal mobile phone is not used to send UCC messages.

1.12.4 Do you agree that maximum number of calls as well as SMS per day from a telephone number (wireless as well as wireline) can be technically controlled to force telemarketers to register with Dot ?What other options you see will help to effectively control telemarketers?

6. About 53 persons/ entities responded to this consultation process. Out of them only four had responded in favour of cap, while the others rejected the idea of putting the cap. Those who rejected the cap had stated that the telemarketers can buy more SIMs to restrict their communication within any specified limit, and as such it would not be advisable to take this step of cap. In response to the above question, the two government owned telecom operators -MTNL and BSNL- had also said that such cap will not help in controlling UCC menace.

7. After the above consultation process, the respondent came out with its Regulations called "The Telecom Commercial Communications Customer Preference Regulations, 2010, dated December 1,2010. This regulation did not specify any cap on SMS and calls. The Regulation took every possible step that could help in curbing UCC menace. It has imposed severe penalties on violations by telemarketers as shown in the following table:-

Violation

Penalty on Telemarketer

1st

Rs. 25,000

2nd

Rs. 75,000

3rd

Rs. 80,000

4th

Rs. 120,000

5th

Rs. 150,000

6th

Rs. 250,000; all Telecom resources allocated to telemarketers are removed immediately and they are blacklisted for two years.

8. In this Regulation, the respondent No. 2 has also made the process of making complaints simple. Within three days of having received the UCC calls/SMS, a user can lodge complaint with the operator. Apart from making complaints by calling toll-free number 1909, a user can also send SMS on 1909 to lodge his complaint by the following method:-

COMP TEL NO XXXXXXXX,dd/mm/yy, Time hh:mm:" Where XXXXXXXX- is the telephone number or header of the SMS, as the case may be, from which the unsolicited commercial communication has originated. After this, the customer complaint shall be registered and acknowledged by providing him a unique complaint number through SMS.

9. The respondent No. 2 has also ensured that on receiving complaint, the operators take prompt action within 72 hours of having received the complaints. The regulation has also specified the detail process of handling complaints without leaving any chance for any ambiguity. The relevant part of the Regulation as reproduced below:-

Relevant extracts of TRAI's UCC Regulation dated December 1,2010 Regulation-19

(5) On receipt of a complaint under sub-regulation (4), the Terminating Access Provider shall,-

(a) immediately acknowledge the complaint by providing a unique complaint number;

(b) verify whether, at the time of complaint, a period of seven days has expired from the date of registration of the subscriber in the Provider Customer Preference Register;

(c) verify the correctness of the complaint as per the available Call Detail Record (CDR); and

(d) Complete the steps at (b) and (c) within seventy two hours from receipt of the complaint

(6) If, on verification, the complaint is found to be correct, the Terminating Access Provider shall, within seventy two hours of the receipt of the complaint, forward the complaint, under simultaneous transmission to the National Telemarketer Register, to the Originating Access Provider from whose network such unsolicited commercial communication has originated.

(7) In case, on verification, the Terminating Access Provider finds that no such unsolicited commercial communication has been made to the complainant, he shall inform the complainant accordingly.

(8) The originating Access Provider, to whom the complaint has been forwarded,

shall within seventy two hours of the receipt of the complaint by it, investigate the nature of call or SMS and if after such investigation, it finds that such call or SMS is an unsolicited commercial communication-

(a) issue a notice to the telemarketer, forwarding the detail of the unsolicited commercial communication made by him and informing him of the deduction from the security deposit of an amount as agreed upon in terms of Scheduled IV or Schedule V to these regulations;

(b) intimate, the result of the investigation and the action taken by it on the basis of the complaint, to the Terminating Access Provider which forwarded the complaint;

(c) deposit the amount so deducted in an account specified by the Authority; and

(d) update the action taken by it in the National Telemarketer register.

