

(1998) 07 DEL CK 0040

In the Delhi High Court

Case No : FAOs. 89/98, 93/98, 94/98, 150/98, 126/98, 132/98, 133/98 134/98, 135/98, 136/98, 137/98, 138/98, 139/98, 140/98, 141/98, 151/98, 309/97, 310/97 and C.W.Nos.2764/97 2805/97, 3947/97, 4513/97, 4514/97, 538/98, 589/98, 591/98, 592/98, 593/98, 594/98, 595/98

Union of India

APPELLANT

Vs

Telecom Regulatory

RESPONDENT

Date of Decision : 16-07-1998

Acts Referred:

Citation : (1998) 5 AD 209 : (1998) 74 DLT 282 : (1998) 46 DRJ 557 : (1998) 4 RCR(Civil) 543

Hon'ble Judges : Usha Mehra, J

Bench : Single Bench

Advocate : Mr. Soli J. Sorabji, Attorney General of India, Mr. C.S. Vaidyanathan, Addl. Solicitor General and Mr. Dipankar Gupta, for the Appellant; Mr. K.K. Venugopal, Authority of India, Mr. Gopal Subramaniam and Ors. Mr. V.P. Singh, Senior Advs., for the Respondent

Judgement

Usha Mehra, J.—Two vital questions have been raised in these appeals; one pertaining to the powers of the Government to grant or revoke license vis-a-vis the extent and ambit of the powers and functions of the Telecom Regulatory Authority of India (in short the TRAI) constituted under the Telecom Regulatory Authority of India Act, 1997 (hereinafter called the TRAI Act, 1997) and secondly; Whether the Mahanagar Telephone Nigam Limited (in short the MTNL) is an existing service provider?

2. To appreciate the questions posed and to afford a satisfactory answer to the rival contentions, it would be convenient to set out broadly the scope, purpose, object and reason of the passing of the TRAI Act, 1997 as well as the relevant provisions of the Indian Telegraph Act, 1885.

3. Major activities in the establishment of telecommunication system began to develop in India, accordingly, Government of India introduced National Telecom

Policy,1994 envisaging telecommunication for all and within the reach of all. Other objective was to achieve unilateral service and quality of telecom service to be of world standard, removal of consumer complaints, dispute realisation and public interface etc. It also envisaged that India emerges as a major manufacturing base and major exporter of telecom equipments. Accordingly, a need was felt to separate regulatory functions from service providing functions of the Department of Telecommunication (in short the DOT). Thus arose the need for independent telecom regulatory body for regulation of telecom services for orderly and healthy growth of telecommunication service apart from protection of consumer interests. To achieve these objects it was considered that the Indian Telegraph Act,1885 be amended. Accordingly the Indian Telegraph (Amendment) Bill,1995 was prepared. But the same did not see the light of the day. Thereafter it was decided to have a regulatory authority which would be a cornerstone of the National Telecom Policy. Accordingly a comprehensive Bill namely Telecom Regulatory Authority of India Bill,1995 was prepared. However, the same was not introduced, instead the Telecom Regulatory Authority of India Ordinance,1996 (known as Ordinance No.10 of 1996) was promulgated on 27th January,1996. Comprehensive Bill to replace the said Ordinance was introduced in Lok Sabha. That Bill could not come up for consideration hence a second Ordinance known as Ordinance 20 of 1996 was promulgated on 27th March,1996. On the lapse of the Ordinance No.20 of 1996, the Telecom Regulatory Authority of India Bill,1996 (in short the TRAI Bill,1996) was introduced on 23rd July,1996. This Bill was referred to the Standing Committee of the Parliament on 25th August,1996, for consideration and report. The Committee after due deliberation suggested certain amendments. It suggested that definition of "licensee" and "service provider" be provided in the Act. Amendments were also suggested pertaining to the qualifications of the Chairman and Members of the Authority, their composition, tenure and other service conditions as well as the functions to be performed by the Authority in particular advising the Central Government in grant of licence, to determine the need and timing for introduction of new service provider, terms and conditions of licence to a service provider, ensuring compliance of terms and conditions of licence, revocation of license for non-compliance of terms and conditions of licence, approval of equipment used in the network and levying of fee and other charges. Committee also suggested that the TRAI should be entrusted with monitoring of such services and conduct periodical survey to find out quality of service achieved by different service providers and take such action as it deem fit to ensure compliance with standard of quality of service prescribed in the licence. It was opined by the Committee that since a large segment of telecom service will remain in Government, Therefore, provisions should be made in the Act for the offence committed by the Government Departments and to make the Head of the Department liable for the same. The Parliament enacted the present TRAI Act,1997 with the avowed object and purpose of the Act, as reflected in the long title, is to regulate the telecommunication service in India.

4. Facts which gave rise to these appeals are that the Government i.e. the

Licensing Authority on the request of the MTNL amended its license thereby permitting it to commence and carry on the business of providing Cellular Mobile Telephone Service as also paging services in Delhi and Mumbai. MTNL was having license in respect of local telephone service, trunk telephone service, international telephone trunk service, telex service, cordless telephone service etc. It was this amendment of MTNL's license by the licensing authority which had been challenged by the private operators before the TRAI. Challenge was primarily on the grounds that the Central Government could not amend or grant license without the prior recommendation of the TRAI. Since the MTNL was not an existing service provider with regard to Cellular Mobile Telephone Service hence grant of Cellular Mobile Service to a new service provider required prior recommendation of the TRAI. Recommendation according to respondents herein was a condition precedent to the grant of license by the Licensor. By the impugned order the TRAI accepted these contentions of the private operators i.e. respondents herein. It held that though the Central Government is the licensing authority yet it cannot exercise its licensing power without the recommendation of the TRAI. For arriving at this conclusion TRAI relied on the provisions of Clauses (a) (b) & (f) of Sub-Section (1) of Section 11 of the TRAI Act, 1997. It further held that since Licensor failed to comply the provisions of Section 11(1) (a) hence its action stood vitiated. The act done or action taken by the Central Government to amend the license of the MTNL without the recommendation of the TRAI was illegal. Thus by the impugned order it was declared that recommendation of the TRAI was a condition precedent for the grant or revocation of license or for laying down terms and conditions of a license to be issued in favor of any service provider.

5. In these appeals the basic arguments of the parties revolves around and depends upon the interpretation of the expression "Government" appearing in Section 2(j) of the TRAI Act, 1997 as well as the use of the expression "recommend" appearing in Clauses (a) (b) & (f) of Sub-Section(1) of Section 11 of the TRAI Act, 1997.

6. In order to arrive at the interpretation of expressions appearing in Section 2(j) and Section 11(1)(a)(b) & (f), I think this will be a convenient stage to refer to the material provisions of the TRAI Act as well as of the Indian Telegraph Act, 1885. The provisions which are relevant for our consideration and for answering the questions posed are reproduced as under:-

Section 2(e) Licensee - "means any person licensed under sub-section (1) of Section 4 of the Indian Telegraph Act, 1885 for providing specified public telecommunication services."

Section 2(j) : Service Provider - "means the Government and includes a licensee".

