IN THE SUPREME COURT OF BANGLADESH

APPELLATE DIVISION

(Civil)

Present:

Md. Muzammel Hossain, CJ
S.K. Sinha, J
Md. Abdul Wahhab Miah, J
Nazmun Ara Sultana, J
Muhammad Imman Ali, J
Muhammad Mamtaz Uddin Ahmed, J

Date of Hearing: The 24th August, 18th, 19th, 25th & 26th October, 2011.
Date of Judgment: The 16th November,2011
Result: Allowed-in-part.

Jamuna Television Ltd. and another.
... Appellants

=VS=

Government of Bangladesh and others
... Respondents

CIVIL APPEAL NO.279 OF 2010

(From the judgment and order dated 20.05.2010 passed by the High Court Division in Writ Petition No.8100 of 2009)

ADVOCATES WHO APPEARED IN THIS CASE:

For the Appellants: Mr. Rafique-ul Haque, Senior Advocate with Mr. Ajmalul Hossain QC, Senior Advocate, instructed by Mr. Syed Mahbubar Rahman, Advocate-On-Record.

For the Respondent No.1: Mr. Mahbubey Alam, Attorney General, instructed by Mrs. Sufia Khatun, Advocate-On-Record.

For the Respondent No.3: Mr. Md. Zohirul Islam, Advocate-On-Record.

For the Respondent Nos.2 & 4: None Represented.

Bangladesh Telecommunication Act, 2001

Section 46 *read with*

বাংলাদেশ টেলিভিশনের জন্য টেরেস্ট্রিয়াল টেলিভিশন সম্প্রচার সুবিধা সংরক্ষণ অধ্যাদেশ,২০০৬ and

বাংলাদেশ টেলিভিশনের জন্য টেরিষ্ট্রিয়াল টেলিভিশন সম্প্রচার সুবিধা সংরক্ষণ আইন, ২০০৯

Stop broadcasting activities of Jamuna Television– There is no illegality in the order dated 19.11.2009 to stop test transmission of the appellant-company's Television Channel cancelling the allocated satellite frequency and using of earth station, SNA and DSNA machineries and equipments and seizing the machineries and equipments under the seizure list dated 19.11.2009. However, in view of the observations and findings made hereinabove, the appeal is allowed-in-part in doing complete justice, the respondents are hereby directed to release the machineries and equipments seized from the appellant-company's TV stations as per seizure list dated 19.11.2009 (Annexure-A2) and to dispose of the appellants' application dated 08.10.2009 in accordance with law within 1(one) month from the date of receipt of a copy of the judgment. At this stage the appellants are not entitled to broadcast or transmit any telecommunication without having obtained requisite licences and NOC in accordance with law from the concerned Ministries and authorities. …(Para-70)

JUDGMENT

MD. MUZAMMEL HOSSAIN, CJ:

01. This appeal by leave is directed against the judgment and order dated 20.05.2010 passed by a Division Bench of the High Court Division in Writ Petition No.8100 of 2009 disposing of the Rule with direction upon the writ respondents to dispose of the application dated 08.10.2009 within one month from the date of receipt of a copy of the judgment.

02. Facts, in short, are that the writ petitioners-appellants filed Writ Petition No.8100 of 2009 challenging the Memo No.তম / টিভি-২ / ১সি-১৫ / ২০০৯ / ৮৪৯ dated 19.11.2009 issued by the respondent No.1 to stop broadcasting activities of Jamuna Television, Memo No.বিটিআরসি / এসএম / ৩-২৪ / ০২ পার্ট-১ / ২০০৮ / ১৫৭-২০৬১ dated 19.11.2009 issued by the respondent No.4 under the authority of the Bangladesh Telecommunication Regulatory Commission (BTRC)-respondent No.3 cancelling the allocated satellite frequency and using of earth station and SNG / DSNG machineries and equipments and also the action of seizure of (i) U/C Model No.A 71 – / GG00002000, Serial No.B931, (ii) Satellite Modulator SM6610 and (iii) Eucoder E5720 by the respondent No.4 vide seizure list dated 19.11.2009 pursuant to Memo No. তম / টিভি-২ / ১সি-১৫ / ২০০৯ / ৮৪৯ and Memo No. বিটিআরসি / এসএম / ৩-২৪ / ০২ পার্ট-১ / ২০০৮ / ১৫৭-২০৬১ both dated 19.11.2009 issued by the respondent Nos.2 and 4 respectively before the High Court Division stating, interalia, that the writ petitioner-appellant No.1 (hereinafter referred to as the appellant-company) is a private limited company incorporated under the Companies Act,1994 with the objects, interalia, to apply for procurement / obtaining of licence from relevant Government, Semi-Government bodies or any other statutory authority for the purpose of opening, floating, running and operating private television channels in Bangladesh and telecasting / broadcasting of programmes; that the company having employed best professionals of the country to operate its activities successfully carried out its test transmission. The writ petitioner No.2 is the Managing Director of the Company.

03. The writ petitioners-appellants denied that on 08.10.2009 they applied for re-issuance of a No Objection Certificate (NOC) from the respondent No.1 for broadcasting activities and while the said application was under consideration the appellant-company unlawfully commenced test broadcasting. They sought for a direction upon the respondent No.3 to issue a formal licence to the appellant-company pursuant to NOC being Memo No. বিটিআরসি / এসএম / ৩-২৪ / ০২ পার্ট-১ / ০৮ / ২৯-২৯৪৫ dated 20.11.2008 issued by the respondent No.3. The appellants stated that they received the impugned Memo dated 19.11.2009 issued by the respondent No.2 through fax; that the NOC dated 05.02.2002 accorded by the respondent No.1 was given for an indefinite period of time; that there was no violation of any law on the part of the appellants for carrying out the test transmission; that the action of respondent Nos.1 and 2 are absolutely malafide, arbitrary and capricious; that the respondent Nos.3 and 4 issued the impugned Memos dated 19.11.2009 simply relying on the Memo of the respondent No.2 without application of mind; that the respondent No.2 issued the impugned Memo in violation of Section 46 of Bangladesh Telecommunication Act,2001 (BT Act,2001) which requires issuance of show cause notice.