(9) The terminating Access Provider shall, upon receipt of the intimation from the Originating Access Provider under sub-regulation (8), intimate to the complainant, within twenty four hours, the result of the investigation and the action taken by the Originating Access Provider on his complaint.

(10) Notwithstanding any delay on the part of the Terminating Access Provider to forward the complaint, as stipulated in sub regulation (6), to the originating Access Provider, it shall be incumbent upon the originating Access Provider to take action on such complaint in accordance with the provisions of sub-regulation (8).

(11) In case the originating Access Provider to whom a complaint has been forwarded under sub-regulation (6) finds that the unsolicited commercial communication originated from a subscriber who is not registered with the Authority as a telemarketer, it shall issue a notice to such subscriber to forthwith discontinue the sending of such unsolicited commercial communications and if such subscriber sends a commercial communication to any subscriber on a second occasion, disconnect the telecom resources of such subscriber.

10. According to the petitioner all though the aforesaid measures were adequate only to put effective control over the UCC. However, these Original Regulations which were to be implemented from January, 2011, their implementation was postponed several times through amendments. Eventually, they became effective from 27.9.2011. From this very day, the TRAI also implemented its 6th Amendment Regulation dated September 5,2011 incorporating the aforesaid provision of maximum 100 SMS per day and thereafter increasing this 200 per day vide 8th Amendment. According to the petitioner, if the purpose was to control UCC, that would not mean that those who want to make use of these SMS with bona fide purpose are also deprived from using this. SMS is an effective means of communication and putting a cap thereupon restricts the freedom of speech.

11. Mr. Prashant Bhushan, learned counsel appearing for the petitioner submits that there is no rationale behind such a provision nor there is any purpose going to be served. He further referred to the judgment of Supreme Court in *Bennett Coleman and Co. and Others Vs. Union of India (UOI) and Others*, where the Court explained the doctrine of freedom in the following manner:-

31. Article 19(1)(a) provides that all citizens shall have the right to freedom of speech and expression. Article 19(2) states that nothing in Sub-clause (a) of Clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said Sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence. Although Article 19(1)(a) does not mention the freedom of the Press, it is the settled view of this Court that freedom of speech and expression includes freedom of the Press and circulation.

32. In the *Express Newspapers case (supra)* it is said that there can be no doubt that liberty of the Press is an essential part of the freedom of speech and expression guaranteed by Article 19(1)(a). The Press has the right of free propagation and free circulation without any previous restraint on publication. If a law were to single out the Press for laying down prohibitive burdens on it that would restrict the circulation, penalise its freedom of choice as to personnel, prevent newspapers from being started and compel the press to Government aid. This would violate Article 19(1)(a) and would fall outside the protection afforded by Article 19(2).

33. In *Sakal Papers case (supra)* it is said that the freedom of speech and expression guaranteed by Article 19(1) gives a citizen the right to propagate and publish his ideas to disseminate them, to circulate them either by words of mouth or by writing. This right extends not merely to the matter it is entitled to circulate but also to the volume of circulation. In *Sakal Papers case (supra)* the Newspaper (Price and Page) Act 1956 empowered the Government to regulate the prices of newspapers in relation to their pages and sizes and to regulate the allocation of space for advertisement matter. The Government fixed the maximum number of pages that might be published by a newspaper according to the price charged. The Government prescribed the number of supplements that would be issued. This Court held that the Act and the Order placed restraints on the freedom of the press to circulate. This Court also held that the freedom of speech could not be restricted for the purpose of regulating the commercial aspects of activities of the newspapers.

34. Publication means dissemination and circulation. The press has to carry on its activity by keeping in view the class of readers, the conditions of labour, price of material, availability of advertisements, size of paper and the different kinds of news comments and views and advertisements which are to be published and circulated. The law which lays excessive and prohibitive burden which-would

restrict the circulation of a newspaper will not be saved by Article 19(2). If the area of advertisement is restricted, price of paper goes up. If the price goes up circulation will go down. This was held in Sakul Papers case (supra) to be the direct consequence of curtailment of advertisement. The freedom of a newspaper to publish any number of pages or to circulate it to any number of persons has been held by this Court to be an integral part of the freedom of speech and expression. This freedom is violated by placing restraints upon it or by placing restraints upon something which is an essential part of that freedom. A restraint on the number of pages, a restraint on circulation and a restraint on advertisements would affect the fundamental rights under Article 19(1)(a) on the aspects of propagation, publication and circulation.