Section 2(k) : Telecommunication service - "means service of any description (including electronic mail, voice mail, data services, audio tex services, video tex services radio paging and cellular mobile telephone services

Section 11 : Powers and Functions of the Authority - (1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885) the functions of the Authority shall be to -

- (a) recommend the need and timing for introduction of new service provider;
- (b) recommend the terms and conditions of license to a service provider;
- (c) ensure technical compatibility and effective inter-connection between different service providers;
- (d) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;
- (e) ensure compliance of terms and conditions of licence;
- (f) recommend revocation of license for non-compliance of terms and conditions of licence;
- (g) lay down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;
- (h) facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;
- (i) protect the interest of the consumers of telecommunication service;
- (j) monitor the quality of service and conduct the periodical survey of such provided by the service providers;
- (k) inspect the equipment used in the network and recommend the type of equipment to be used by the service providers;
- (l) maintain register of interconnect agreements and of all such other matters as may be provided in the regulations;
- (m) keep register maintained under clause (1) open for inspection to any member of public on payment of such fee and compliance of such other requirements as may be provided in the regulations;
- (n) settle disputes between service providers;
- (o) render advice to the Central Government in the matters relating to the development of telecommunication technology and any other matter relating to telecommunication industry in general;
- (p) levy fees and other charges at such rates and in respect of such services as may be determined by regulations;
- (q) ensure effective compliance of universal service obligations;
- (r) perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be

necessary to carry out the provisions of the Act.

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

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

Section 15. Filing of application to Authority and procedure for passing order by it.-

Sub-Section (5) - The orders and directions of the Authority shall be binding on the service providers, Government and all other persons concerned.

Section 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.

7. Section 3(6) of the Telegraph Act defines "telegraph authority". By virtue of Section 4 of the Telegraph Act, the Central Government has the power to grant license and can delegate such powers to Telegraph Authority. Section 8 empowers the Central Government to revoke the license granted u/s 4 of the Telegraph Act on two grounds namely (1) In case of breach of any of the conditions of license committed and secondly for default of payment of any consideration payable thereunder.

8. The respondents i.e. private operators challenged the licensor's action to the grant or amendment of the license to MTNL for carrying on Cellular Mobile Telephone Service and of revocation of license of other operators without the recommendation of the TRAI. It is their contention that in the absence of recommendation, the Government could not grant or revoke the licence. As already pointed out above the TRAI accepted these contentions and declared the action of the Government invalid.

9. We must first understand what the expression "Government" appearing in Section 2(j) stand for. Does it include licensor. The word "Government" has not been defined either under TRAI Act or under the Telegraph Act. Mr.K.K.Venugopal and Mr.Gopal Subramaniam, Senior Advocates, appearing for respondent contended that since the definition of "Government" has not been given in either Act hence we have to look for its definition under General Clauses Act. Section 2(23) of the General Clauses Act defines "Government" to mean the Central as well as State Government. Therefore, according to them TRAI can give directions to Central as well as State Government. Mr.K.K.Venugopal, Senior Advocate

further contended that "service provider" is a term of the Art. it is not meant to be simply a provider of telecommunication service. This artificial definition is given for the purpose of covering Government in all its facets u/s 2(j). According to him there is nothing in the Act to indicate that the role of the Government as Licensor was taken out of the purview of the definition of "service provider". When a word has been defined in the interpretation clause, prima facie that definition governs whenever that word is used in the body of the Statute. That is a golden rule of interpretation. The only exception is where repugnancy occurs on account of the context. That repugnancy of a definition arises only when the definition does not agree with the subject or context. Since the Legislature in its wisdom used the expression "Government" it has to be given its ordinary meaning i.e. Central & State Government which expression would also include the licensor. In the absence of any indication to the contrary, the expression "Government" will include licensor. To a plain word "Government" meaning cannot be added to say that it has a restricted application to Government as provider of service. For providing service no definition was required. Using the expression "Government" the Legislature intended to cover the Government as Licensor as well as provider of service. MTNL is the alter ego of the Government, Therefore, Government could not have amended the license of the MTNL without the recommendation of the TRAI. The Court must not add words to the statute. Furthermore the Court must apply the definition as it appears in the body of the Statute. In this regard he placed reliance on the following decisions; (1) Indian Immigration Trust Board of Natal Vs. Govindasamy, AIR 1920 PC 114 The Vanguard Fire and General Insurance Co. Ltd., Madras Vs. Fraser and Ross and Another, Wyre Forest District Council Vs. Secretary for the environment and another, (1990) 1 All E.R. 780.

10. On the other hand Attorney General assisted by Mr.C.S.Vaidyanathan, Additional Solicitor General and Mr.Deepankar Gupta, Senior Advocate for MTNL contended that the expression "Government" in Section 2(j) no way includes licensor. According to them when Government grants license u/s 4(1) of the Telegraph Act it acts as licensing Authority and not as service provider. The meaning of expression "Government" in Section 2(j) has to be read in the context in which it occurs. To support their contention they relied on Section 15(5) of this Act. According to them the Act itself makes a distinction between a "service provider" and "Government". If the expression "service provider" included the licensor then the Legislature would not have used two different expressions in Section 15(5). These are used with a certain purpose and, Therefore, the language of Section 15(5) is a clear pointer to the fact that the word "Government" appearing in Section 2(j) does not include licensor. The Government acts in the capacity of a licensor and its departments providing service in the telecommunication system stand on a different footing. That Department of the Government which provide service would be covered under the definition of service provider.

11. After considering the respective contentions and before dealing with

interpretation of the expression "Government" appearing in Section 2(j), we have to see the spirit behind the incorporation of the definition of "service provider" and the Scheme underlying the Act. The definition of "service provider" was not there in the Ordinance No.10/96 and Ordinance No.20/96. It came to be introduced on the recommendation of the Standing committee. The Committee recommended the definition of "service provider" to mean "a Licensor or the government or any other person or body engaged in providing telecommunication service". Standing Committee accordingly suggested that that role of the "Government" which provide telecommunication services be brought within the definition of "service provider". Standing Committee also suggested that "since a large segment of telecom services will remain in Government in the forceable future, Therefore, a new clause should be inserted to make provisions about offences committed by Government Departments." Accordingly that department of the Government which provides telecom services has in fact been covered under the definition of "service provider". To arrive at this conclusion reference can be made to Section 31 of the 1997 Act which provides that in case of any fault or breach committed by a Department of the Government, the Head of the Department or any person responsible for the same be held responsible and made guilty under the provision of Section 31 of the TRAI Act, 1997. This shows the expression "Government" used in Section 2(j) relates to that Department of the Government which provides telecom service. The "Government" as licensor, was not the intention of the Legislature, to be covered under the definition of "service provider". The definition of "service provider" was suggested to remove the confusion and not to enlarge the scope and ambit of the expression "service provider". The use of the expression "Government" has to be understood in the sense it is used. Since the 1997 Act does not prevent any Department of the Government to operate or carry on business of telecom service or compete with private operators in the filed of Cellular Mobile Telephone Service, Therefore, contention of the appellants that licensor has not been covered by the expression "Government" stands fortified from the bare reading of Section 15(5) of this Act. It provides that the order and directions of the Authority shall be binding on the service providers, Government and all other persons concerned. If the expression "Government" in Section 2(j) was wide enough to cover licensor then there was no necessity for the Legislature to use use two different expressions in Section 15(5). The provision of Section 15(5) are in fact in the nature of execution proceedings. TRAI's directions and orders u/ s 15(5) come into operation after the TRAI takes a decision on the application of an aggrieved person. Once the decision is given that assumes the form of a decree, pursuance to that decree the TRAI can issue binding directions for compliance. These directions can be issued to both i.e. the Licensor as well as the licensee as the case requires. That is why different expression have been used in Section 15(5). The expression "Government" in Section 15(5) has been used separately in addition to the preceding expression "service provider". No expression or use of word by the Legislature is redundant. If we do not conclude thus the expression "Government" appearing in Section 15(5) would become

redundant. That could not have been the intention of the Legislature. The context and the intention with which the expression "Government" has been used in Section 2(j) does not permit the interpretation suggested by the counsel for the respondents. To arrive at this conclusion reference can also be made to clause (a) of Sub-section (2) of Section 12 of the TRAI Act, 1997. Clause (a) is a pointer to the fact that the expression "Government" used in Section 2(j) relates to such department of Government which provides telecom service.

