



'C.R.'

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE MR. JUSTICE P.M.MANOJ

FRIDAY, THE 1ST DAY OF NOVEMBER 2024 / 10TH KARTHIKA, 1946

WA NO. 1649 OF 2024

AGAINST THE JUDGMENT DATED 07/10/2024 IN WP(C) NO.29443 OF
2024 OF HIGH COURT OF KERALA

APPELLANT/S:

- 1 INDIAN BROADCASTING AND DIGITAL FOUNDATION
C-301-303, THIRD FLOOR, ANSAL PLAZA, KHEL GAON MARG, NEW
DELHI REPRESENTED BY ITS AUTHORIZED SIGNATORY SHRI. S.
RADHAKRISHNAN NAIR, PIN - 110049
- 2 VIACOM18 MEDIA PRIVATE LIMITED
31ST FLOOR, TOWER-4, ONE UNITY CENTER SENAPATI BAPAT
MARG, PRABHADEVI, MUMBAI, MAHARASHTRA REPRESENTED BY
ITS AUTHORIZED SIGNATORY SHRI. GAUTAM DUBEY, PIN - 400013
- 3 STAR INDIA PRIVATE LIMITED
STAR HOUSE, URMI ESTATE, 95, GANPATRAO KADAM MARG,
LOWER PAREL, MUMBAI ALSO AT 3RD & 4TH FLOOR, PRESTIGE TMS
SQUARE, OPPOSITE OBERON MALL, NH-47 BYPASS, EDAPALLY,
KOCHI – 682024 REPRESENTED BY ITS AUTHORIZED
SIGNATORY SHRI. BIJU K S, PIN - 400013



- 4 **LAURIANA FERNANDES**
AGED 42 YEARS
D/O. MR. FRANCIS FERNANDES, CREATIVE DIRECTOR, VIACOM18
MEDIA PRIVATE LIMITED RESIDING AT 23, OUR LADY OF AMPARO
CHS LTD., BEHIND HOLY CROSS CHURCH, PREMIER ROAD, KURLA
(W), MUMBAI, MAHARASHTRA, REPRESENTED BY P.A HOLDER
SHRI. GAUTAM DUBEY, S/O. MR. SUNIL KUMAR DUBEY, AGED 39
YEARS, RESIDING AT 352, WINDSOR GREENS, F-28, SECTOR 50,
NOIDA, UTTAR PRADESH, PIN - 400070
- 5 **KISHAN KUMAR MS**
AGED 46 YEARS
TV CHANNEL HEAD, ASIANET CHANNEL RESIDING AT 4033,
MARINA ONE, MARINE DRIVE, KOCHI, PIN - 682018

BY ADVS.
SR.ADV.AMIT SIBAL FOR A1
SR.ADV. MUKUL ROHATGI, FOR A2, AND A3
SR.ADV SANTHOSH MATHEW, FOR A4 AND A5
MATHEW NEVIN THOMAS
ARUN THOMAS
VEENA RAVEENDRAN
KARTHIKA MARIA
ANIL SEBASTIAN PULICKEL
KURIAN ANTONY MATHEW
SHINTO MATHEW ABRAHAM
LEAH RACHEL NINAN
JOE S. ADHIKARAM
NOEL NINAN NINAN
KARTHIK RAJAGOPAL
APARNNA S.
SIDHARTH CHOPRA
RANJEET SINGH SIDHU
SWIKRITI SINGHANIA
SRISHTI KUMAR

**RESPONDENTS:**

- 1 THE TELECOM REGULATORY AUTHORITY OF INDIA
4TH, 5TH, 6TH & 7TH FLOOR, TOWER-F, WORLD TRADE CENTRE,
NAUROJI NAGAR, NEW DELHI REPRESENTED BY ITS SECRETARY,
PIN - 110029**
- 2 ALL INDIA DIGITAL CABLE FEDERATION
236 OKHLA INDUSTRIAL ESTATE PHASE #8211; III NEW DELHI,
INDIA REPRESENTED BY ITS SECRETARY GENERAL MANOJ
PRAKASH CHHANGANI., PIN - 110020**
- 3 TATA PLAY LIMITED
REGIONAL OFFICE NORTH, TATA COMMUNICATIONS COMPLEX,
MANDI ROAD, P.O. CHHATTARPUR, NEW DELHI - 110074,
REPRESENTED BY ITS AUTHORIZED SIGNATORY SHRI. AMANDEEP
BAWA, PIN - 110074**
- 4 BHARTI TELEMEDIA LIMITED
HAVING ITS REGISTERED OFFICE AT BHARTI CRESCENT, 1, NELSON
MANDELA MARG VASANT KUNJ, PHASE #8211; II NEW DELHI.
AND REGIONAL OFFICE AT SL AVENUE, SERVICE ROAD, NH BYPASS,
KUNDANNOOR, KOCHI, ERNAKULAM, REPRESENTED BY ITS CIRCLE
HEAD-LEGAL AND REGULATORY, PIN - 110070**
- 5 DISH TV INDIA LTD.
OFFICE NO. 803, 8 TH FLOOR, DLH PARK, SV ROAD, GOREGAON
(WEST), MUMBAI - , REPRESENTED BY SIGNATORY SOPAN GHOSH,
AGED 51 YEARS, S/O LATE PRABIR KUMAR GHOSH, RESIDING AT F-
176/T-2, DILSHAD COLONY, DELHI 110095, PRESENTLY WORKING
AS HEAD - LEGAL & REGULATORY., PIN - 400062**
- 6 PRASAR BHARATI
TOWER B, DOORDARSHAN BHAWAN, COPERNICUS MARG NEW
DELHI, PIN - 110001**

