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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 15.09.2020

Date of decision: 29.09.2020

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+ W.P.(C) 6238/2020 & CM 22291/2020

BENNETT COLEMAN AND CO LTD & ANR. Petitioners

Through: Dr.Abhishek Manu Singhvi, Sr.
Adv. and Mr.Maninder Singh, Sr.
Adv. with Mr.Kunal Tandon,
c Mr.Kumar Shashank Shekhar,
Mr.Prabhas Bajaj, Mr.Amit
Bhandari & Mr.Amandeep Singh,
Adv.

d versus

BROADCAST AUDIENCE RESEARCH COUNCIL INDIA

...Respondent

e Through: Mr.Neeraj Kishan Kaul, Sr. Adv.
with Mr.Saikrishna Rajagopal,
Ms.Sneha Jain, Mr.Ranjeet Singh
Sidhu, Mr.Sudarshana MJ &
Mr.Akash Lamba, Adv.

f **CORAM:**
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition has been filed by the petitioners praying for the
g following relief:-

h *“a) Issue an appropriate writ, order or direction in
the nature of mandamus or such other writ,
order or direction, quashing the communication
dated 03.09.2020 alongwith Press Release dated
03.09.2020 and Frequently Asked Questions*

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issued by the Respondent, BARC, annexed as Annexure P-1(Colly) with the present petition.”

2. This petition has been filed by the petitioners with the averment that the jurisdiction to adjudicate on the disputes raised in the petition lies with the learned Telecom Disputes Settlement and Appellate Tribunal (hereinafter referred to as ‘TDSAT’), the functioning of which stands suspended due to detection of a COVID-19 positive case.

3. It is further asserted that the date of commencement of the functioning in the learned TDSAT is not known and in any case, is suspected not to recommence in the near future and as the petitioners pray for urgent interim relief, the present petition has been filed.

4. As far as the assertion of the petitioners of the learned TDSAT not being functional, the same is not denied by the respondent.

5. In view of the above, at the outset, it is clarified that the observations made in the present judgment are mere *prima facie* opinions of this Court which shall not bind the learned TDSAT in its adjudication of the petition that is or would be filed by the petitioners before it. The observations made in the present judgment are confined only to the interim relief claimed by the petitioners for the period till its petition/interim application is taken up for hearing by the learned TDSAT.

6. By the Impugned Communication dated 03.09.2020, the respondent, a not-for-profit Company incorporated under Section 25 of the Companies Act, 2013 registered as a television rating agency by the

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Government of India, introduced algorithms into its data validation method purported to mitigate the impact of 'Landing Page' on viewership data across all genres of television channels. The release date of such data was 03.09.2020 and is thereafter, published every Thursday.

7. The learned senior counsels for the petitioners, in challenge to the above communication, have submitted that the Telecom Regulatory Authority of India (TRAI) had earlier, by Directions issued under Section 13 read with sub-Clause (ii) of Clause (b) of sub-section (1) of Section 11 of the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as the 'Act') sought to restrain the placing of television channels on the Landing Page *inter alia* on the ground that the same leads to false viewership data and creates market distortions. This was followed by further Direction dated 25.04.2018 by which the Direction dated 08.11.2017 was withdrawn. The TRAI thereafter, issued Directions dated 03.12.2018, again restraining the television channels to be placed on the Landing Page. This was again stated to be premised on the alleged influence such placement has on the Television Rating Point (TRP).

8. The said Direction was challenged *inter alia* by the petitioners before the learned TDSAT by way of Broadcasting Appeal No. 2/2018. The said appeal was allowed by the learned TDSAT vide its order dated 29.05.2019.

9. TRAI challenged the said order before the Supreme Court by way of a Civil Appeal No. 6001-6003/2019 and the Supreme Court, on 30.07.2020 passed the following order:-

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“Heard the learned counsel appearing for the parties at length.

After hearing the learned counsel with respect to interim stay, we direct that the appellant shall not enforce Landing Page Regulations/directions against the respondents and other similarly situated members of the Association.

Subject to the aforesaid, the operation of the impugned Judgment shall remain stayed.”