12. The use of the expression "Government" has a bearing to the expression "licensee" meaning thereby that both expressions have same meaning. The meaning of the expression will have to take colour from the associated expression used in this case "licensee". When "Government" includes Licensee it means that that role of the Government by which it performs the functions of a Licensee. Licensor and licensee cannot be synonymous. It is only that Department of the Government which provide telecommunication service has been equated with licensee and hence covered under the definition of "service provider". The role of licensor as envisaged u/s 4(1) of the Telegraph Act or of a policy maker as provided u/s 25 of the TRAI Act has not been brought within the scope and ambit of the definition of "service provider". To fortify further we can have reference to the context in which the word "Government" has been used in Clauses (o) and (r) of Section 11(1) of the TRAI Act, 1997. Clause (o) says that TRAI shall render advise to the Central Government with regard to the development of telecommunication service or matter relatable to telecommunication industry. Here the expression "Central Government" would stand for licensor. This advise the TRAI would render to the licensor suggesting ways for the development of telecommunication service. Similarly in clause (r) the expression Central Government shows that the licensor can entrust additional functions to the TRAI. It is only in respect of Section 12(2) and Section 31 of this Act that the functions of the Department of Government as licensee or provider of telecom service have been dealt with.

13. Reading of these provisions show that the expression "Government" appearing in Section 2(j) relates to its Department which provide service and for which punishment is provided if they commit breach.

14. In fact we have to read the provision of Indian Telegraph Act and that of the TRAI Act, 1997 harmoniously. Neither of the Act can be made redundant by reading the provision of one into the the provision of another thereby curtailing, restricting or otherwise circumscribing the plenary of the Government as licensing Authority. If what the respondents contend is accepted it would amount to rewriting the provision of Section 4 of the Telegraph Act. The Legislature in its wisdom did not amend the Indian Telegraph Act, 1885. Instead incorporated TRAI Act, 1997 which is a totally different legislation. Legislature has not bestowed to this Authority any power to grant licence. Such powers of the Government have been kept intact proving thereby that Government as Licensor is not under the control of this Authority. It is only that Department of the Government which

provides service has been covered.

15. From the report of the Standing Committee which suggested amendments intention of the Legislature can be inferred. Committee knew that even after amendments in the TRAI Bill, 1996, the powers to grant license of the Government has not been effected nor licensor's power have been made subject to TRAI Act. It is only after understanding this position that the Committee expressed hope that since "The Indian Telegraph Act, 1885 and the Indian Wireless Telegraphy Act, 1933 provide for issue of license by the Government, the Government may consider desirability of undertaking review of the provisions of these two Acts in the context of the developments in telecom sector and the proposed constitution of the Telecom Regulatory Authority of India Bill, 1996, so that a comprehensive Legislature may be enacted." The above hope as expressed by the Committee is a clear pointer to the fact that the licensing powers of the Government was not made subject to the recommendation of TRAI nor covered under the definition of "service provider". Had the Government as licensor been covered by the definition of "service provider" the Committee could not have expressed the hope of enacting comprehensive legislation.

16. Once it is accepted that the Government as licensor grants the license then the grantor cannot be taker. Licensee cannot be equated with the licensor nor can such a licensor be providing service. If the interpretation as urged by Mr.K.K.Venugopal and Mr.Gopal Subramaniam is accepted, it would lead to undesirable consequences. Definition of "service provider" was necessitated to remove the confusion. It was felt that beside private operators, some of the Government Departments are also providing service, Therefore, in order to remove any doubt as to who would be service provider the Committee suggested the definition of "service provider" which has already been reproduced above. Reading of the same makes the intention of the Legislature clear that Government when providing service would be covered under the definition of "service provider". If on the contrary what is suggested by the respondents is accepted it would amount to adding words in the definition which is not there. Once the Legislature did not intend to cover licensor in the definition, this Court while interpreting cannot add something. From the reading of the TRAI Act in its entirety, it cannot be said it is an artificial definition. Rather from the report of the Committee the intention of the Legislature clearly emerges. I cannot appreciate the argument of Mr.Gopal Subramaniam and of Mr.K.K.Venugopal that report of the Committee has no importance nor can be relied for the purpose of finding out the intention of the Legislature. To the contrary report of the Committee has a persuasive authority. In this regard reference can be made to the statutory interpretation by F.A.R. Bennian in his book on Statutory Interpretation says that report of the Committee on the Act be given due importance. Para 257 of his book reads as under:-

"The Court may treat as of persuasive authority in the construction of an enactment the view of an official committee reporting on the meaning of the

enactment."

17. Contentions of the appellants that the TRAI could not give directions to the Licensing Authority nor could declare licensor's action illegal, to my mind, this argument has a force. Grant or revocation of license by the licensor does not fall under the adjudicatory powers of the TRAI as defined u/s 14(2) of TRAI Act. TRAI has not been conferred power or jurisdiction of a Writ Court (under Article 226 of the Constitution) or a Civil Court to grant specific relief nor it has been empowered to declare the action of the licensing Authority invalid, even assuming that there was a failure on the part of the licensor to comply with Clauses (a) (b) & (f) of Section 11(1) of the TRAI Act.

18. TRAI's functions under the Act as pointed out by the Attorney General over multifarious. These can be summed up under five heads namely, (1) Advisory, (2) Regulatory (3) Adjudicatory, (4) Semi Legislative and (5) Ancillary. So far as clauses (a) (b) (f) & (o) of Section 11(1) are concerned, these deal with advisory functions of the TRAI. Clauses (c) (d) (e) (j) (k) (i) (p) (q) deal with regulatory functions of the TRAI. So far as regulatory functions are concerned TRAI can ensure its compliance by issuing directions either u/s 12(4) or Section 13 of the Act. These directions can be issued to service providers and have a binding force. Since licensor is not a Service Provider hence TRAI has no powers to issue directions to the licensor. Section 11(2) deals with legislative functions of the TRAI. u/s 14(2) inbuilt dispute settlement mechanism is provided. It was, Therefore, urged by the Attorney General that Section 4(1) of the Telegraph Act confers plenary powers upon the Government in the matter of licensing. Even though the TRAI Act,1997 came into being yet no amendments have been made to the Telegraph Act. The TRAI having admitted vide the impugned order that the Government is the licensing authority, Therefore, the said plenary powers of the Government cannot be made subordinate to a regulatory authority. Nor could such powers be subject to the provisions of Sub-Section (1) of Section 11. If it is so it would amount to rewriting Section 4 of the Telegraph Act. This was neither the intention of the Legislature while enacting the TRAI Act,1997 nor permissible. These plenary powers of the Government or for that matter of the delegated authority u/s 4 of the Telegraph Act have been protected u/s 38 of the TRAI Act,1997. Section 4 has not been made subject to the functions to be performed by the TRAI as stipulated u/s 11(1) of the 1997 Act. Nor any provisions have been made in either of the Acts to indicate that the power to grant license cannot be exercised by the Licensor in the absence of recommendation of the TRAI.