04. The appellant-company in due course of its business in order to obtain a licence for allocation of frequency in UHF band V Channel No.40-50 9 Frequency 622-702 MHz vide letter dated 23.11.2001 submitted a proposal to the respondent No.1 for setting up a privately owned terrestrial and satellite television channel. The respondent No.1 on receipt of the said proposal issued a NOC vide Memo dated 05.02.2002 (Annexure-B) to the appellant-company for opening countrywide terrestrial and satellite television broadcast in the UHF band under their own management. In the said NOC dated 05.02.2002 a condition was set out to the effect that it will be cancelled if the company violates or deviates from any condition set out therein. The appellant-company vide letter dated 13.02.2002 applied to the BTRC for allocation of licence for frequency in the UHF Band but it deliberately avoided to accord the licence as required. In such a situation, the appellants, finding no other alternative, filed Writ Petition No.7999 of 2002 before the High Court Division praying for a direction upon the BTRC to allocate them frequency. A Division Bench of the High Court Division by the judgment and order dated 25.08.2003 and 26.08.2003 made the Rule absolute directing the BTRC to dispose of the pending application filed by the appellants praying for allocation of frequency and grant of licence within 30(thirty) days of passing of the said judgment. The said judgment was upheld by the Appellate Division by the judgment and order dated 25.10.2003 in Civil Petition for Leave to Appeal Nos.1253 of 2003 and 1356 of 2003 directing the BTRC to dispose of the applications preferred by the appellants expeditiously. But the BTRC did not dispose of the said applications submitted by the appellants and consequently, the appellants had prayed for drawing up a contempt proceeding against the Chairman of the BTRC. In order to avoid contempt proceeding the BTRC vide order dated 10.03.2004 (Annexure-D) allocated frequency to the company along with a demand notice setting out the rate respectively for satellite system and terrestrial system to be paid by the appellant-company within 15 days of the receipt of the said demand notice. The appellant-company immediately paid licence fees for satellite system but the fees for terrestrial system having required some clarifications, the appellants requested to clear certain points as to the rate of calculation. The respondent Nos.1 and 2 after the expiry of 15 days issued a Memo dated 22.03.2004 (Annexure-E) directing the appellants to refrain from setting up any broadcasting station and operating all kinds of broadcasting activities. Subsequently, the respondent-BTRC vide Memo dated 08.04.2004 (Annexure-E1) cancelled the licence for frequency dated 10.03.2004 on the ground that the appellants had failed to pay money as per the demand note within the stipulated period.

05. Thereafter the appellants challenged the aforesaid Memos dated 22.03.2004 and 08.04.2004 issued by the respondent Nos.1 and 3 respectively by filing Writ Petition No.4600 of 2004. A Division Bench of the High Court Division by the judgment and order dated 16.05.2005 made the Rule absolute declaring that the aforesaid memos were issued without lawful authority. Thereafter both the Government and the BTRC preferred Leave Petition Nos.767 of 2005 and 993 of 2005 respectively before this Division against the judgment and order dated 16.05.2005 passed by the High Court Division and these leave petitions were dismissed on 30.04.2008.

06. The appellants stated that the tenure of the said NOC dated 05.02.2002 is of indefinite period unless any condition set out therein is violated. The appellant-company has already completed all preparations and went on test transmission. In fact the appellant-company did

not apply for any fresh NOC. In any event such application, if any, for fresh NOC is redundant and superfluous, as the earlier NOC being restored by the Apex Court of the country and the tenure of the said NOC having been determined in the said judgment dated 16.05.2005 for indefinite period, is still subsisting. Pursuant to the judgments passed by both the Divisions of the Supreme Court of Bangladesh the memo dated 05.02.2002 according NOC by respondent No.1 for frequency and memo dated 10.03.2004 issued by the BTRC allocating frequency and permission for import of machineries and equipments were restored and the same are subsisting till date. The BTRC vide memo dated 20.11.2008 (Annexure-H) extended the period of the allocation of frequency. The BTRC thereafter vide memo dated 18.12.2008 (Annexure-H1) accorded its NOC for import of DSNG Machineries. The appellants imported all machineries and other equipments on payment of duties and taxes as assessed and installed the same in the TV station.

07. The appellants further stated that it incurred costs of about one hundred crore Taka for installation of the TV station. The appellant-company has employed about three thousand employees in various levels all over the country. The appellant-company following all the provisions of law of the land and various NOCs issued by the Government and the BTRC as well carried out test-transmission since 15.10.2009. The appellant-company vide its letter dated 15.11.2009 reminded the BTRC that the full report of the test transmission of the appellant-company was submitted to the BTRC on 01.11.2009 vide Memo JTV / BTRC / 09 / 2009 / dated 01.11.2009. Therefore, the BTRC-respondent No.3 was well aware about the test transmission of the appellant-company from 01.11.2009 onwards. In the said letter dated 01.11.2009 the appellant-company requested the BTRC for according its formal permission allowing the appellant-company to inaugurate the regular broadcasting / transmission. The appellant-company vide letter dated 15.11.2009 also requested the BTRC to accord licence for frequency and for purchasing equipments and machineries as per clause (Q) of the NOC dated 20.11.2008. When the appellant-company was expecting that licence for frequency and for purchasing equipments would be allocated by the BTRC, to its utter shock and surprise received a fax dated 19.11.2009 issued by the respondent No.2 alleging that the appellant-company submitted an application on 08.10.2009 for re-issuance of NOC (পুনঃঅনাপত্তি) but it commenced test broadcasting pending consideration of the said application which is not lawful. Upon such allegation, the respondent No.2 issued a memo dated 19.11.2009 directing the appellants to cancel the broadcasting activities immediately. The said fax was followed by another impugned memo dated 19.11.2009 issued by the respondent No.4 cancelling the allocated frequency and the approval for using earth station and SNG / DSNG equipments pursuant to the memo dated 19.11.2009 issued by the respondent No.2. The respondent No.4 on 19.11.2009 at 10:30 p.m. seized all equipments as set out in the seizure list from the office of Television Station of the appellant-company.