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10. The learned senior counsels for the petitioners submit that in view of the above order, the placement of television channels on the Landing Page is still permitted, though the operation of the judgment of the learned TDSAT has been stayed.

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11. The learned senior counsels for the petitioners submit that the respondent has, by way of the Impugned Communication, sought to achieve what the TRAI could not achieve by the Direction dated 03.12.2018. The respondent has, in a manner, again sought to restrict the rights of the television channels to be placed on the Landing Page on the same ground as was sought to be done by the TRAI.

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12. The learned senior counsels for the petitioners further submit that the Impugned Communication and the new algorithms have been issued without any consultation and in a non-transparent manner. They submit that the effect of the new algorithms on the TRP of the channels on the Landing Page, infact is of reduction even from what it could have achieved if it was not so placed on the Landing Page. They submit that

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the complete basis of algorithms have not been disclosed by the respondent, thereby making the exercise non-transparent.

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13. Placing reliance on the 'Policy Guidelines for Television Rating Agencies in India' (hereinafter referred to as 'Policy Guidelines') issued by the Government of India and specifically Clause 5 thereof, the learned senior counsels for the petitioners submit that the rating process/methodology that can be adopted by the respondent, must be transparent and disclosed not only to the Government but also to the general public, in the form of publishing it on the website of the respondent. They submit that in the present case, the respondent has clearly breached the said condition of the Policy Guidelines.

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14. The learned senior counsels for the petitioners further submit that in response to the Consultation Paper floated by the TRAI on the issue of placing of television channels on Landing Page, the respondent itself had lauded the purpose of Landing Page and has infact, gone on to say that there is no measurement system worldwide that detects Landing Page and removes it from reported data and that such concept could not be clubbed with technology /methodology of viewership measurement. They submit that the respondent has not explained the change in its opinion from its earlier stated stand, especially when it had informed the TRAI that it was following the 'global best practices'.

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15. On the other hand, the learned senior counsel for the respondent submits that the petition before the learned TDSAT would not be maintainable. He submits that under Section 14 of the Act, only the disputes between licensor or licensee; between two or more service

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providers; or between a service provider and a group of consumers, is maintainable. He submits that the respondent is neither the licensee nor the service provider. Its functions are merely that of a rating agency.

16. Placing reliance on the judgment of the Supreme Court in *Ramakrishna Mission And Another vs. Kago Kunya And Others*, (2019) 16 SCC 303, he submits that only because the respondent has to obtain registration from the Government of India for the purposes of its activity, such registration neither makes the respondent a “Licensee” as defined in Section 2(1)(e) of the Act nor a “service provider” as defined in Section 2(1)(j) of the Act or an alter ego or agent of the Government, as contended by the petitioners in the petition.

17. The learned senior counsel for the respondent has further submitted that even otherwise, the Policy Guidelines issued by the Government of India itself provides for a dispute settlement mechanism to be put in place by the respondent for addressing the grievance of a third party, including the petitioners herein. Such dispute settlement mechanism has also been put in place in the End User License Agreement dated 08.12.2017 executed between the petitioner no. 1 and the respondent.

18. He submits that Clause 24 of the End User License Agreement provides that any dispute in connection with the Agreement shall be agitated only before the Courts at Mumbai, and no other Court shall have jurisdiction over such disputes. In presence of the said Clause vesting exclusive jurisdiction in Courts at Mumbai, this Court even otherwise, would not have any jurisdiction to entertain the present petition.

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19. On the merits of the dispute, the learned senior counsels for the respondent submits that in terms of the End User License Agreement, the respondent has an unfettered right to change the parameters for the rating of television channels. He submits that even in terms of the Policy Guidelines issued by the Government of India, the respondent has been permitted to use necessary algorithms to detect 'outliers' having unusual viewing behaviour and discard such data. He submits that the respondent formed an opinion that the placement of the channels on the Landing Page creates exaggerated viewership by forcing viewership. The same, therefore, falls in the category of 'outliers' which needs to be addressed. It is the case of the respondent that the new algorithms were thereafter arrived at through rigorous development and testing across multiple genres and have been applied non-discriminately across all television channels.