19. The word "recommendation" appearing in clause (a) (b) & (f), the Attorney General contended, cannot be confused with the word "determine". Vide Section 11(1)(a) the Legislature intended that the need and timing be suggested by the TRAI, but it cannot determine nor give final decision on the same. Such powers to determine are left with the Government i.e. the licensing authority. Hence the expression "recommend" used in clause (a) (b) & (f) of sub-section (1) of Section 11 can only mean to suggest, to counsel a course of action and leave its

acceptance to the other person. Relying on Black's Law Dictionary, 6th Centennial Edition page 1272 and 181 F2d 394, 396 which defines recommendation to mean "to counsel, to suggest". The Attorney General contended that suggestions to be given by the TRAI cannot assume the character of determination and or of final decision. In fact none of these powers can be construed as condition precedent to the exercise of any other power by the Central Government under the Telegraph Act. Functions of TRAI cannot be read as a procedural prerequisite. The condition precedent, if read into Section 4 of the Telegraph Act, will supplant that power itself. It will destroy that power. The licensing authority will be obliged to remain inactive if no recommendation is forth-coming from the TRAI and blindly to issue the license if recommended to do so. In that eventuality the exercise of power u/s 4 is inhibited. This would lead to a vacuum and produce undesirable consequences.

20. Mr. Dipankar Gupta, Senior Advocate, appearing for MTNL contended that Section 11(1) of the TRAI Act does not deal with procedure. A power cannot be read as a procedural pre-requisite. According to Mr.Gupta, we must have regard to the language employed for each individual function in various sub-clauses of Section 11(1) to find out its true meaning and contents. According to him the word "regulator" has been grossly over-emphasised. The word "regulator" may be appropriate for describing various functions to be performed by TRAI, but because of this descriptive word, recommendations of TRAI do not assume a binding character. He, Therefore, contended that the expression and jurisdiction, powers and functions required to be exercised or performed by the Telegraph Authority refers to and protects the delegated licensing powers. Based on this interpretation, Mr.Dipankar Gupta, contended that the grant of license to MTNL was within the "jurisdiction, power and function" to be performed by the Telegraph Authority and this power is protected u/s 38 of the TRAI Act. The Indian Telegraph Act,1885 gives exclusive privilege of establishing, maintaining and working telegraphs and also the right to grant license to Central Government. By virtue of part one of Section 38 of TRAI Act,1997, the TRAI in addition can exercise the functions as enumerated in Clauses (a) (b) & (f) of Section 11(1) of the Act. The expression in addition used in first part of Section 38 of the Act does not mean that the power of the Central Government to grant license are subject to the recommendation of the TRAI. "In addition" would mean that the power of the Central Government u/s 4 are not to be affected, restricted or curtailed. To strengthen his arguments he placed reliance on second part of Section 38 which protects the powers of the licensing Authority including the powers of delegated authority.

21. Attorney General and Mr.C.S.Vaidyanathan, Additional Solicitor General contended that Section 11(1) of the Act opens with the non-obstante clause, this non-obstante clause can be harmonised with the non-obstante clause in Section 38. Reading of both the non-obstante clauses will lead to the conclusion that notwithstanding Government's exclusive privilege contained in Section 4 of the Telegraph Act, the TRAI can in addition recommend to the Government that

license be granted to a new service provider because there exist need and that time was ripe or is perfect for that purpose. But for this non-obstante clause in Section 11(1), the Attorney General contended that no suggestions or recommendation could have been made by any person or for that matter by this Authority. The grant of license is a quasi-judicial function. It is only due to non-obstante clause of Section 11(1) that the TRAI can suggest or recommend for the grant of license to a new service provider justify the same on the basis of need and time. That is the rationale and purpose of non-obstante clause of Section 11(1). Government, of course, will give due regard and weightage to such recommendations, if made by the TRAI. Such recommendations in the normal course will not be lightly brushed aside by the licensor but at the same time the licensor for good reasons may not accept or act on the same. In the case in hand the TRAI has not made any recommendation, Therefore, there was no question of Government giving reasons for its non acceptance.

22. The directions envisaged u/s 12(4) and Section 13 of the Act can be issued by the TRAI for the discharge of its functions. These directions can be issued only to a service provider and not to the licensor. Since Government is not a service provider hence these directions are not binding on it as licensor. On the basis of such directions as stipulated u/s 12(4) or for that matter u/s 13 of the Act the scope of Section 11(1) cannot be extended nor the same can convert a recommendatory or advisory function into a mandatory function. To support his arguments that these recommendations are not binding, the Attorney General placed reliance on the provisions of Article 320 of the Constitution of India which deals with the functions of Union Public Service Commission (in short UPSC). UPSC is a creation of the Legislature. It advises the Government on the selection of candidates for various services and formation of recruitment rules, still its advise is not binding on the Government though Government gives due weightage and regard to its advise. This position has been affirmed by the Apex Court in the case of State of U.P. Vs. Manbodhan Lal Srivastava, .

23. Mr. K.K. Venugopal and Mr. Gopal Subramaniam, Senior Advocates, appearing for respondents contended that TRAI Act,1997 has to be read in the context of the new milieu of telecom service, stiff private competition and international investment in infrastructure and environment and India's offer at GATT's opening up and ensuring access to telecommunication service in India. It is in this backdrop they contended we have to see that the Central Government must adhere to regulation, control and participation in level playing conditions both as an operator and licensor. By virtue of TRAI Act Central Government's exercise of power u/s 4 of the Telegraph Act has been made subject to the recommendation of the TRAI. Harmonious reading of these two Acts lead to the conclusion that 1997 Act is an amendment to the Telegraph Act. Expression "recommendation" appearing in Section 11(1)(a) has to be read into the power of the Government. It means that the licensing authority's power to grant license has been made subject to the recommendation of the TRAI. If this harmonious construction of both the Acts is not given, the Authority will become