08. The writ respondent No.1 alone and the respondent Nos.3 and 4 jointly contested the Rule by filing two separate Affidavits-in-Opposition in identical terms denying the material allegations made in the petition stating, interalia, that the writ petition in its present form is not maintainable as it raises disputed questions of facts hence, the Rule is liable to be discharged; that the respondents did not violate the fundamental rights as envisaged in Articles 27, 31, 40 and 42 of the

Constitution; that the Memo No.তম / টিভি-২ / ১সি-১৫ / ২০০৯ / ৮৪৯ dated 19th November,2009 was issued complying with the procedure laid down in Section 55 of the B.T. Act,2001; that the NOC তম / টিচ-৩ / ১০(৪) / ৯৯ (অংশ-১) / ৬৩, dated 05.02.2002 was issued by the respondent No.3 regarding broadcasting through both terrestrial and satellite system; that subsequently the বাংলাদেশ টেলিভিশনের জন্য টেরেস্ট্রিয়াল টেলিভিশন সম্প্রচার সুবিধা সংরক্ষণ অধ্যাদেশ,২০০৬ (২০০৬ সনের ৩ নং অধ্যাদেশ) was promulgated making provisions for exclusive use of terrestrial system by the BTV only and not by any private TV Channel; that thereafter বাংলাদেশ টেলিভিশনের জন্য টেরিষ্ট্রিয়াল টেলিভিশন সম্প্রচার সুবিধা সংরক্ষণ আইন,২০০৯ (২০০৯ সনের ৪৪ নং আইন) was enacted; that the learned Counsel for the appellant-company at the hearing in the Civil Petition for Leave to Appeal Nos.767 and 993 of 2005 submitted that they had abandoned their claim for terrestrial system; that after the judgment passed in the Civil Petition for Leave to Appeal Nos.767 and 993 of 2005 the appellants applied to the respondent No.1 for re-issuance of a fresh NOC for broadcasting through satellite system vide memo No.জেটিভি-এন.ও.সি. / তম ০৩ / ১৫০৯১৬ dated 08.10.2009; that the application for fresh NOC has not yet been disposed of by the respondent No.1; that the appellants did not state that the application for fresh NOC was false or the signature therein was a forged one but before disposal of the application for fresh NOC, the appellant-company commenced test transmission whereupon, the respondent No.1 issued the impugned letter dated 19.11.2009 (Annexure-A) to the appellant No.2 endorsing a copy thereof to the respondent No.3 stating that the very test transmission was unlawful and therefore broadcasting by the appellant-company should be stopped; that a request was also made through the same letter to the BTRC-respondent No.3 to cancel the frequency allocated to the appellant-company; that the BTRC-respondent No.3 in its 13th Special Meeting on 19.11.2009 took a special resolution for cancellation of the frequency allocated to the appellant-company; that accordingly, the frequency was cancelled and some equipments were seized and General Diary (GD) No.1450 dated 20.11.2009 was lodged with the Badda Police Station and those equipments were kept under the police custody.

09. The respondents further stated that the respondent Nos.3 and 4 cancelled the frequency in accordance with the provisions of Section 55(3) of the B.T. Act,2001. The procedures laid down in Section 46 of the B.T. Act,2001 is not applicable to frequency related issues because the said Section is applicable to cancellation of any licence issued under Chapter V of the B.T. Act,2001. The issues of allocation, suspension and cancellation etc of frequency are exclusively the subject matter of Chapter VIII of the B.T. Act,2001 and governed by the provisions of Section 55 of the B.T. Act,2001 and accordingly, frequency is allocated, suspended or cancelled under the provisions of Section 55 of the B.T. Act,2001. A broadcasting permission from the respondent No.1 is a precondition to get allocation of frequency from the BTRC and this condition is not fulfilled by the appellants under the new circumstances. The BTRC came to know that a new circumstance had arisen for the application of fresh NOC which is yet to be disposed of. Section 3(2) of the B.T. Act,2001 does not apply to any broadcasting and as such broadcasting does not come within the purview of the B.T. Act,2001 which applies to allocation of frequency for radio station or television station or broadcasting apparatus or

control of the allocated frequency as well as to the use of a telecommunication apparatus in combination with broadcasting apparatus or use of telecommunication apparatus for the purpose of broadcasting. The respondent No.3-BTRC can allocate frequency to a TV Chanel which has already got the permission from the MOI for broadcasting. The BTRC acted independently in cancelling the frequency. It is to be noted that under Chapter V pursuant to Section 36 licences are issued for Telecommunication System etc. and under Chapter VIII pursuant to Section 55 of the B.T. Act,2001 licences are issued for establishing, operating or using radio apparatus or using radio frequency etc. Under Chapter V, the telecommunication service provider licences may be issued, amended, renewed, suspended, cancelled or otherwise dealt with. On the other hand, licences or allocation of frequency may be issued amended, renewed, suspended, cancelled or otherwise dealt with by or under the provisions of Chapter VIII. For example, requirement for licence for a telecommunication system or telecommunication service or internal service is dealt with in Section 35(1) of the B.T. Act,2001. Suspension and cancellation of a telecommunication service provider licence is dealt with in Section 46 of the B.T. Act,2001 whereas suspension and cancellation of a licence or allocation of frequency is dealt with in Section 55(3) of the B.T. Act,2001. As such the fields of application and operation of Sections 46 and 55 are compeletely different and no overlapping of one to the other is possible under any circumstance whatsoever. Section 46 of the B.T. Act,2001 is not applicable to any document which is not a licence under the Act,2001. The BTRC has not yet issued any licence to the appellants but issued two NOCs and frequency allocation letters subject to fulfillment of certain conditions stated therein (Annexures-D & H respectively). After fulfillment of all legal requirements i.e. all terms and conditions of the frequency allocation letter by the appellants, the BTRC would finally issue a licence to operate radio communication equipment to the concerned Channel. This licence is not a subject or object of Section 46 rather is exclusively governed by Section 55 of the B.T. Act,2001. The respondent No.1 (MOI) by their letter dated 22.03.2004 (Annexure-E) cancelled the permission / NOC / Licence for broadcasting as the appellant-company failed to commence operation within the stipulated time i.e. within one year as stated in the memo dated 05.02.2002 issued by the MOI. The appellants were not running regular transmission, rather they were running test transmission on which no income depends. Test transmission occurs merely for checking and examining the equipments and systems before providing services through regular transmission and not for any commercial purpose. The BTRC cancelled frequency in accordance with the provisions of Section 55(3) of the B.T. Act,2001 as the appellants have neither any licence under Section 55(1) of the Act nor any permission or licence for broadcasting from the MOI. The BTRC rightly cancelled the frequency and the question of dictation of the Ministry does not arise. The grounds taken in the writ petition are misconceived and untenable and as such the Rule is liable to be discharged.