35. This Court in Hamdard Dawakhana case (supra) considered the effect of Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954 in relation to Articles 19(1)(a), 19(1) (f), 19(1)(g) and 19(6). The Act in that case was to control the advertisement of drugs in certain cases to prohibit the advertisement for certain purposes of remedies alleged to possess magic qualities and to provide for matters connected therewith. The Act was challenged on the ground of violation of fundamental rights. The ruling of this Court in Hamdard Dawakhana case (supra) that advertisement is no doubt a form of speech and it is only when an advertisement is considered with the expression or propagation of idea that it can be said to relate to freedom of speech. The right to publish commercial advertisements is not a part of freedom of speech."

12. He also submitted that air waves restriction does not apply in the instant case as there is no limitation of air space and, therefore, it was unreasonable restriction on the freedom of speech. He referred to the judgment of Supreme Court cited as Secretary, Ministry of Information and Broadcasting, Govt. of India and others Vs. Cricket Association of Bengal and others, He even questioned the bona fides of this provision, arguing that the motive was to frustrate good causes.

13. Mr. Meet Malhotra, learned Senior Counsel appearing for the TRAI countered the aforesaid submissions by arguing that it was a laudable object which was sought to be achieved by such a provision. He argued that even the petitioner accepted the fact that this mechanism was introduced to control UCC which was causing much public nuisance. In the first instance, he submitted that the petitioner's argument predicated on Cricket Association of Bengal judgment (supra) itself is flawed and the provision was in the nature of reasonable restriction which could legitimately be imposed under Article 19 (2) of the Act. He argued that the petitioner has no inherent right to free speech using public property (i.e. airwaves) which can be controlled and regulated by a public authority (i.e. TRAI) for larger societal interests and also interests of other users (i.e. listener or receivers of SMS) of the same medium of airwaves, as per the ratio of the aforesaid judgment of Cricket Association of Bengal judgment (supra) contained in paras 201 (1) (b):-

(b) Airwaves constitute public property and must be utilized for advancing public

good. No individual has a right to utilize them at his choice and pleasure and for purposes of his choice including profit. The right of free speech guaranteed by Article 19 (1)(a) does not include the right to use airwaves, which are public property.

On the aforesaid premise, it was submitted that the aforesaid ratio has been arrived at by an elaborate discussion of the nature of broadcasting medium (i.e. spectrum) used, inter alia for sending/receiving SMS. So it is not just the freedom of speech of the sender, it is equally or more so the same right of the receiver of SMS. Over the years, evolving jurisprudence in this field has overwhelmingly veered around to the rights of the receivers/listeners of airwaves rather than merely the sender/broadcaster is of primary importance.

14. Mr. Malhotra additionally argued that even if it was to presume that the petitioner had a constitutionally guaranteed right to send unlimited SMSs as expression of free speech, the same is undisputedly, restrictable under Article 19(2) by law/or regulations having force of law. His submission was that admittedly, misuse of the frequencies created widespread nuisance and affected public order. The TRAI, in discharge of its statutory functions to protect the interests of consumers [Section 11 (1) (b) (v)] framed Regulations to address the public order issue. Even on that touchstone, TRAI action is informed by and within bounds of law. Whether Regulations are delegated legislation etc. and so therefore law etc. is really not a question raised or addressed by the petitioner. Indisputably the power exercised u/s 11(1)(b)(v) has force of law. If it is exercised in interest of public order, then even if the petitioner has Article 19(1) (a) right to send unlimited SMS the same can be and has been properly and legally curbed. He further argued that it is an unexceptional proposition that when rights of free speech are intertwined with right to carry on trade or business (i.e. a Article 19(1) (g) issue) the right to free speech undergoes a sea change and can be regulated on grounds other than mentioned in Article 19(2). In A. Suresh, etc. etc. Vs. State of Tamil Nadu and Another, etc. etc., the Apex Court held as under:-

where the freedom of speech gets intertwined with business it undergoes a fundamental change and its exercise has to be balanced against societal interest.