a mere tariff setting authority. There has to be necessarily a close relation between Section 11(1) and (2) of the TRAI Act. Correct tariff cannot be fixed by the Authority unless its functions stipulated u/s 11 have a mandatory character. TRAI under Clause (a) of Sub-section(1) of Section 11 has been given the right to determine the need and timing for the introduction of a new service provider. While considering the "need and timing" the Authority has to take into consideration the economic needs as well. The determination of need and timing has to be construed as empirical objective and scientific facts. Therefore, the expression "determine" in Section 27 of the TRAI Act relates to all the functions to be discharged by the TRAI. It does not necessarily relate to the adjudicatory power of the Authority u/s 14 but is capable of apprehending effective, factual, empirical determination or fact finding both adjudicatory, administrative and judicial. Recommendations are a must to enable the Government to fulfill its true licensing functions. Mr.K.K.Venugopal further contended the recommendation of the Authority pertaining to need and timing as well as the terms and conditions to be incorporated in the license as stipulated in clause (a)(b) & (f) are to be addressed to the Government as licensor irrespective of the fact the licensor or provider of service are covered under the definition of "service provider". TRAI has full power to give directions to the Government which include the licensor. Once the power to "ensure" are given to the TRAI, it cannot be presumed or assumed that its recommendation to the Central Government to grant license or to revoke because the terms and conditions have not been complied with, will be a matter at the discretion of the Government. Recommendation of the TRAI u/s 11(1) Clauses (a) (b) & (f) are mandatory. The primary object of the TRAI is to facilitate competition, promote efficiency in the operation of telecommunication service, and growth in such services. These objects cannot be discharged by the TRAI unless its power and functions as stipulated u/s 11(1) are having a mandatory character and binding force. It is in this background Mr.K.K.Venugopal contended that the expression "recommend" must be construed in a positive and effective manner. The recommendation of the Authority is an effective intermediary step before the final licensing power is exercised by the Central Government.

24. Mr. V.P. Singh, Senior Advocate appearing for BPL relying on the principles of *pari-materia* contended that TRAI Act,1997 is an amendment to the Telegraph Act. According to him object of both the Acts namely the Indian Telegraph Act,1885 & TRAI Act,1997 is to achieve the telecom services in India. The Act of 1885 was to be amended instead legislature in its wisdom brought comprehensive legislation i.e. TRAI Act,1997. Relying on 22nd report of the Select Committee Mr.V.P.Singh urged that the idea to bring 1997 Act was to give supremacy to Regulatory Authority over the bureaucracy. The idea behind introduction of TRAI Act 1997 Act was to curtail the exclusive and arbitrary powers of the Central Government in the grant of licences and, Therefore, subjected it to the recommendation of the Regulatory Authority which is fully equipped to know whether there existed need and time for introduction of new

service provider. Section 4 of the Telegraph Act cannot be read in isolation in view of Section 38 of TRAI Act. It is only the powers of Central Government which are protected under second part of Section 38 and not of its delegatee. Since both the Acts are *pari-materia* and as per Section 38 powers of TRAI have to be read in addition to the powers of the Central Government, hence the recommendation of TRAI is a pre-condition for the grant of license by the Central Government. Harmonious reading of these two Acts show that one serve the purpose of the other, thereby making neither Act redundant. If the interpretation as given by the Attorney General is accepted it would make the expression "in addition" appearing in Section 38 meaningless. Since the purpose of both the Acts is common, Therefore, relying on the "Craines on Statute Law" Mr.V.P.Singh contended that the rule as laid down by the twelve Judges in Palmer's case (1785) 1 Leach C.C.Ed.355 is that such Acts are to be taken together as following one system and as interpreting and enforcing each other. G.P.Singh in his 6th Edition 1996 on the "Proposition of Statutory Interpretation" defined *pari-materia*. Relying on the interpretation as given by Mr.G.P.Singh, Mr.V.P.Singh contended that a Statute must be read as a whole, as words are to be understood in all context. Since the Tele-graph Act and TRAI Act,1997 are *pari-materia* since these relate to the same subject, form one system, that is the reason in Section 38 the Legislature used the expression "in addition" to mean that the provisions of 1997 Act are in addition to the powers of the Central Government u/s 4 of the Telegraph Act. Powers to recommend the grant of license to new service provider by TRAI are in addition to the exclusive privilege of Central Government in this regard. Powers of Central Government u/s 4(1) of Telegraph Act are subject to the recommendation of the TRAI. TRAI Act,1997 is explanatory to the Telegraph Act. In this regard he placed reliance on the decision of Apex Court in J.K. Steel Ltd. Vs. Union of India (UOI), and Supreme Court Advocates-on-Record Association and another Vs. Union of India, . Legislature, according to him presumed to have had contemplated the existence of another Statute having common purpose and object and to have framed new enactment with reference thereto.

25. After due consideration of the respective contentions of both the parties, I am of the view that consequence of acceptance of contention of the respondents would be to add words to Section 4 of the Telegraph Act and to change the basic structure of the Telegraph Act. It would amount to subjecting the power of the Government to the discretion of the TRAI to recommend and thereafter only the Government to act. This amounts to placing the licensing authority i.e. the Government under the control of the regulatory authority thereby curtailing, restricting and circumscribing the power of the Government. In fact, if the reasoning of the TRAI as given in the impugned order as well as the arguments of respondents are accepted i.e. that the recommendation of TRAI is a pre-condition or a pre-requisite for the grant of licence, it would lead to horrendous consequences. It would amount to re-writing Section 4 & 8 of the Telegraph Act. Section 11(1) of the TRAI Act is only an empowering section. It does not deal

with procedure nor lays down procedural pre-requisite. To my mind, the functions stipulated under Clauses (a) (b) & (f) of sub-section (1) of Section 11 are recommendatory or advisory in nature. On the other hand expression used in Clauses (c) (d) (e) (g) (h) (i) (p) and (q) of Section 11(1) is couched in mandatory language and relate to service provider including the Government Department which provide service. This can be seen from the expressions used namely "ensure" "regulate" "levy" etc.

26. The expression "recommend" as defined in the Webster's Dictionary means "to advise, to counsel, as recommend that something be done, to speak favourably as suited for some use, function, position etc., to make acceptable or pleasing to suggest, to counsel a course of action and leave its acceptance to that person. "Recommend" implies a favourable or favouring report and precludes an unfavourable or opposing report. Thus "to recommend" is to present one's advise or choice or as having one's approval and involves the idea that another has the final decision. This was so held by United States Court of Appeal, Third Circuit in the case of People of Virgin Islands V. Price, C.A. Virgin Islands, 181 Federal Reports 2d 394, 396. The word "recommend" has to be seen in the context in which it was suggested by the Standing Committee conveying the intention of the Legislature to mean "advise" "suggest" and "counsel", while the quasi judicial function of the grant of license rests with the Government i.e. the licensing authority, which on account of this recommendation or suggestion cannot be abridged or curtailed.