10. The appellants filed Affidavit-in-Reply against the Affidavit-in-Opposition filed by the respondent No.3 stating, interalia, that there was no disputed question of facts to be decided in the writ petition; that Section 55 of the B.T. Act,2001 does not empower the answering respondents to issue the impugned memo (Annexure-A1) inasmuch as the whole action of answering respondents is malice-in-law; that

no fresh NOC was required by the appellants from MOI after the ordinance of 2006 was promulgated; that the appellants received NOC dated 05.02.2002 without any time limit and the same have been merged in Memo dated 20.11.2008 issued by the respondent No.3 and during subsistence of the same the impugned memos dated 19.11.2009 (Annexure-A, A1 and A2) can not be issued; that admittedly, the appellants are legally entitled to have licence as appears from condition 'ka' of the said memo dated 20.11.2008 and as such the respondents are legally bound to comply with their promise to give licence and the respondents shall be estopped by the principle of promissory estoppel from refusing to issue licence or to stop transmissions and broadcasting and cancelling frequency allocation and use of earth station and SNG / DSNG equipments and machineries and seizure of equipments as appears from Annexures-A, A1 and A2 to the writ petition on extraneous and unwarranted grounds beyond the scope of the said permission; that the Telegraph Act,1885 and the Wireless Telegraphy Act,1933 and other laws have been overridden by Sections 4 and 5 of the B.T. Act,2001 and notwithstanding any contrary provisions of any other law, the provisions of the B.T. Act,2001 shall have effect.

11. The High Court Division by the judgment and order dated 20.05.2010 disposed of the Rule with the direction that the respondents shall dispose of the appellants' application dated 08.10.2009 within one month from the date of receipt of a copy of the judgment.

12. Being aggrieved by the impugned judgment and order passed by the High Court Division the writ petitioners-appellants preferred the instant Civil Appeal by leave of this Court. Leave was granted to consider the following grounds:

(I) Whether the petitioner is entitled in law on the ground of promissory estoppel or legitimate expectation to a licence for broadcasting programmes having (1) obtained the NOC from the MOI by Memo No. তম / টিচ-৩ / ১০(৪) / ৯৯ (অংশ-১) / ৬৩, dated 05.02.2002; (2) obtained the allocation of frequency from the Bangladesh Telecommunication Regulatory Authority (BTRC) by Memo No.বিটিআরসি / এস,এম, / ৩-২৪ / ০২ পার্ট-১ / ০৮ / ২৯-২৯৪৫ dated 20.11.2008; (3) complied with the terms thereof by importing machineries and equipments; (4) received permission for the import of machinery from BTRC by Memo No. বিটিআরসি / এস,এম, / ৩-২৪ / ০২ পার্ট-১ / ২০০৮ / ৭৯-৩৩৯৪ dated 18.12.2008; (5) completed the test transmission for a period exceeding one year; and (6) submitted the test transmission report.

(II) Whether the licence required for the broadcasting television programmes is required by law to be granted under Section 35 and / or Section 55 of the Bangladesh Telecommunication Act,2001 or whether the provisions relating to licences under the Telegraph Act,1885 and the Wireless Telegraphy Act,1933 are also applicable.

(III) Whether the direction by the MOI in its Memo No. তম / টিভি-২ / ১সি-১৫ / ২০০৯ / ৮৪৯, dated 19.11.2009 to stop the test transmission of the petitioners' television channel and to the BTRC to cancel the allocation of frequency and the cancellation of the frequency allocated to the petitioners by BTRC's Memo No. বিটিআরসি / এস,এম, / ৩-২৪ / ০২ পার্ট-১ /

২০০৮ / ২৫৭-২০৬১ dated 19.11.2009 and the seizure of the machinery and equipment of the petitioners as evidenced by the seizure list also dated 19.11.2009 are each equal and valid.

13. Mr. Ajmalul Hossain, the learned Counsel appearing for the appellants having placed before us the impugned judgment and order passed by the High Court Division and other materials on record submits that the High Court Division committed error of law in not taking into consideration that the appellants have complied with the condition 'ka' of Memo dated 20.11.2008 and as such the appellants are legally entitled to have a licence and the respondents are legally bound to comply with their promise to issue a licence and that the respondents are estopped by the principle of promissory estoppel from refusing to issue licence or to stop transmissions and broadcasting and cancelling frequency allocation, and use of earth station and SNG / DSNG equipments and machineries and seizure of equipments on an extraneous and unwarranted ground are beyond the scope of the said permission. He then submits that the High Court Division erred in law in failing to consider the judgment and order passed by the High Court Division in writ petition No.4600 of 2004 making the Rule absolute which was affirmed by the Appellate Division in Civil Petition for Leave to Appeal Nos.767 and 993 of 2005 wherein it was observed that the operation of NOC dated 05.02.2002 (Annexure-B) would continue to be valid till issuance of a formal licence. Mr. Hossain then submits that the High Court Division failed to consider that as per terms "chha" of the NOC dated 20.11.2008 for use of satellite link frequency, the appellants should have obtained licence for frequency and radio equipments after installation of equipments, commencing broadcasting and submission of test report to the BTRC. He then submits that as per provisions of Sections 4 and 5 of B.T. Act,2001, the Telegraph Act,1885, the Wireless Telegraphy Act,1933 and any other laws promulgated shall have effect subject to the provisions of the Act of 2001 and that the writ respondent No.3 has been vested with absolute authority to give effect to the earlier order. He finally submits that the direction by the MOI in its Memo dated 19.11.2009 to stop the test transmission of the appellants' television channel and to the BTRC to cancel the allocation of frequency and the cancellation of the frequency allocation to the appellants by the BTRC's Memo dated 19.11.2009 and the seizure of the machineries and equipments of the appellants as evidenced by the seizure list also dated 19.11.2009 have been made without lawful authority.