15. Ld. Senior Counsel further argued that even otherwise, no one has a right to assert an Article 19(1)(a) right when it violates another's persons right under Article 21 as held in In Re: Noise Pollution - Implementation of the Laws for restricting use of loudspeakers and high volume producing sound systems,

Those who make noise often take shelter behind Article 19(1) (a) pleading freedom of speech and right to expression. Undoubtedly, the freedom of speech and right to expression are fundamental rights but the rights are not absolute. Nobody can claim a fundamental right to create noise by amplifying the sound of his speech with the help of loudspeakers. While one has a right to speech, others have a right to listen or decline to listen. Nobody can be compelled to listen and

nobody can claim that he has a right to make his voice trespass into the ears or mind of others. Nobody can indulge into aural aggression. If anyone increases his volume of speech and that too with the assistance of artificial devices so as to compulsorily expose unwilling persons to hear a noise raised to unpleasant or obnoxious levels then the person speaking is violating the right of others to a peaceful, comfortable and pollution-free life guaranteed by Article 21. Article 19 cannot be pressed into service for defeating the fundamental right guaranteed by Article 21.

16. Based on that his plea was that the right of a party receiving SMS was equally important and had to be kept in mind which was done by the TRAI in the instant case and thus interest of both the parties was balanced and it was most equitable provision which was framed by the TRAI having adequate authority, after following the details consultation process.

17. We have considered the respective submissions of counsel on either side.

18. At the outset, it would be important to emphasize the objective behind the impugned Regulations. Even as per the respondents, the amendment in The Telecom Commercial Communications Customer Preference Regulations, 2011 (6th & 8th Amendment) with the objective to control the UCC messages. We have already referred to the Consultation Paper on review of telecom unsolicited Commercial Communication Regulation, dated 11.5.2010 circulated by TRAI. Previous to this, the Consultation Paper itself emphasizes that the Telecom Communication revolution has changed the social behaviour in many ways. Telephone has become a ubiquitous communication medium and people have started using telephone for marketing commonly known as telemarketing, apart from personal voice communication. At the same time, it pointed out that a majority of telemarketing calls are unsolicited. Most of the telecom consumers find telemarketing calls/SMSs inconvenient and disturbing. This termed as UCC and treated as one of the major issue for concern of telephone consumer resulting in large number of complaints. It is also pointed out that in order to curb UCCs, the TRAI had notified the Telecom Unsolicited Commercial Communication Regulation, 2007 and "National Do Not Call (DDNC)" Registry was established. However, it could not check the menace of the UCCs. The TRAI was receiving more than 18,000 consumer complaints with their service provider regarding receiving of UCC from telemarketers and the actual number of these complaints was much higher. It was for this purpose, in order to check these UCCs effectively, the TRAI came out with the Consultation Paper and invited suggestions. Chapter-1 of the Consultation Paper incorporates International Practices to Curb Unsolicited Commercial Communications and points out the position prevailing in European Union, USA, Australia, U.K, Canada, Germany, among other countries. Chapter-2 highlights the status which was prevalent at the time of circulation of this Consultation Paper and issues and measures to curb Unsolicited Commercial Communications. Issues for consultation are specified in Chapter-4 and on that suggestions were invited. After receiving the

suggestions and going through the same, the impugned Amendments to the Regulations came to be incorporated.