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20. The learned senior counsel for the respondent submits that the complete data of such algorithms cannot be disclosed to the petitioners or to any third party as such disclosure will have the potentiality of the purpose sought to be achieved being circumvented. Only the broad framework of such algorithms need to be disclosed and has been duly disclosed by the respondent.

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21. As far as the change of stand of the respondent is concerned, the learned senior counsel for the respondent submits that there cannot be any estoppel against the respondent from creating its methodology. The respondent having realized the need, carried out studies and only then brought about a change in its algorithms and reporting of data. The same

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cannot, therefore, be faulted only because of the stand taken by the
respondent at a prior point of time, when it had not developed the
b algorithms.

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22. As far as the submission of the petitioners based on the order of the
learned TDSAT is concerned, the learned senior counsel for the
respondent submits that the said order determined only the jurisdiction or
lack thereof of the TRAI to prohibit placement of channels on the
Landing Page and can have no affect on the power of the respondent to
determine a fair and transparent manner of reporting the TV viewership.

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23. The learned senior counsel for the respondent further submits that
the respondent has representation from the Indian Broadcasting
Foundation (IBF), the Indian Society of Advertisers (ISA) and the
Advertising Agencies Association of India (AAAI), making it broad-
e based and therefore, it cannot be said that the algorithms approved by
such a body are arbitrary or discriminatory.

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24. In rejoinder, the learned senior counsels for the petitioners, while
reiterating their submission on merit, have submitted that the petition
before the learned TDSAT would be maintainable inasmuch as the
respondent has not only carried out the function of the Government of
India but is also its licensee. Placing reliance on Clause 19.1, Clause 19.2
g and Clause 24.1 of the Policy Guidelines, they submit that the respondent
is not only bound by the provisions of the Act but also to the jurisdiction
of the learned TDSAT. They further submit that infact, the Government
h has sought recommendations from the TRAI on the television audience
measurement and rating system in India and such recommendations were

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c submitted by the TRAI to the Government on 28.04.2020. They submit that therefore, the submission of the respondent challenging the maintainability of the petition before the learned TDSAT is liable to be rejected.

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e 25. I have considered the submissions made by the learned senior counsels for the parties.

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g 26. On the issue of maintainability of the petition before the learned TDSAT, Clause 19.1 and Clause 24.1 of the Policy Guidelines issued by the Government of India need to be referred to and are reproduced hereinbelow:-

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24.1 *The company shall also be governed by the provisions of the Telecom Regulatory Authority of India Act, 1997.*

27. A reading of the above Clauses would show that the respondent is governed by the provisions of the Act and any dispute between the Government of India and the respondent is to be raised before the learned TDSAT.

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28. Section 14 of the Act, insofar as it is relevant for the present petition, is reproduced hereinbelow:-

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

(a) *adjudicate any dispute-*

(i) *between a licensor and a licensee;*

(ii) *between two or more service providers;*

(ii) *between a service provide and a group of consumers.”*

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29. Dispute between the Central Government and the respondent can lay before the learned TDSAT only if the Central Government is treated as a ‘licensor’ and the respondent as a ‘licensee’. It would also imply that the respondent would be a “Service Provider” as defined in Section 2(1)(j) of the Act, which is reproduced hereinbelow:-

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“Definition

(j) *“service provider” means the Government as a service provider and includes a licensee.”*

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30. It cannot be challenged that the petitioner no. 1 is a service provider and therefore, the dispute between them would fall within the scope of Section 14(a)(ii) of the Act as a dispute between two or more service providers. Therefore, the judgment of the Supreme Court in *Ramakrishna Mission And Another* (supra) may not have application in the present case.
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31. Reliance of the respondent on Clause 18 of the Policy Guidelines would not have any effect on the question of jurisdiction of TDSAT, inasmuch as it merely absolves the Government from liability arising out of any dispute that the respondent may have with any third party.