14. Mr. Mahbubey Alam, the learned Attorney General appearing for the respondent No.1 submits that in order to commence television broadcasting the appellant-company requires four licences namely; (I) licence for establishing, maintaining or working a telegraph under Section 4(1) of the Telegraph Act,1885, (II) licence for possessing wireless telegraphy apparatus to be granted by the Ministry of Posts and Telecommunications (MOPT) under Section 3 of the Wireless Telegraphy Act,1933, (III) licence / NOC to be granted by the MOI for the Ministry's own convenience for performance of its functions of supervision, monitoring and controlling the contents of broadcasting properly and effectively under the Rules of Business and (IV) licence to be granted by the BTRC for establishing, operating or using radio apparatus for the purpose of radio communication and additionally, the appellant-company also requires frequency to be allocated by the BTRC under Section 55(1) of the B.T. Act,2001. The

learned Attorney General submits that admittedly the appellant-company has failed to obtain these licences from the concerned authorities and hence the said NOC dated 05.02.2002 issued by the MOI has not yet become legally operative because the said NOC contained a clear condition being condition No.9, stipulating that the Policy of 1998 will be applicable to the said NOC and given that as per clauses 2(1) and 2(4)(kha) of the Policy of 1998 an intending television operator is required to obtain two licences from the MOPT and that for not having obtained these two licences from the said Ministry (MOPT) the appellants have failed to comply with the terms and conditions of the NOC dated 05.02.2002. He then submits that in view of the promulgation of বাংলাদেশ টেলিভিশনের জন্য টেরিস্ট্রিয়াল টেলিভিশন সম্প্রচার সুবিধা সংরক্ষণ অধ্যাদেশ,২০০৬ (২০০৬ সনের ৩নং অধ্যাদেশ) making provisions for exclusive use of terrestrial system by BTV only and not by any private TV Channel and the subsequent enactment of বাংলাদেশ টেলিভিশনের জন্য টেরিস্ট্রিয়াল টেলিভিশন সম্প্রচার সুবিধা সংরক্ষণ আইন,২০০৯ (২০০৯ সনের ৪৪নং আইন) containing the aforesaid provisions and because of the change in scenario the NOC dated 05.02.2002 issued by the MOI had become invalid and ineffective. The learned Attorney General asserts that the appellants have failed to comply with the terms and conditions stipulated in the memos dated 20.11.2008 and 18.12.2008 of the respondent No.3-BTRC and hence the memos of the BTRC are not legally operative since the appellant-company failed to obtain the aforesaid two licences from the MOPT and as such the conduct of the appellants in carrying out test transmission since 15th October,2009 and submitting report of the same to the BTRC vide letter dated 01.11.2009 and any other act said to have been done by the appellants in accordance with condition (ছ) of the said memo of BTRC dated 20.11.2008 are of no legal effect. In reply to the appellants' submission that the appellant-company is entitled in law on the doctrine of promissory estoppel or legitimate expectation to have a licence issued by the BTRC for broadcasting programmes, the learned Attorney General opposing the same submits that this doctrine is not applicable in this case. The learned Attorney General finally submits that the appeal is liable to be dismissed.

15. We have heard the submissions advanced on behalf of the respective parties, perused leave granting order, concise statements filed on behalf of both the parties, impugned judgment and order passed by the High Court Division and meticulously examined the relevant laws, documents and other connected papers on record.

16. The appellants' case in brief is that upon an application dated 23.11.2001 filed by them the Government of Bangladesh, represented by the Secretary, Ministry of Information, respondent No.1 granted a NOC vide memo dated 05.02.2002 (Annexure-B) for commencing and operating terrestrial and satellite television in the UHF Band under their own management and in the said NOC it has been stipulated that the respondent would cancel the NOC if the appellants violate or deviate from any conditions set out therein. Thereafter, the appellants vide letter dated 13.02.2002 applied to the BTRC for grant of licence and allocation of frequency in the UHF Band but the BTRC did not accord any licence. In the compelling circumstances the appellants filed Writ Petition No.7999 of 2002 wherein a Division Bench of the High Court Division made the Rule absolute directing the BTRC to dispose of the pending applications filed by the

appellants praying for allocation of frequency and grant of licence within 30 days from the date of passing of the judgment and order which was upheld by this Division in it's judgment and order dated 25.10.2003 in Civil Petition for Leave to Appeal Nos.1253 of 2003 and 1256 of 2003. On failure of the BTRC to comply with the directions of the High Court Division as well as this Division in disposing of the applications, the appellants were constrained to file a Contempt Petition against the Chairman, BTRC who with a view to avoid contempt proceedings by the memo dated 10.03.2004 (Annexure-D) allocated frequency with a demand note setting out the rate for satellite system and terrestrial system respectively to be paid by the appellant-company within 15 days from the date of receipt of the demand note. The appellants paid licence fees for satellite system but they did not pay the fees for terrestrial system which according to them required some clarifications from the BTRC on certain points as to the rate of calculation. Without giving any clarification the BTRC deliberately let the 15 days period expire whereupon the respondent Nos.1 and 2 after the expiry of 15 days issued a memo dated 22.03.2004 directing the appellants to refrain from setting up any broadcasting station and operating all kinds of broadcasting activities which led the BTRC to issue memo dated 08.04.2004 cancelling the licence for frequency dated 10.03.2004 on the ground of default. The appellants thereafter filed Writ Petition No.4600 of 2004 challenging the memos dated 22.03.2004 and 08.04.2004 by the respondent Nos.1 and 3. A Division Bench of the High Court Division by the judgment and order dated 16.05.2005 made the Rule absolute whereupon the MOI and the BTRC separately moved this Division unsuccessfully in Civil Petition for Leave to Appeal Nos.767 of 2005 and 993 of 2005 respectively wherein this Division by the judgment and order dated 30.04.2008 dismissed both the leave petitions. Having faced with this situation the BTRC vide memo dated 20.11.2008 (Annexure-H) extended the period of allocated frequency and vide memo dated 18.12.2008 accorded its NOC for importation of DSNG Machinery. Accordingly, the appellants claimed that the imported machineries were installed in the TV station and about three thousand employees were employed in various levels all over the country.

17. The sum and substance of the appellants' contention is that the High Court Division erred in law in not taking into consideration that the appellants have complied with the condition 'ka' of the Memo dated 20.11.2008 and as such they are entitled to have licence and the respondents are legally bound to comply with their promise to issue licence and they are estopped by the principle of promissory estoppel from refusing to issue licence or to stop transmission and broadcasting and cancelling frequency allocation and use of earth station and SNG / DSNG equipments and machineries and seizure of equipments on extraneous and unwarranted grounds beyond the scope of the said permission granted earlier. The appellants also submit that in view of the judgment passed by this Division in Civil Petition for Leave to Appeal Nos.767 and 993 of 2005 arising out of Writ Petition No.4600 of 2004, the operation of NOC dated05.02.2002 would continue to be valid till issuance of formal licence. The appellants' contention is that the High Court Division also failed to consider that as per term 'chha' of the permission for use of satellite link frequency dated 20.11.2008 the licence for frequency and radio equipments should be obtained after installation of equipments and on submitting test report after commencing broadcasting. Accordingly, the appellants