27. The recommendations which the TRAI is entitled to make u/s 11(1) Clauses (a) (b) and (f) cannot be called a condition precedent to the power of the Central Government to grant licence. Respondents have attempted to read the words into Section 4 of the Telegraph Act which the Legislature had no intention to do. If what construction Mr.K.K.Venugopal & other counsel wants this Court to give to Section 11(1), it will definitely denude the power of the licensing authority. If the Legislature had any such intention to make the functions of the TRAI u/s 11(1) to be mandatory it would not have used different expression for different functions to be performed by the TRAI. Clauses (c), (d),(e), (g), (i),(j), (k), (p) and (q) are in exercise of regulatory powers. But so far as the functions mentioned in Clauses (a) (b) & (f) are concerned these cannot be confused with the regulatory powers and functions of the TRAI. It would amount to shifting the monopolistic powers from Government to the Authority. These recommendations are not binding on the licensor nor the licensor is under statutory obligation to seek such recommendation from TRAI before exercising its powers u/s 4 of the Telegraph Act. To arrive at this conclusion reference can be made to the provisions of Section 11 itself. It does not deal with procedure nor lays down procedural pre-requisite for the exercise of any power. A condition precedent to the exercise of a power is a procedural pre-requisite which has to be specifically provided. For example if the TRAI does not choose to make recommendation then exercise of power u/s 4 is inhibited. This would lead to vacuum and produce undesirable consequences. The construction which Mr.K.K.Venugopal and for that matter

Mr.Gopal Subramaniam and Mr.V.P.Singh, Senior Advocates, want this Court to adopt would make the licensing authority's power subservient to the power of the TRAI. It is unimaginable that the powers to grant license rests with the Government but would be subject to the discretion of another Authority? TRAI in the impugned order accepted that the licensing powers vests with the Central Government. Having said so it could not make that plenary power subject to the recommendation of the Authority.

28. The Attorney General rightly contended that the licensing is a quasi judicial function, but for the non-obstante clause in Section 11(1) it could not have been possible for any person or for that matter for this TRAI even to suggest to the Government in the matter of grant of license or for the terms and conditions of license or revocation of a licence. That is the rationale and purpose of the non-obstante clause of Section 11(1).Argument of respondent that the non-obstante clause of Section 11(1) is over riding by the functions and powers of the TRAI has no merits. I have failed to understand how mentioning of the provision of Telegraph Act in the non-obstante clause of Section 11(1) can link the power of the Government to grant license with the function and power of the TRAI u/s 11(1) of this Act. The non-obstante clause has not been used in Section 11(1) to confer over-riding effect and empowering the TRAI to perform the function of a licensor. The word "recommendation" used in Section 11(1) is very clear. This I say because in the Bill the functions of TRAI as stipulated u/s 11(1)(a) (b) & (f) were not there. It was the Standing Committee who suggested amendment and to incorporate clause (a) (b) & (f) and opined that TRAI be given power to advise the Government with regard to the need and timing of the introduction of new service provider. This advise cannot be equated or can be treated at par with the word "dictate" or "determine". Therefore, the non-obstante clause used in Section 11(1) cannot go down nor can restrict the scope of the power of the Government as licensor. It appears the non-obstante clause as incorporated in Section 11(1) of the Act was by way of abundant caution. It was not by way of limiting the ambit and scope of the plenary powers of the Government. It is not within the province of this Court to interpret the intention of the Legislature differently more so when from the report of the Standing Committee the intention of the Legislature can be clearly inferred. Supreme Court in the case of The Dominion of India and Another Vs. Shrinbai A. Irani and Another, while dealing with interpretation of Statutes with reference to non-obstante clause concluded that "Although ordinarily there should be close approximation between the non-absentee clause and the operative part of the Section, the non-obstante clause need not necessarily and always be co extensive with the operative part, so as to have the effect of cutting down the clear terms of an enactment". No doubt as and when the TRAI recommend the need and time to introduce new service provider, the licensing authority will give due regard to such recommendations. But such recommendations by itself may not usurp the quasi judicial function of the Government to grant licence. For the grant of license prior to passing of TRAI Act, no one could interfere with, but after the passing of TRAI

Act, the Authority has been given in addition the power to suggest that license to a new service provider be provided and support its suggestion on the basis of need and time of the hour.

29. It would not be correct to contend that the provisions of Indian Telegraph Act are *pari-materia* to the function to be performed by the TRAI and as stipulated u/s 11(1) of the TRAI Act nor the provisions of Section 11(1) of the TRAI Act can be read as an amendment to the Telegraph Act. This argument of Mr.V.P.Singh on the face of it appears to be unsustainable. The idea of both the Acts may be to advance the telecom service in India, but the objects are different. It is not the object of the TRAI to grant license to a new service provider. There is no provision under the TRAI Act empowering the TRAI to grant license nor TRAI can cancel or revoke it. Therefore, it will not be correct to contend that functions of the TRAI u/s 11(1) are *pari-materia* to the function of the Central Government under Sections 4 and 8 of the Telegraph Act. It is difficult to imagine that the supremacy regarding regulatory functions will in any way curtail the power of the Government to grant license with or without the recommendation of TRAI.

30. That the word "regulator" has been as Mr.Dipankar Gupta contended has been over-emphasised by the respondents. This expression may be appropriate for many of the functions which the TRAI has to perform, but it will be totally incorrect to suggest that because of the use of the expression "regulator" even the Authority's recommendation will assume a binding character. If this argument is accepted, it would alter and does violence to the language of Section 11. We must have regard to the language employed for each individual function in various clauses of Section 11(1) to find out its true meaning and contents. By picking up the expression "regulator" it would not amount to nor would lead us to the conclusion that the word "regulator" controls and alters the meaning of every clause of Section 11 irrespective of its language. TRAI has an important role to play in the telecom, development reforms and its establishment. Its regulatory role is crucial to the promotion of competition in telecom service. At the same its advisory role also assumes importance considering its various facets and acts to be performed. TRAI has exposure to the problems faced by the service providers and know about the ground realities, Therefore, it can render valuable and objective advise to the licensor. But that does not mean that such an advise is binding on the licensor. If the advise of UPSC is not binding the TRAI's powers are not different from that of UPSC.

31. The expression "in addition" appearing in Section 38 of the TRAI Act is significant. It indicates that the contents of power u/s 4 of the Telegraph Act are not to be effected and certainly not curtailed. Contention of Mr.K.K.Venugopal that the expression "in addition" appearing in Section 38 of the TRAI Act means the power of the Authority in addition to the power to be exercised by the Government u/s 4 of the Telegraph Act, this contention cannot be appreciated in view of second part of Section 38 of the TRAI Act. Reading of second part of Section 38 indicates that "jurisdictions, powers and functions" of the Government

and its delegates have been protected and preserved. So what is sought to be pre served by Section 38 are the powers of the licensing Authority. The non-obstante clause of Section 38 provides that this Act does not effect the "jurisdiction, powers and functions" required to be performed by the Telegraph Authority. Reading of both the non-obstante clauses harmoniously i.e. of Section 11(1) and 38 of the TRAI Act makes it clear that despite the exclusive privilege of the Central Government to grant license the TRAI can also "in addition" recommend to the Government to grant license to a new service provider. The expression "in addition" does not mean that beside the licensor, the Authority has also acquired the right to grant license under the garb of its recommendation. What is not provided under the Act cannot be added or provided by indirect method. Contention of Mr.V.P.Singh, Senior Advocate, that only power under Part-III of the Telegraph Act,1885 have been protected is misconceived. Part-III of the Telegraph Act deals with the power to place Telegraph lines and posts. There is nothing in the TRAI Act which deals with or confers any of the power on the Authority to place telegraph lines and posts. Therefore, the construction of Second Part of Section 38 would lead to only one conclusion that the power of the licensing authority or its delegatee u/s 4 with regard to its "jurisdictions, powers and functions" required to be performed by the Telegraph Authority have been protected. It would not be correct on the part of respondents to contend that the only powers of the Government as licensing authority have been protected and not the power of its delegated authority. When the Legislature protected the power of the licensing authority u/s 38 it also protected delegated licensing power of the Government.