BY ADVS.

**TUSHAR MEHTA, SOLICITOR GENERAL OF INDIA FOR R1
SR.ADV.SAKET SINGH, FOR R1
JAISHANKAR V.NAIR, CGC, FOR R1
ARJUN NATARAJAN FOR R1
ARUN KATHPALIA FOR R2
SR.ADV.ABRAHAM VAKKANAL FOR R3
SR.ADV.RAKESH DWIVEDI FOR R4
GOPIKRISHNAN NAMBIAR M**



W.A.No.1649/2024

-:4:-

2024:KER:80988

**K.JOHN MATHAI(K/413/1984)
JOSON MANAVALAN(J-526)
KURVAN THOMAS(K/131/2003)
PAULOSE C. ABRAHAM(MAH/58/2006)
RAJA KANNAN(K/356/2008)
JAI MOHAN(D/2454/2009)
R.V.SREEJITH
PAUL ABRAHAM VAKKANAL
ANIRUDH INDUKALADHARAN
JEEVAN BABU
VINEETHA SUSAN THOMAS
MOHAMMED SADIQUE T.
SHANKAR V.
T.H.ABDUL AZEEZ FOR R5
T.C.KRISHNA
TEJVEER SINGH BHATIA
ROHAN SWARUP
KUNAL VATS**

**THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 29.10.2024, THE
COURT ON 01/11/2024 DELIVERED THE FOLLOWING:**



'C.R.'

A.MUHAMED MUSTAQUE & P.M.MANOJ, JJ.

W.A.No.1649/2024

J U D G M E N T**Dated this the 1st day of November, 2024**A.Muhamed Mustaque, J.

The appellants filed a writ petition seeking the following reliefs:

- i. Issue a writ of certiorari or any other appropriate writ, order, or direction setting aside Clause 3 of 2024 Tariff Order;
- ii. Issue a writ of certiorari or any other appropriate writ, order, or direction setting aside Fifth Proviso to Clause 3(3) of the 2017 Tariff Order;
- iii. Issue a writ of certiorari or any other appropriate writ, order, or direction setting aside Clause (a) of Second Proviso to Regulation 6(1) of 2017 Regulations; and
- iv. Issue such other appropriate writ, order, or direction which this Hon'ble Court may deem fit and just in the circumstances of this case.

The relief sought above indicates that the appellants challenged clause (a) of the second proviso to Regulation 6 of the



Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017. They also contested the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017 (hereinafter referred to as the Tariff Order). This Regulation, formulated by the Telecom Regulatory Authority of India (TRAI) under Section 36 of the TRAI Act, holds statutory colour. The Tariff Order represents a decision by TRAI and, therefore, is subject to judicial review.

2. In *Bharat Sanchar Nigam Limited v. Telecom Regulatory Authority of India and Others* [(2014) 3 SCC 222], the Hon'ble Supreme Court ruled that the Telecom Disputes Settlement and Appellate Tribunal (TDSAT) lacks jurisdiction to hear challenges against regulations framed by TRAI under Section 36 of the TRAI Act. The learned Single Judge who heard the appellants' challenge ruled that the writ petition was not maintainable, as the same petitioners had previously raised similar challenges before the Madras High Court and, ultimately, the Supreme Court. In *Star India Private Limited v. Department of Industrial Policy and*



Promotion and Others [(2019) 2 SCC 104], the Supreme Court ultimately upheld the validity of the same regulation. Consequently, the learned Single Judge dismissed the writ petition, declaring it not maintainable. However, during the dismissal, the Judge noted that a challenge against the Tariff Order is indeed maintainable before TDSAT. After evaluating the matter, the Judge concluded that the contested provision in the Tariff Order cannot be challenged on the basis that it violates Article 14 of the Indian Constitution.