contend that in view of their compliance with the terms and conditions of the Memo dated 20.11.2008 they are entitled to get a licence, inasmuch as, the memo dated 20.11.2008 is nothing but a NOC and as such, the High Court Division committed error of law in not giving direction upon the writ respondent No.3 to grant formal licence; that the BTRC extended the period of allocation of frequency and they accorded it's NOC for importation of DSNG machinery and pursuant thereto the appellants imported machineries and installed them in the TV Station and as per clause "chha" of the NOC they submitted test report after commencing broadcasting. The appellants' further contention is that as per provisions of Sections 4 and 5 of the B.T. Act,2001, all existing laws including the Telegraph Act,1885 and the Wireless Telegraphy Act,1933 shall have effect subject to the provisions of the B.T. Act of 2001 and the writ respondent No.3-BTRC has been vested with absolute power and authority to grant licence required for broadcasting TV programme. The final submission advanced on behalf of the appellants is that the direction by the MOI in its Memo dated 19.11.2009 to stop the test transmission of the appellants' television channel and to the BTRC to cancel the allocation of frequency and BTRC's order dated 19.11.2009 in respect of the cancellation of the frequency allocation to the appellants and seizure of the machineries and equipments of the appellants as evident from the seizure list dated 19.11.2009 are without lawful authority and of no legal effect.

18. The sum and substance of the respondents' submissions are that in order to commence television broadcasting the appellant-company requires four licences / NOC namely; (i) licence to be granted by the MOPT for establishing, maintaining or working a telegraph, (ii) licence to be granted by the MOPT for possessing wireless telegraphy apparatus, (iii) licence / NOC to be granted by the MOI for the Ministry's own convenience in performing its functions of supervising, monitoring and controlling the contents of broadcasting properly and effectively and (iv) licence to be granted by the BTRC for establishing, operating or using radio apparatus for the purpose of radio communication. Furthermore, the appellant-company also requires frequency to be allocated by the BTRC under Section 55(1) of the B.T. Act,2001. The contention of the respondents is that the appellants not having obtained two licences from the MOPT they failed to comply with the terms and conditions of the NOC dated 05.02.2002 and as such the NOC dated 05.02.2002 issued by the MOI has not yet become legally operative. The further submission of the respondents is that the appellants are not legally entitled to invoke the principle of promissory estoppel or legitimate expectation to have a licence issued by the BTRC since these grounds are misconceived.

19. On perusal of the materials on record it appears that upon an application dated 23.11.2001 filed by the appellants, the MOI (respondent No.1) granted NOC vide memo dated 05.02.2002 for commencing and operating terrestrial and satellite system in UHF Band and thereafter the appellants vide their letter dated 13.02.2002 applied to the BTRC for licence for frequency in UHF Band but the BTRC did not dispose of the appellants' application whereupon they filed Writ Petition No.7999 of 2002 in which the Rule was made absolute by the judgment and order dated 26.08.2003 passed by a Division Bench of the High Court Division directing the BTRC to dispose of the pending applications filed by the appellants praying for allocation of frequency and grant of licence within 30 days from the date of passing of the judgment and order. The

said judgment and order was challenged before this Division in Civil Petition for Leave to Appeal Nos.1253 of 2003 and 1256 of 2003 which were disposed of by the judgment and order dated 25.10.2003 passed by this Division with a direction to dispose of the petition for allocation of frequency as per rules / law as early as possible with an observation that the BTRC should consider that prior to allocation of frequency, licences are required for the purpose from the competent authority. As the BTRC failed to comply with the directions of the High Court Division as well as this Division in disposing of the application, the appellants were compelled to file a contempt petition against the Chairman, BTRC who with a view to avoid contempt proceedings by the memo dated 10.03.2004 (Annexure-D) allocated frequency with a demand note setting out the rate for satellite system and terrestrial system respectively to be paid by the appellant-company within 15 days from the date of receipt of the demand note. The BTRC in a compelling situation allocated frequency before the grant of licence by the competent authority which is not in conformity with the aforesaid observations of this Division and the provisions of clause 2(5) of the "বেসরকারী মালিকানায় টেলিভিশন চ্যানেল স্থাপন ও পরিচালনা নীতি ১৯৯৮". It appears that admittedly appellants paid licence fees for satellite system but did not pay the fees for terrestrial system as a result of which respondent No.1 vide memo dated 22.03.2004 (Annexure-E) directed the appellants to refrain from setting up any broadcasting station and operating all kinds of broadcasting activities and consequently, the BTRC vide memo dated 08.04.2004 (Annexure-E1) cancelled the grant of frequency dated 10.03.2004 on the ground of default in payment of money as per demand note within the stipulated period. Being aggrieved by the aforesaid order of cancellation the appellants preferred Writ Petition No.4600 of 2004 challenging the memos dated 22.03.2004 and 08.04.2004 issued by the respondent No.1 and a Division Bench of the High Court Division vide judgment and order dated 16.05.2005 made the Rule absolute. Both the government and the BTRC unsuccessfully moved this Division in Civil Petition for Leave to Appeal Nos.767 of 2005 and 993 of 2005 respectively wherein this Division by the judgment and order dated 30.04.2008 dismissed both the leave petitions with the observation that neither the memo dated 05.02.2002 (Annexure-B) nor the memo dated 10.03.2004 (Annexure-D) is a licence. The former is a NOC issued by the MOI and the latter is a temporary allocation of frequency and permission to import equipments and machineries by the BTRC and thereby this Division maintained the judgment and order passed by the High Court Division with different observations on merit. It also appears from both the judgment and order dated 16.05.2005 passed in Writ Petition No.4600 of 2004 by the High Court Division and the judgment and order dated 30.04.2008 passed by this Division in Civil Petition for Leave to Appeal Nos.767 of 2005 and 993 of 2005 that in Writ Petition No.4600 of 2004 an incorrect statement was made to the effect that Civil Petition for Leave to Appeal Nos.1253 of 2003 and 1256 of 2003 which had arisen out of Writ Petition No.7999 of 2002 were dismissed but in fact by the judgment and order dated 25.10.2003 both of these leave petitions were disposed of with observation as under:

> "..... that prior to allocation of frequency, licence is required for the purpose from the competent authority ....
>
> In the circumstances, we are of the view that the BTRC is to dispose of the petition of the respondents pending

before it as to allocation of frequency as per rules / law as early as possible."