19. Thus, the primary object and entire focus for bringing the amendment in Regulation is/was to curb UCCs. It thus relates to the commercial communication i.e. mode of telemarketing by means of voice communication or SMSs which are largely unsolicited.

Two questions arise for discussion, in this context;

(i) Whether the impugned amendments are justified in curbing the Unsolicited Commercial Communication?

(ii) When the object is to curb UCCs, whether in the process the impugned Regulations impinge upon the right/freedom of speech of other citizens who have nothing to do with the commercial communication?

To put it otherwise, in its attempt to curb UCCs, the impugned Regulations have over stepped its purpose and has violated the Fundamental Rights of the citizens of this Country enshrined under Article 19(1) (a) of the Constitution?

20. We will start out discussion by addressing the legal position in the first instance.

21. Right to freedom of speech and expression is guaranteed as Fundamental Right under Article 19(1)(a) of the Constitution. In a recent judgment delivered in Ramlila Maidan Incident Vs. Home Secretary, Union of India (UOI) and Others, the Supreme Court recapitulated and restated the importance of this right by observing that the freedom of speech is the bulwark of democratic Government. This freedom is essential for proper functioning of the democratic process. The freedom of speech and expression is regarded as the first condition of liberty. It occupies a preferred position in the hierarchy of liberties, giving succour and protection to all other liberties. It has been truly said that it is the mother of all other liberties. Freedom of speech plays a crucial role in the formation of public opinion on social, political and economic matters. It has been described as a "basic human right", "a natural right" and the like. With the development of law in India, the right to freedom of speech and expression has taken within its ambit the right to receive information as well as the right of press. The framers of our Constitution, in unambiguous terms, granted the right to freedom of speech and expression and the right to assemble peaceably and without arms. This gave to the citizens of this country a very valuable right, which is the essence of any democratic system. There could be no expression without these rights. Liberty of thought enables liberty of expression. Belief occupies a place higher than thought and expression. Belief of people rests on liberty of thought and expression. Placed as the three angles of a triangle, thought and expression would occupy the two corner angles on the baseline while belief would have to be placed at the upper angle. Attainment of the preambled liberties is eternally connected to the liberty of expression. (Ref. Preamble, The Spirit and Backbone

of the Constitution of India, by Justice R.C. Lahoti).

22. We would also like to point out that even commercial speech is protected under Article 19(1)(a) of the Constitution, though, purely commercial advertisement meant for furtherance of trade or commerce would be outside the concept of freedom and expression. However, a commercial speech with the objective of propagation of ideas, social, political or economic or in furtherance of literature or human thought would be covered by Article 19 (1)(a) of the Constitution. In support, we refer to the case of *Hamdard Dawakhana and Another, Kalipada Deb and Another, Lakshman Shripati Itpure @ Lakshman Shripati Impore and A.B. Choudhri and Another Vs. The Union of India (UOI) and Others*, wherein the Constitution Bench of the Supreme Court laid down the principle in the following term:-

An advertisement is no doubt a form of speech but its true character is reflected by the object for the promotion of which it is employed. It assumes the attributes and elements of the activity under Article 19(1) which it seeks to aid by bringing it to the notice of the public. When it takes the form of a commercial advertisement which has an element of trade or commerce it no longer falls within the concept of freedom of speech for the object is not propagation of ideas social, political or economic or furtherance of literature or human thought; but as in the present case the commendation of the efficacy, value and importance in treatment of particular diseases by certain drugs and medicines, in such a case, advertisement is a part of business even though as described by Mr. Munshi its creative part, and it was being used for the purpose of furthering the business of the petitioners and had no relationship with what may be called the essential concept of the freedom of speech, it cannot be said that the right to publish and distribute commercial advertisements advertising an individual's personal business is a part of freedom of speech guaranteed by the Constitution. In *Lewis v. Valentine v. F. J. Chrestensen* 1941 (86) L Ed. 1262 it was held that the constitutional right of free speech is not infringed by prohibiting the distribution in city streets of handbills bearing on one side a protest against action taken by public officials and on the other advertising matter. The object of affixing of the protest to the advertising circular was the evasion of the prohibition of a city ordinance forbidding the distribution in the city streets of commercial and business advertising matter. Mr. Justice Roberts, delivering the opinion of the Court said :--

This Court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or prescribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.... If the respondents was attempting to use the streets of New York by distributing commercial advertising, the prohibition of the Code

provisions was lawfully invoked against such conduct.