3. We hold the view that the writ petition was maintainable in as much as there is a specific challenge to the regulation. We are also of the view that the learned Single Judge had erred in going into the merit of the challenge against the Tariff Order after observing that the writ petitioners had an efficacious alternate remedy challenging the provisions before the TDSAT. However, we find that this matter ought not have been entertained by this court for the reasons to be stated hereafter.

4. The challenge to regulation earlier made by the writ petitioners attained finality by the judgment of the Supreme Court reported in *Star India's* case (supra). The very same regulation is



questioned in the writ petition. This Court cannot entertain a challenge to the same regulation as it would amount to reopening the judgment of the Supreme Court.

5. The learned Senior Counsel for the first appellant, Shri Amit Sibal, cited the Supreme Court judgment in *Mathura Prasad Bajoo Jaiswal and Others v. Dossibai N.B. Jeejeebhoy* [(1970) 1 SCC 613], arguing that the principle of *res judicata* does not apply if a specific issue was not raised in prior litigation. According to Shri Sibal, the previous challenge addressed the regulation in the context of the Copyright Act, 1957, rather than on broader grounds. The current challenge, however, contends that regulations are challenged in the light of the Tariff Order. Further submitted that Tariff order infringes on the petitioners' fundamental rights under Article 19(1)(a) of the Indian Constitution. He further argued that the TDSAT lacks the authority to address challenges based on fundamental rights violations.

6. The learned Senior Counsel Mr. Mukul Rohatgi, representing appellants 2 and 3, argued that it is essential to consider the context in which the challenge is brought and the legal



principles established over time. He noted that as circumstances evolve, the foundation of earlier judgments may change, and constitutional courts have a duty to interpret fundamental rights in line with these changes. He emphasized the importance of context in such challenges and relied on the Supreme Court's ruling in *Secunderabad Club v. Commissioner of Income-Tax* [(2023) SCC OnLine SC 1004]. Additionally, Mr. Rohatgi cited *Union of India and Others v. Dhanwanti Devi and Others* [(1996) 6 SCC 44], where the Supreme Court held that a precedent is defined by the core of its decision and ratio, and each decision should be applied based on the specific facts proven in that case.

7. The learned Solicitor General, Shri Tushar Mehta, representing the first respondent, argued that the prayers challenging the regulation cannot be entertained by this Court, as doing so would effectively reopen the binding precedent set by the Supreme Court in *Star India's* case (supra). He further elaborated by asserting that the TDSAT is fully empowered to review the Tariff Order on any grounds, including those involving alleged violations, as outlined in Section 14(a)(7) of the TRAI Act.



8. The learned Senior Counsel Shri Rakesh Dwivedi, representing the fourth respondent, contended that the writ petition is unfounded and, therefore, not maintainable. He argued that once a challenge to the regulation has been unsuccessful, it cannot be reasserted on different grounds that may be relied on by the challenging party. Shri Dwivedi cited the Supreme Court judgments in *Suganthi Suresh Kumar v. Jagdeeshan* [(2002) 2 SCC 420] and *Omprakash Verma and Others v. State of Andhra Pradesh and Others* [(2010) 13 SCC 158]. In these cases, the Supreme Court held that the legal principles established by the Supreme Court cannot be circumvented by the High Court simply because not all grounds were presented in a previous challenge.

9. The learned Senior Counsel Abraham Vakkanal for the third respondent also supported the arguments of the learned Senior Counsel who appeared for the respondents and submitted that the writ petition was not maintainable.

10. We have already noted that the writ petition is maintainable. However, just because the writ petition is maintainable does not mean this Court must entertain a challenge



to the regulation, especially if it cannot provide any relief due to the binding judgment of the Supreme Court.

11. Typically, a statutory regulation can be challenged on two grounds: first, for violating fundamental rights, and second, for being inconsistent with the parent Act. Once the Supreme Court has dismissed a challenge to the regulation, any court bound by the declaration of law under Article 141 of the Constitution cannot revisit a binding judgment of the Supreme Court on different grounds. It is important to differentiate between precedent and *res judicata*. *Res judicata* pertains to the parties involved in a particular case, while precedent refers to a binding declaration of law that applies to courts or authorities and is independent of the rights and obligations of the parties involved. In other words, precedent falls within the category of case law in the hierarchical system of adjudication and serves as a source of law that binds inferior authorities to the legal declarations made by superior authorities. The binding nature of precedent brings in certainty of law to be followed by all courts and authorities. In contrast, *res judicata* pertains to procedural rules that bind litigating parties to previous