20. To our utter surprise upon such distorted presentation of the judgment of the Apex Court the appellants having obtained Rule and interim order of stay in Writ Petition No.4600 of 2004 finally got the Rule made absolute. In view of the judgment and order dated 30.04.2008 passed by the this Division, the BTRC vide memo dated 20.11.2008 extended the period of allocated frequency and vide memo dated 18.12.2008 accorded its NOC for import of DSNG machinery. It has been asserted that the appellants having imported all machineries and equipments installed them in the TV station and employed about three thousand employees. Thus the appellants having commenced test transmission on 15.10.2009 submitted test transmission report vide memo dated 01.11.2009 and by memo dated 15.11.2009 requested the BTRC for granting formal permission to commence the regular television broadcasting.

21. Under Section 4 of the Telegraph Act,1885 the Government shall have exclusive privilege of establishing, maintaining and working telegraphs. The Rules of Business,1996 framed by the President under Article 55(6) of the Constitution for allocation and transaction of business of the Government clearly allocates all functions in relation to telegraph to the MOPT. Both the Bangladesh Telegraph and Telephone Department and the Bangladesh Post Office are the attached departments with the MOPT. The word "telegraph" as defined in Section 3(1) of the Telegraph Act,1885 means "an electric, galvanic or magnetic telegraph, and includes appliances and apparatus for making, transmitting or receiving telegraphic, telephonic or other communications by means of electricity, galvanism or magnetism". According to Section 2(1) of the Wireless Telegraphy Act,1933 "wireless communication" means the making, transmitting or receiving of telegraphic, telephonic or other communications by means of electricity or magnetism without the use of wires or other continuous electrical conductors between the transmitting and the receiving apparatus. Under Section 2(2) of the Act of 1933 "wireless telegraphy apparatus" means any apparatus, appliance, instrument or material used or capable of use in wireless communication, and includes any article determined by rule made under section 10 to be wireless telegraphy apparatus. On the other hand, according to Section 2(30) of the B.T. Act,2001 "broadcasting" means "transmission of any message, information, signal, sound, image or intellectual expression by radio wave, satellite, cable or optical fibre connection for the purpose of receipt by the public, but transmission of anything by Internet connection shall not be deemed to be a broadcasting". In order to commence television broadcasting as per the relevant provisions of the Telegraph Act,1885, the Wireless Telegraphy Act,1933, as well as that of the policy of 1998 the appellant-company requires two licences- one for establishing, maintaining or working any telegraph under Section 4(1) of the Telegraph Act,1885 and the other for possessing wireless telegraphy apparatus under Section 3 of the Wireless Telegraphy Act,1933. In the case of BTRC –Vs- ETV reported in 58 DLR(AD) 82 this Division held that any broadcasting is done through broadcasting station or television broadcasting station or broadcasting apparatus by means of establishing, maintaining or working of telegraph. Section 4(2) of the Telegraph Act,1885 envisages that the Government may by notification in the official gazette delegate to the Director General, Bangladesh Telegraph and Telephone Department all or any of its power to grant licence on such conditions and in consideration

of such payments as it thinks fit to any person to establish, maintain or work a telegraph within any part of Bangladesh. Under Section 5(1) of the W.T. Act,1933 the Director-General, Bangladesh Post Office, or an officer authorized by him in this behalf shall be the authority competent to issue licenses to possess wireless telegraphy apparatus under this Act. Further, it is to be noted that the Rules of Business,1996 also allocate businesses to the MOI which consists of publicity policy-both internal and external supervising, monitoring and controlling the contents of broadcasting. In view of the businesses allocated and transacted to the MOI under the Rules of business it may in performing its functions properly and effectively issue licence or NOC for the said purposes.

22. We have already noticed that in order to commence television broadcasting an intending television operator is required to obtain a licence to establish, maintain or work a telegraph and a licence to possess wireless telegraphy apparatus under Section 4(1) of the Telegraph Act,1885 and Section 3 of the Wireless Telegraphy Act,1933 respectively from the MOPT. In condition No.9 of the NOC dated 05.02.2002 it has been stipulated that "বেসরকারী মালিকানায় টেলিভিশন চ্যানেল স্থাপন ও পরিচালনা নীতি১৯৯৮ প্রযোজ্য / অনুসৃত হবে।" (hereinafter referred to as "the Policy of 1998") is applicable and that Clause 2(1) and Clause 2(4)(kha) of the Policy of 1998 have incorporated the relevant laws and procedures in respect of commencement of television broadcasting as envisaged in Section 4(1) of the Act of 1885 and Section 5 of the Act of 1933 to the effect that an intending television operator is required to obtain the said two licences from the MOPT. But the appellant-company has failed to obtain any of the said two licences from the MOPT and therefore by not having obtained these two licences from the MOPT, the appellant-company has failed to comply with the terms and conditions of the NOC dated 05.02.2002 and also the provisions of the Act of 1885 and the Act of 1933. It also appears that the NOC dated 05.02.2002 was issued in respect of broadcasting through both terrestrial and satellite system. But in view of the promulgation of the "বাংলাদেশ টেলিভিশনের জন্য টেরিস্ট্রিয়াল টেলিভিশন সম্প্রচার সুবিধা সংরক্ষণ অধ্যাদেশ,২০০৬ (২০০৬ সনের ৩নং অধ্যাদেশ) making provisions for exclusive use of terrestrial system by BTV only and not by any private TV Channel and also subsequent enactment of "বাংলাদেশ টেলিভিশনের জন্য টেরেস্ট্রিয়াল টেলিভিশন সম্প্রচার সুবিধা সংরক্ষণ আইন,২০০৯ (২০০৯ সনের ৪৪ নং আইন) with the same provisions of the aforesaid Ordinance, it can be safely construed that the NOC dated 05.02.2002 has become ineffective. Having referred to Clause 2(6) of the Policy of 1998 which provides that a licence may be granted initially for 5(five) years, the respondents asserted that the said NOC dated 05.02.2002 issued by the MOI had expired on 04.02.2007. In that view of the matter it can be safely construed that NOC dated 05.02.2002 issued by the MOI has not yet become legally operative. The High Court Division by the judgment and order dated 16.05.2005 passed in Writ Petition No.4600 of 2004 observed that there is nothing in the said policy which empowers the Ministry to cancel and / or withdraw the NOC / licence if one fails to go into operation within one year of the NOC or to say that after one year validity of such NOC / licence shall expire. But this observation does not reflect the correct position of the matter in issue. From the materials on record it appears that following the judgment and order dated 30.04.2008 passed by this Division in Civil Petition for Leave to Appeal Nos.767 of 2005