32. Wherever the Legislature wanted certain directions, decisions and orders to be binding it so specifically provided in TRAI Act,1997. Reference can be made in this regard to Section 25 of the TRAI Act. u/s 25 the Central Government has been given residual powers to issue directions on question of policy. Those directions have a binding force. But there is no corresponding or contra provision under the TRAI Act making the "recommendations" u/s 11(1) of the TRAI Act as binding. Reliance by respondents to the power of TRAI to issue directions u/s 12(4) or Section 13 of this Act will not make the recommendation of the Authority mandatory. Section 12(4) empowers the TRAI to issue direction to "service providers" for proper functioning. As observed above the Licensing Authority is not covered by the definition of "service provider", Therefore, the directions u/s 12(4) do not apply to Licensor. Similarly respondents cannot take any help or aid of Section 13 to contend that recommendations are mandatory. The directions stipulated u/s 13 cannot convert a recommendatory or advisory function of TRAI into a mandatory one to be obeyed by the licensing authority. In fact TRAI u/s 13 issues directions for the discharge of its functions enumerated u/s 11 to a service provider and not to Licensing Authority. The function envisaged in clauses (a),b) and (f) or for that matter in clause (o) in Section 11(1) are not addressed to service providers. These recommendations and advise as stipulated in clauses (a) (b) (f) & (o) are to the Licensor. Directions u/s 13 can only be

issued where appropriate functions so warrants namely the function to ensure compliance by the service providers and not to licenser to abide by the TRAI's advisory functions. If the interpretation as conversed by respondents is accepted it would completely alter the structure of Section 11(1) and fly in the teeth of Section 38. Since the functions stipulated in clauses (a) (b) (f) and (o) of Section 11(1) are recommendatory or advisory hence by interpreting the directions in Section 13, the scope and extent of the function to be performed by the TRAI u/s 11(1) cannot be converted into mandatory. Such directions as the Attorney General rightly contended must be subordinate to and in relation to the functions specified in Section 11(1), but would not apply to the advisory function of the TRAI. Section 13 has to be construed strictly keeping in view the penal provisions contained u/s 29 of the Act. Reliance by Mr.K.K.Venugopal, Senior Advocate on the Apex Court decisions, namely, A.Panduranga Rao Vs. State of Andhra Pradesh & Anr. (1975) 4 S 709. Tej Pal Singh Vs. State of U.P. & Anr. (1986) 3 S 604. State of U.P. & Ors. Vs. Babu Ram Upadhyay AIR (1961) SC 781 and People's Union for Civil Liberties (PUCL) Vs. Union of India, (1997) 1 S 301 are of no help to him. In the case of A Panduranga Rao (Supra) the Apex Court was dealing with provision of Article 233(2) of the Constitution of India where the appointment of a District Judge from the Bar requires recommendation of the High Court. High Court's recommendation is a pre-requisite. Clause (2) of Article 233 stipulates that "a person who is not already in service shall be eligible to be appointed as a District Judge only on the recommendation of the High Court".

Therefore as per the provisions of Clause (2) of Article 233 "recommendation" of High Court is a must before Government appoints a District Judge from the Bar. It was in this background the Apex court held the recommendations of High Court not only mandatory but also pre-requisite. But in the case in hand the language of Section 11(1)(a)(b) & (f) does not stipulate that recommendation of TRAI is a pre-condition. Similarly in Tej Pal Singh's case (Supra) the apex Court was dealing with supervisory power of the High Court on the subordinate judiciary. Article 235 of the Constitution and Chapter III and Rules of the High Court of Allahabad came up for interpretation. The Apex Court after analysing the rules and Article 235 concluded that for taking any action against a judicial officer the Full Court alone is empowered. High Court's control over the District Courts and the Court subordinate thereto under Article 235 was held to be exclusive in nature, comprehensive in extent and effective in operation. But that is not the case in hand. Judgment of Apex Court in the case of People's Union for Civil Liberties (Supra) is also of no help to the respondents. The Apex court while relying on the case of Maneka Gandhi V. Union of India (1978) 1 S 248 held that in the absence of any Statute it is not possible to provide for prior judicial scrutiny as a procedural safeguard. In the case of Babu Ram Upadhyay (Supra) the Apex Court was dealing with the rules made under a Statute and observed that the rules governing the disciplinary proceedings cannot be treated as an administrative instruction, but shall have the same effect as the provision of the Statute whereunder they are made, in so far as they are not inconsistent with

the provisions thereof. But that is not the case in hand. Reliance by Mr.V.P.Singh on the decision of Supreme Court in the case of *Sirsilk Ltd. Vs. Textiles Committee and Others*, is of no help to him. In that case observations of the Apex Court are that "If a subsequent statute by the same Legislature can be pressed in aid for the purpose of interpreting in the event of any doubt, the provisions of an earlier statute, there could be no reason to say that the earlier statute cannot be made use of for the purpose of construing in the event of ambiguity, the provisions of a later Statute." In the present case there is no ambiguity or doubt so far as the powers of the Government to grant license u/s 4 of the Telegraph Act are concerned. If Legislature in its wisdom intended these recommendations to be mandatory or a condition precedent, it ought to have provided a procedure for the same in the Statute itself or could have indicated that power of the government to grant license would be subject to these recommendations. Having not so provided it is not possible for this Court to hold otherwise.

33. Argument of Mr.K.K.Venugopal and Mr.Gopal Subramaniam, Senior Advocates, that the expression "determine" in Section 27 indicates the ouster of jurisdiction of Civil Court in respect of all those functions which the authority shall perform and determine u/s 11 of the Act, has no merits. Nor it appeals to reason that the expression "determine" is different from "adjudication" appearing in Section 14 of the Act or that the expression "recommends" used in Section 11 may themselves contained in them or import in them an element of determination. In fact TRAI has no power to adjudicate all disputes. In this regard reliance by the respondents on clause (N) of Section 11(1) is misplaced. u/s 11(1) functions which the TRAI under the Act has to perform have been indicated. The procedure to accomplish those functions and its extent have been indicated under different chapters of the Act. For example, for the discharge of its function under Clause (n) the relevant chapter is Chapter IV. Section 14 falls under Chapter IV under title "Settlement of Disputes". It would not be correct to contend that unlimited powers have been given to TRAI to settle all sorts of disputes, nor can it be said that the ouster of jurisdiction contained in Section 27 is not confined to matter u/s 14(2) of the Act. The ambit and scope of functions of the TRAI u/s 11(1) Clauses (a) (b) & (f) are advisory, it cannot amount to determination. The term "determination" appearing in Section 27 of the Act by virtue of which jurisdiction of the Civil Court has been barred confines only to the adjudicatory functions of the authority as stipulated u/s 14(2). On the contrary if what is argued by Mr.Gopal Subramaniam is accepted that by virtue of Clause (n) of Section 11(1) all disputes are covered u/s 14, it would lead to horrendous consequence. For example, on account of Clause (o) of Section 11(1) a right has been given to the TRAI to render advise to the Central Government in the matter relating to development of telecommunication technology and any other matter relatable to telecommunication industry. Suppose this advise is not accepted by the Central Government. Can this be called a dispute to be referred for adjudication? Can any direction u/s 13 be issued by the TRAI to Central