judgments on the same issue. It is the *ratio decidendi* that determines the binding nature of a precedent, not the cause of action. In the *Star India's* case decided by the Supreme Court, the *ratio decidendi* pertained to the challenge against the validity of the regulation, while the cause of action in that instance may have been related to the violation of broadcasters' copyright, the current case involves the violation of fundamental rights. The cause of action refers to the bundle of facts that give rise to a legal action, which is crucial in determining the applicability of the principles of *res judicata* but not necessarily on binding nature of precedent. Only the Supreme Court has the authority to revisit its own declared law; no other court can do so. The Supreme Court addressed this issue in *Palitana Sugar Mills (P) Ltd. and Another v. State of Gujarat and Others* [(2004) 12 SCC 645], where it stated in paragraph 62:

62. It is well settled that the judgments of this Court are binding on all the authorities under Article (142*) 141 of the Constitution and it is not open to any authority to ignore a binding judgment of this Court on the ground that the full facts had not been placed before this Court and/or the judgment of this Court in the earlier proceedings had only collaterally or incidentally decided the issues raised in the show-cause



notices. Such an attempt to belittle the judgments and the orders of this Court, to say the least, is plainly perverse and amounts to gross contempt of this Court. We are pained to say that the then Deputy Collector has scant respect for the orders passed by the Apex Court. (*sic*)

Therefore, this Court cannot entertain the challenge to the regulation and is bound by the Supreme Court judgment in *Star India's* case (*supra*).

12. The next question concerns the challenge to the Tariff Order. The Tribunal is an expert body of members with specialized knowledge in their respective fields. While constitutional courts are competent to take up such challenges, specialized tribunals addressing specific subjects cannot be equated with constitutional courts. Constitutional courts must consider the economic implications as well as the policy dimension of TRAI's decisions requiring a perspective that takes into account various angles of consideration. There is a need for specialized tribunals because constitutional courts are not equipped to handle specialized fields or subjects. The implementation of law can involve multiple dimensions, including market, economic, environment, social, and political aspects. The intersection of law with specialized areas



necessitates a nuanced approach that focuses on the impacts resulting from the enforcement of such laws—something that traditional constitutional courts typically cannot address effectively. The traditional courts often tend to focus on a dogmatic interpretation of the law.

13. The learned Solicitor General placed reliance on the judgment of the Supreme Court in *Cellular Operators Association of India and Others v. Union of India and Others* [(2003) 3 SCC 186] wherein the Supreme Court considered the amplitude of jurisdiction of TDSAT and held in para.27, thus:

27. TDSAT was required to exercise its jurisdiction in terms of Section 14-A of the Act. TDSAT itself is an expert body and its jurisdiction is wide having regard to sub-section (7) of Section 14-A thereof. Its jurisdiction extends to examining the legality, propriety or correctness of a direction/order or decision of the authority in terms of sub-section (2) of Section 14 as also the dispute made in an application under sub-section (1) thereof. The approach of the learned TDSAT, being on the premise that its jurisdiction is limited or akin to the power of judicial review, is, therefore, wholly unsustainable. The extent of jurisdiction of a court or a tribunal depends upon the relevant statute. TDSAT is a creature of a statute. Its jurisdiction is also conferred by a statute. The purpose of creation of TDSAT has expressly been stated by Parliament in the amending Act of 2000.



TDSAT, thus, failed to take into consideration the amplitude of its jurisdiction and thus misdirected itself in law.

14. We cannot agree with Mr. Sibal's arguments that TDSAT is incompetent to address challenges based on the violation of fundamental rights. There is a fundamental distinction between enforcing fundamental rights and exercising judicial review concerning those rights. In the former case, only constitutional courts have the authority to enforce fundamental rights. However, regarding judicial review based on fundamental rights parameters, any authority with review power can determine whether a decision or order aligns with fundamental rights or applicable law. Therefore, we conclude that the challenge to the regulation must fail in light of the binding judgment. We grant the appellants the liberty to challenge the Tariff Order before TDSAT.

The learned Senior Counsel, Shri Santhosh Mathew, representing appellants 4 and 5, requested that the interim order issued by this Court be maintained to allow the appellants to approach TDSAT should any adverse orders arise from this Court. Taking note of the request as above, we order that coercive steps



shall be deferred for a period of two weeks to enable the appellants to invoke alternate remedy.

The writ appeal stands dismissed as above.

Sd/-

**A.MUHAMED MUSTAQUE
JUDGE**

Sd/-

**P.M.MANOJ
JUDGE**

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