It cannot be said therefore that every advertisement is a matter dealing with freedom of speech nor can it be said that it is an expression of ideas. In every case one has to see what is the nature of the advertisement and what activity falling under Article 19(1) it seeks to further. The advertisements in the instant case relate to commerce or trade and not to propagating of ideas; and advertising of prohibited drugs or commodities of which the sale is not in the interest of the general public cannot be speech within the meaning of freedom of speech and would not fall within Article 19(1)(a). The main purpose and true intent and aim, object and scope of the Act is to prevent self-medication or self-treatment and for that purpose advertisements commending certain drugs and medicines have been prohibited. Can it be said that this is an abridgement of the petitioners' right of free speech. In our opinion it is not. Just as in *R.M.D. Chamarbaugwalla Vs. The Union of India (UOI)*, it was said that activities undertaken and carried on with a view to earning profits e.g. the business of betting and gambling will not be protected as falling within the guaranteed right of carrying on business or trade so it cannot be said that an advertisement commending drugs and substances as appropriate cure for certain diseases is an exercise of the right of freedom of speech. Freedom of speech goes to the heart of the natural right of an organised freedom-loving society to "impart and acquire information about that common interest". If any limitation is placed which results in the society being deprived of such right then no doubt it would fall within the guaranteed freedom under Article 19(1)(a). But all it does is that it deprives a trader from commending his wares it would not fall within that term, in *John W. Rast v. Van Deman & Lewis Company* 1915 (60) Law Ed 679. Mr. Justice Mckenna. dealing with advertisements said:--

Advertising is merely identification and description, apprising of quality and place. It has no other object than to draw attention to the article to be sold and the acquisition of the article to be sold constitutes the only inducement to its purchase.

As we have said above advertisement takes the same attributes as the object it seeks to promote or bring to the notice of the public to be used by it. Examples can be multiplied which would show that advertisement dealing with trade and business has relation with the item "business or trade" and not with "freedom of speech". Thus advertisements sought to be banned do not fall under Article 19(1) (a).

23. Examined in the light of the aforesaid legal position, it appears us to think that UCCs are normally commercial advertisement meant for furtherance of trade and commerce and not sent with the objective of propagation of ideals, social, political or economic or in furtherance of literature or human thought. Therefore, prima facie such UCCs would not even amount to freedom of speech under Article 19(1)(a) of the Constitution and therefore, provision can be made placing restrictions on such UCCs.

24. Even if we proceed on the basis that UCCs would amount to freedom of speech, such freedom of speech is subject to reasonable restriction contemplated under Article 19 (2) of the Constitution and imposing a cap on the maximum number of UCCs may pass the test of reasonable restrictions. Our reasons for coming to this conclusion are stated in the following paragraphs:

Any action taken by a public authority which is entrusted with the statutory power has, therefore, to be tested by the application of two standards - first, the action must be within the scope of the authority conferred by law and, second, it must be reasonable. If any action, within the scope of the authority conferred by law is found to be unreasonable, it means that the procedure established under which that action is taken is itself unreasonable. The concept of "procedure established by law" changed its character after the judgment of the Supreme Court in the case of *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, where this Court took the view as under:-

The principle of reasonableness, which legally as well as philosophically is an essential element of equality or non arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be right and just and fair and not arbitrary fanciful or oppressive otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied.

This was also noted in the case of *Madhav Hayawadanrao Hoskot Vs. State of Maharashtra*, where the Supreme Court took the following view:-

Procedure established by law are words of deep meaning for all lovers of liberty and judicial sentinels.