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32. Similarly, the reliance of the respondent on Clause 6 of the Policy Guidelines, in my *prima facie* opinion, would not have the effect of divesting the learned TDSAT of its jurisdiction inasmuch as such dispute redressal mechanism under the Policy Guidelines would only act as an alternate dispute redressal mechanism and not to the exclusion of the statutory jurisdiction conferred on the TDSAT.

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33. Once it is held that the learned TDSAT would have jurisdiction under Section 14 of the Act, the same cannot be diversified through an Agreement between the parties and especially Clause 24 of the End User License Agreement as sought or contended by the learned senior counsel for the respondent. Equally, the present petition has been premised on the submission that the functioning of the learned TDSAT stands suspended, as a supervisory High Court, this Court would , therefore, have jurisdiction to entertain the present petition, irrespective of Clause 24 of the Agreement.

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34. Having *prima facie* held that the learned TDSAT would have jurisdiction to entertain the petition, I now consider the submissions made by the learned senior counsels for the parties on the merits of the dispute itself.

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35. Clause 5 of the Policy Guidelines lays down the Methodology for Audience Measurement. Clause 5.5 thereof provides for Data Analysis and reads as under:-
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“5.5 Data Analysis

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5.5.1 All weighting or data adjustment procedures utilized by the rating agency in the process of converting basic raw measurement data to rating reports shall be based on systematic and logical procedure and applied consistently.

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5.5.2 Any shortcomings, deficiencies, limitations in the rating system shall be clearly disclosed in the rating reports and also brought to the notice of users of the rating system.

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5.5.3 In the event that a rating agency identifies an attempt to bias measurement results by a respondent's submission of fabricated information, it shall eliminate such cases from analysis. In the event that such cases have been included in published data, the agency shall be required to assess the effect on results and notify users about the same along with indication of its practical significance.”

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36. Clause 5.6.2 of the Policy Guidelines requires the rating agency to submit the detailed methodology it uses, to the Government as also publish it on the website thereby ensuring transparency. Clause 8 of the Guidelines further provides for information to be disclosed by the rating agency on its website.
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37. The End User License Agreement executed between the petitioner no. 1 and the respondent in Clause 6(v) and 9(i)(g)(v) allows the
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respondent to change the methodology used by it for the TV channel rating.

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38. The petitioners themselves assert the composition of the respondent in the petition as under:-

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“5. As per the information available on the website of BARC, the Respondent is not-for-profit company incorporated under Section 25 of the Companies Act, and has been promoted by the Indian Broadcasting Foundation (IBF), the Indian Society of Advertisers (ISA) and the Advertising Agencies Association of India (AAAI), in the shareholding ratio of 60:20:20 respectively. Indian Broadcasting Foundation established in 1999 is India's premium apex organization of television broadcasters. The Indian Society of Advertisers has been the peak national body for advertisers for 60 years and represents the interests of organisations involved in Indian advertising, marketing and media industry. The Advertising Agencies Association of India (AAAI) is the official national organisation of advertising agencies, formed to promote their interests so that they continue to make an essential and ever-increasing contribution to the nation. To the best of the knowledge of the Petitioners, Respondent has obtained registration in terms of the policy guidelines issued by the Government of India on 28.07.2015 and is the only rating agency in India.”

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39. A reading of the above averment would show that the respondent had broad representations from the broadcasting and advertising industry. They can, therefore be presumed to be an expert in the field as also in possession of knowledge of the industry and the steps required for its improvement. Decision of such a body cannot be interfered with lightly.

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40. Clause 5.4.2 of the Policy Guidelines requires the rating agency to use necessary algorithms to detect outliers having unusual viewing behaviour and discard such data. The respondent, in its Impugned Communication dated 03.09.2020 has stated that its Oversight Committee and its Technical Committee, on the basis of a study undertaken, concluded that use of a Landing Page by a channel exaggerates viewership estimates by ‘forcing viewership’. Statistical evidence also demonstrated that use of Landing Pages exaggerated ratings estimates. Therefore, inclusion of this false exaggeration in the ratings would mean that BARC would not be accurately estimating and reporting ‘What India Watches’. It further states that the new methodology evolved by the respondent is after detailed study and testing across multiple genres and would ensure minimization of any ‘false positives or negatives’.