Government to accept its advise. If not, then the expression "determine" appearing in Section 27 of the Act relates to the disputes as stipulated u/s 14(2) of the Act and no more. It would be changing the structure, ambit and scope of the Act if we say that expression "determination" appearing in section 27 is applicable to both judicial and non-judicial functions of the TRAI. In fact if we have to read Section 11(1)(n) to confer a general and unlimited power on the Authority to adjudicate upon every dispute in addition to Section 14(2) then the grant of power u/s 14 and the mode and manner of its exercise would become redundant and otiose. Reading of Section 11(1)(n) clearly shows that one of the functions of the Authority is to settle the disputes which have been provided specifically in Section 14(2) and the mode and manner contained therein. For invoking Section 14, two conditions have to be fulfilled namely dispute must be between service providers or consumers and it must fall within the provisions of Section 14(2). Unfortunately the grant of license by the Government, the Licensing Authority, to MTNL, to my mind, did not fall within the provisions of Section 14(2). Grant of license by the licensor cannot be a subject matter of dispute stipulated u/s 14(2) of this Act.

34. Contention of Mr.K.K.Venugopal, Senior Advocate, that role of the TRAI has to be seen in the light of India's commitment at GATT. In order to break the monopoly of the Government this Regulatory Authority was introduced. This far there cannot be any quarrel. But the contentions of the respondents that by not considering the recommendation of this Authority as mandatory, this Court would be rendering the TRAI ineffective and powerless or that it would not be able to effectively regulate the telecom service, this argument is without substance. The Parliament created a statutory Authority which would effectively assert and get its directions implement qua service providers. It has also been given semi-legislative powers to fix the tariff which is a very important function to be performed. Therefore, simply because its recommendations are advisory in nature it cannot be said the Authority has become ineffective or powerless nor for that matter it can be said that it is independent and statutory status has been effected or eroded. In fact Authority's status has no relevance to the powers and functions it has to perform u/s 11(1) (a) (b) (f) & (o). Functions u/s 11(1) (a)(b) (f) & (o) are advisory, it does not mean that the TRAI will not act impartially or any of its impartial decisions making powers have been effected. As a regulator it has to perform very significant and important functions qua the market participants. The breach of its directions to service providers would lead to penal consequences. The word "shall" appearing u/s 11 by no stretch of imagination can convert the recommendation of the Authority as mandatory. The use of the expression "shall" in Section 11(1) means and relates to its regulatory functions. Hence from the use of the word "shall" appearing in Section 11(1) no help can be taken by the respondent nor this court is persuaded to hold that because of the use of the expression "shall" TRAI's "recommendation" to the licensor would become binding or would be a condition precedent. While interpreting the "Statute" Supreme Court in the case of Suresh Lohiya Vs. State of Maharashtra &

Anr., (1196) 10S 397 held that:

"The legislature having defined 'forest-produce', it is not permissible for the Court to read in the definition something which is not there. It is Therefore not possible to accept the contention that if bamboo mat is held to be not a forest-produce, the object of the Act would be frustrated inasmuch as it would debar the forest authorities to enquire about the removal of such goods from the forests, which would be used as a handle by unscrupulous dealers to denude the country of its forest wealth.If there be any lacuna in the definition it is really for the legislature to take care of the same. where a word or an expression is defined by the legislature, Courts have to look to that definition; the general understanding of it cannot be determined."

35. These observations of the Apex Court cut to pieces the argument of the respondents that recommendation should be treated as mandatory. The Legislature used the expression "recommend" to mean "advise". Having taken the aid of the intention of the Legislature, I have come to the conclusion that the word "recommend" was only by way of "counsel" "advise" or "suggestion" and, Therefore, "advisory" in nature and not "mandatory". We have to give harmonious construction to both the Acts i.e. the Indian Telegraph Act and the TRAI Act, 1997 so that purpose of the Act may be given effect to. If what the respondent contend is accepted it will take away power of the Government u/s 4 of the Telegraph Act and make it subordinate to the discretion of the Authority.

36. No doubt India made commitment at GATT, but it cannot be said that simply because the recommendation of the Authority has not been considered as a pre-requisite or a pre-condition to the grant of license by Central Government it has in any way prejudiced the independent statutory status of the Authority. It is regulatory authority and to regulate the functions and to ensure its compliance, there are functions defined u/s 11(1). For the violation of its directions teeth has been to the Authority. When confronted as to what functions Government would perform if recommendations of TRAI are prerequisite, Mr. Gopal Subramaniam contended that the powers of the Central Government would still survive in as much as it would perform the function of (i) tendering and accepting the document, (ii) would issue tenders, determine the process of technical and financial qualification; (iii) release the tenders; (iv) receive queries from potential bidders, provide clarifications; evaluate bids both; (v) declaring the winners and award the license. To my mind, these functions as suggested by respondents are nothing but clerical in nature. This submission of the respondents clearly show that the powers of the Government to grant license would now vest with TRAI. Power of the Government as licensor will be completely eroded and denuded. It would tantamount to creating monopoly of the TRAI in the grant of licence. It would mean that powers to grant license u/s 4 have become redundant, it would now be exercised at the discretion of TRAI thereby making the Telegraph Act redundant which this Court is not in a position to declare.

37. Lastly Mr. K. K. Venugopal's contention that if the recommendation are not

treated as mandatory it would violate India's commitment at GATT. This argument deserve consideration only for rejection. It has to be rejected for two reasons; firstly it was not the commitment of the Government of India that the licensing power of the Government will be subject to the discretion of the regulatory authority. Secondly this Court is not hearing a complaint under the GATT. This Court for all intend and purpose has to interpret the TRAI Act,1997 as it stands. For its interpretation this Court cannot look into as to what was the commitment of the Government at GATT. Even otherwise the commitment made by the Government of India at GATT fortifies the contention of the Attorney General that the Government was fully aware while making the commitment that the designated authority i.e. the licensor is different from the regulatory authority. These are two distinct legal entities. The power to grant license solely vests with the designated authority and not with the regulatory authority. Therefore, reliance by Mr.K.K.Venugopal on the reference paper to highlight the commitment at GATT or of the terms and conditions of the World Trade Organisation cannot be forced in aid to interpret the TRAI Act,1997. We have to confine our reasoning for arriving at the conclusion on the basis of the interpretation of the Act in question.

38. For the reasons stated above, it can safely be concluded that the Authority fell in error in concluding that the power of the Government to grant or amend the license is subject to the recommendations of the TRAI or that these recommendations are mandatory in nature. Hence the impugned order of the Authority is hereby set aside. It is further made clear that the dispute regarding the grant or to amend the license by the licensor is not a dispute covered under the provisions of Section 14(2). These are not the disputes which can be adjudicated by the Authority. These disputes are beyond the purview of Section 14(2). Having held that the question of grant or amendment of license by the licensor does not fell within the jurisdiction of TRAI, I have no hesitation to hold that the impugned order suffers from legal infirmities. So far as the question whether MTNL is an existing service provider I have left this question open.

39. With these observations, these appeals are allowed and the impugned order is hereby set aside with no order as to costs.