In *Ramlila Maidan (supra)*, the Supreme Court mentioned the parameters which are to be gone into while adjudging the reasonableness of the restrictions in the following manner:-

No person can be divested of his fundamental rights. They are incapable of being taken away or abridged. All that the State can do, by exercise of its legislative power, is to regulate these rights by imposition of reasonable restrictions on them. Upon an analysis of the law, the following tests emerge:

- a) The restriction can be imposed only by or under the authority of law. It cannot be imposed by exercise of executive power without any law to back it up.
- b) Each restriction must be reasonable.
- c) A restriction must be related to the purpose mentioned in Article 19(2).

The questions before the Court, thus, are whether the restriction imposed was reasonable and whether the purported purpose of the same squarely fell within the relevant clauses discussed above. The legislative determination of what restriction to impose on a freedom is final and conclusive, as it is not open to judicial review. The judgments of this Court have been consistent in taking the

view that it is difficult to define or explain the word "reasonable" with any precision. It will always be dependent on the facts of a given case with reference to the law which has been enacted to create a restriction on the right. It is neither possible nor advisable to state any abstract standard or general pattern of reasonableness as applicable uniformly to all cases. This Court in the case of *State of Madras Vs. V.G. Row*, held:

It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard or general pattern of reasonableness, can be laid down as applicable to all cases.

For adjudging the reasonableness of a restriction, factors such as the duration and extent of the restrictions, the circumstances under which and the manner in which that imposition has been authorized, the nature of the right infringed, the underlining purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, amongst others, enter into the judicial verdict. (See: *Chintaman Rao Vs. The State of Madhya Pradesh*,

25. While adjudging upon the reasonableness of restrictions, another factor which is to be kept in mind is the balancing of right to freedom of expression of the persons exercising such right on the one hand and the rights of other persons which would include right to privacy as well as right to live nuisance free life. What is emphasized is that no person by exercising his right to freedom of speech can encroach upon the aforesaid rights of other persons against whom this right is exercised. Undoubtedly, the State has a compelling interest in regulating the right to speech when it comes in conflict with the aforesaid rights of other citizens. It is for this reason, the accepted position is that the right that spring from Article 19(1)(a) is not absolute and unchecked and is subject to regulatory measures. At the same time, there is also limitation on the power of the legislature to restrict these freedoms which are to be exercised within the ambit of Article 19(2) of the Constitution. How the two opposite interest are to be balanced was explained by the Apex Court in *S. Rangarajan Vs. P. Jagjevan Ram and Others*, 4 in the following words:-

45. The problem of defining the area of freedom of expression when it appears to conflict with the various social interests enumerated under Article 19(2) may briefly be touched upon here. There does indeed have to be a compromise between the interest of freedom of expression and special interests. But we cannot simply balance the two interests as if they are of equal weight. Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up

with the action contemplated like the equivalent of a "spark in a power keg.

26. Reason to justify the imposition of reasonable restriction is that right, restrictions and duties co-exist. While on the one hand, it is necessary to maintain and preserve the freedom of speech and expression in a democracy, on the other hand it is also necessary to place reins on this freedom in the maintenance of "social order", the term which include "law and order", "public order" as well as "security of the State".

27. We may also usefully extract the passage from the judgment of Dr. D.C. Saxena, Contemnor Vs. Hon"ble the Chief Justice of India, . The "balancing of interest" theory was explained by the Supreme Court in the said judgment in the following manner:-