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41. The submission of the petitioners to discredit the exercise conducted by the respondent on the ground of its purported change of stand from its earlier response to the Consultation Paper floated by the TRAI cannot be accepted. Based on such a response, it cannot be contended that the respondent is restrained for all times from changing its position or from coming out with new algorithms to answer any perceived shortcoming in its own system. It is important to note here that the new algorithms are mandated to be reported to the Government and it is not the case of the petitioners that the Government has raised any objection thereto.

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42. Similarly, reliance of the petitioners on the order dated 29.05.2019 of the learned TDSAT cannot also be accepted. The learned TDSAT was considering the powers of the TRAI to issue the Direction prohibiting placement of TV channels on the Landing Page and concluded that TRAI had no such powers under the provisions of the Act. However, the TDSAT also observed as under:-

“22. Since the main point of power or jurisdiction to issue the impugned direction has been decided against the respondent, it is not necessary to decide other issues and hence they are left open but in the interest of all the stakeholders and also for achieving the objects and purpose of the Act, it is deemed necessary to observe that a so called valuable right of the distributors, if proposed to be curtailed should be interefered with only after seriously considering all the pros and cons including the extent of injury likely to be sustained by different stakeholders if such a curb is not imposed or if it is imposed. The relevant data on the basis of study should justify such a strong measure of Regulation, if again proposed in future.

23. Having said that distributors' rights may require a serious consideration of all the pros and cons germane to the issue, it is worthwhile to note that the issue of landing page may throw up conflicting interests and rights because TRAI claims to balance them mainly in the interest of consumers. Such rights can be properly understood and regulated only when it is clearly understood as to whom landing page belongs to as an owner and also as a beneficiary of the end product. Does it belong to the subscriber or to the DPO who brings the signals to the subscriber or to none of these? To be fair, such a question of law has been canvassed neither by appellants which include DPOs and Broadcasters, nor by TRAI which claims to have also

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acted in the interest of consumers. Mr. Maninder Singh makes it clear that it belongs to the DPOs, who therefore have full rights on what to place on the landing page. TRAI has not applied its mind to this basic question but has obliquely referred to the suggestion whether landing page can be used for subscriber related information. Such a suggestion has been dismissed on account of technical difficulties that the DPOs may face. We do not know such difficulties or whether those difficulties are insurmountable. However, we do know that the Authority has applied sufficient energy and diligence in addressing technical problems faced by BARC since BARC did not wish to change its methodology keeping in view the international best practices. No one can have cavil with following best practices. However, we do not know what are the best international practices in respect of landing page or in respect of regulation of LCNs in general. Would it not be a best practice if subscriber is given a choice to "opt"? Should the landing page be a default or a separate page in its own right? Can the subscriber be presented with a default, be it a rated or unrated channel? Or, as Mr. Maninder Singh suggests, the subscriber's right is sufficiently covered since the DPO determines the tariff for subscriber after accounting for revenue generated through the default landing page? Of course, the question at hand may have many perspectives and the regulator is not obliged to conceive or answer all of them. The observation we wish to make is that when subscriber's interest is canvassed, it may be appropriate to consider question of their rights, howsoever small, in more details."

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43. As noted hereinabove, the respondent claims to have carried out such extensive study before issuing the Impugned Communication and adopting the new method.

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44. In view of the above, in my opinion, the petitioners have been unable to make out the case for grant of interim injunction at this stage.

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45. The petition is accordingly dismissed, however, reiterating that this Court has made observation only for the purpose of deciding the present petition and none of such observations shall bind the learned TDSAT in any manner whatsoever and the learned TDSAT shall hear the petition filed/ to be filed by the petitioners and any interim application filed therein, remaining uninfluenced by any observation made in the present order.

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46. There shall be no order as to costs.

NAVIN CHAWLA, J

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SEPTEMBER 29, 2020/rv

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a *This is a Print Replica of the raw text of the judgment as appearing on Court website.*

Publisher has only added the Page para for convenience in referencing.

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