31. If maintenance of democracy is the foundation for free speech, society equally is entitled to regulate freedom of speech or expression by democratic action. The reason is obvious, viz., that society accepts free speech and expression and also puts limits on the right of the majority. Interest of the people involved in the acts of expression should be looked at not only from the perspective of the speaker but also the place at which he speaks, the scenario, the audience, the reaction of the publication, the purpose of the speech and the place and the forum in which the citizen exercises his freedom of speech and expression. The State has legitimate interest, therefore, to regulate the freedom of speech and expression which liberty represents the limits of the duty of restraint on speech or expression not to utter defamatory or libellous speech or expression. There is a correlative duty not to interfere with the liberty of others. Each is entitled to dignity of person and of reputation. Nobody has a right to denigrate others" right to person or reputation. Therefore, freedom of speech and expression is tolerated so long as it is not malicious or libellous, so that all attempts to foster and ensure orderly and peaceful public discussion or public good should result from free speech in the market-place. If such speech or expression was untrue and so reckless as to its truth, the speaker or the author does not get protection of the constitutional right.

28. Read in this context, the respondents have provided complete justification for imposing maximum limit of 200 SMSs per day in order to curb the menace of UCC. We have already pointed out that the TRAI has found that Unrestricted Unsolicited Commercial Communications (UCC) calls and SMSs were interfering with the personal lives of the individuals as often telemarketers would call them up for selling their products. All such calls were unsolicited, i.e., i.e. the receiving party does not want to receive such calls or messages. These UCC messages disturb the recipients, intrude into their privacy, and impose a cost in terms of the time and efforts. In fact, they infringe the equally importance rights of the unwilling recipients.

29. So far so good the question is as to whether, in the process of doing so, restrictions can also be imposed against others who want to use the means of

voice calls or SMSs to propagate their ideas exercising freedom of speech. As held in *Re: Noise Pollution* (supra) that while one has a right to speech, others have a right to listen or decline to listen. Nobody can be compelled to listen and nobody can claim that he has a right to make his voice trespass into the ears or mind of others. This may be relevant insofar as curbing UCC is concerned. We can also appreciate the anxiety of the TRAI which has, in true spirit accepted and realize the unbalancing and obnoxious levels of UCCs. However, while, the aforesaid provisions have been made, keeping in mind this objective and examining the issue from this angle, the moot question is as to whether while doing so, the TRAI could trample upon the rights of others, not indulging in voice calls/SMSs for commercial purposes in mind but only with the objective of dissemination of information. Even as per TRAI, the sole objective of the entire exercise was to check the malpractices of UCC. The consultation paper which was prepared and circulated itself related to UCCs, i.e., Unrestricted Unsolicited Commercial Communications. Regulations were intended to be framed keeping this objective in mind. Various suggestions which were given in the consultation paper were aimed at curbing the menace of UCC in order to effective control on such calls. However, when the final product came, viz., impugned provision, it not only puts embargo on the maximum voice calls/SMSs that can be seen for commercial purposes, but all categories of SMSs. To our mind, the TRAI has painted the second category also with the same brush and imposition of such a condition qua others is not related to the purpose mentioned in Article 19(2). This restriction, in the present form without any provision of proper regulation in our view, offends the fundamental rights of the users enshrined under Article 19(1)(a) of the Constitution.

30. We would like to clarify that even non-UCCs voice calls/SMSs may impinge upon the rights of privacy of others. Therefore, it would always be open to TRAI to regulate such freedom of speech as well in so far to protect the rights of the receivers. However, the provision in the present form is not made keeping in view that objective. It would also be open to the TRAI to address this issue independently and come out with necessary Regulation or amendment in the present Regulations.

31. We are, therefore, of the opinion that the impugned provision insofar as it covers non-UCCs SMS in the present form as it exists, infringes the freedom of speech of the citizens and the conditions imposed upon the freedom of speech is not reasonable which would be protected under Article 19 (2) of the Act. Thus, while upholding this provision qua UCC i.e. commercial calls, the same is set aside insofar as it covers non-UCCs SMS also. At the same time, liberty is granted to TRAI to come out with more appropriate Regulations for regulating unsolicited non-UCCs SMSs that could meet the test of reasonableness under Article 19(2) of the Constitution. Writ Petition stands disposed of in the aforesaid manner with no order as to costs.