and 993 of 2005 dismissing the petitions which arose out of Writ Petition No.4600 of 2004 containing incorrect statements to the effect that Civil Petition for Leave to Appeal Nos.1253 of 2003 and 1256 of 2003 were dismissed though these were disposed of with observations that the BTRC vide Memo dated 20.11.2008 temporarily allocated frequency for satellite link and gave permission for importation and establishing earth station in favour of the appellant-company. Thereafter the BTRC vide memo dated 18.12.2008 (Annexure-H1) accorded its NOC for importation of one DSNG machinery subject to certain conditions of which Condition No.2 stipulated that "তরঙ্গ বরাদ্দপত্রঃ বিটিআরসি / এসএম / ৩-২৪ / ০২ পার্ট-১ / ২০০৮ / ২৯-২৯৪৫, তাং ২০-১১-২০০৮ খ্রীঃ এর সকল শর্ত প্রযোজ্য।". It is to be noted that the Condition (জ) of the memo dated 20.11.2008 of the BTRC stipulated to the effect that "তথ্য মন্ত্রণালয় কর্তৃক প্রদত্ত সম্প্রচারের অনাপত্তি পত্র এবং বেসরকারী মালিকানায় টেলিভিশন চ্যানেল স্থাপন ও পরিচালনা নীতি-১৯৯৮ অনুসরণ করে কার্যক্রম পরিচালনা করতে হবে।" In view of above discussions and findings we have no hesitation in holding that the appellant-company has failed to comply with the requirements of the Policy of 1998 and also the terms and conditions of the aforesaid memos and as such there is no merit in the contention of the appellants that they had complied with all the terms and conditions stipulated in the aforesaid memos of the BTRC.

23. In the judgment passed in Civil Petition for Leave to Appeal Nos.1253 of 2003 and 1256 of 2003 this Division held that it is within the power of the BTRC to allocate frequency to the appellant-company and that prior to allocation of frequency, licence is required for the purpose from the competent authority and accordingly this Division observed:- "In our opinion this point is to be considered by the BTRC and the BTRC being a statutory authority having exclusive jurisdictions for the purpose of allocation of frequency is at liberty to dispose of the application of the appellant seeking allocation of frequency as per rules". Further in Civil Petition for Leave to Appeal Nos.767 of 2005 and 993 of 2005 arising out of the judgment and order dated 16.05.2005 passed in Writ Petition No.4600 of 2004 this Division observed: "We find that neither Annexure-B nor J(1) [BTRC's memo dated 10.03.2004] as discussed above is a licence. One is temporary allocation of frequency and permission to import equipments and machinery by BTRC and the other is NOC by the MOI". But in 58 DLR (AD) 82 this Division held that the appellant should have first applied for licence or no objection for broadcasting to the Ministry of Information and after obtaining the same they could approach the BTRC for allocation of frequency and licence for establishing telecommunication system etc. From the above discussions, we are of the view that the memo dated 05.02.2002 is not a licence but a NOC and that prior to allocation of frequency by the BTRC, the appellant-company is required to obtain two licences and one NOC from the concerned Ministries and as such the BTRC's memos dated 20.11.2008 and 18.12.2008 respectively have not become legally operative.

24. In the instant case the appellants relied on the doctrine of promissory estoppel to get a broadcasting licence. The doctrine of promissory estoppel is an equitable conception. By this doctrine, if a person makes to another a clear and unambiguous representation of a fact intending that other to act on it, if the representation transpires to be untrue, and if the other does act upon it to his detriment, the representor is prevented or estopped from

denying its truth. This doctrine has been enunciated by Denning,J as his Lordship then was in the case of Central London Property Trust Limited -Vs- High Trees House Limited (1947) KB 130. The precise status of the doctrine was a subject matter of much speculation but Lord Hailsham, L.C. in the case of Woodhouse A.C. Israel Cocoa Ltd. -Vs- Nigerian Produce Marketing Co. Ltd. 1972 A.C. 741 at page 758 observed as under:

> "I desire to add that the time may soon come when the whole sequence of cases based on promissory estoppel since the war, beginning with *Central London Property Trust Ltd. -Vs- High Trees House Ltd.* [1947], K.B. 130, may need to be reviewed and reduced to a coherent body of doctrine by the courts. I do not mean to say that any are to be regarded with suspicion. But as is common with an expanding doctrine they do raise problems of coherent exposition which have never been systematically explored."

25. The next question is whether the doctrine of promissory estoppel operates only by way of defence not as a cause of action. Denning,L.J. in a subsequent case before the Court of Appeal restated the position as under:

> "The principles stated in the High Trees case ..... does not create new causes of actions where none existed before. It only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealing which have taken place between the parties .... "

26. However, the doctrine of promissory estoppel has been invoked by this Division in a number of cases. The case of Collector of Customs, Custom House, Chittagong and others -Vs- A. Hannan reported in 42 DLR (AD) 167 is worth mentioning. In this case in order to meet scarcity of sugar in the country the Government decided to import sugar under Wage Earners' Scheme and waived certain formalities. The Government issued notification reducing the existing customs duty and sales tax on the importation of sugar on fulfillment of certain conditions. The respondent availed this opportunity for importing sugar at the concessional rate of duty and sales tax fulfilling the conditions but before the arrival of the cargo and submission of the bill of entry the concessional rate was withdrawn by the Government. The Collector of Customs took the view that the respondent was not entitled to concessional rate of customs duty and taxes because the bill of entry was delivered to the Customs Authority after the withdrawal of the concessional rate. This Division held that the respondent importer acting upon the solemn promise made by the appellant incurred huge expenditure and if the appellant is not held to its promise, the respondent would be put in a very disadvantageous position and therefore the doctrine of promissory estoppel can also be invoked in this case. Accordingly, it has been held that the importer having acted upon the assurance given, the Government can not retrace its steps and ask for duty at the rate mentioned in the subsequent notification. This is clearly a case of well settled doctrine of promissory estoppel. This Division having considered a number of decisions of it's own as well as those of the apex courts of the sub-continent decided the case. However this Division in the case of Secretary, Ministry of Industries, Nationalised Industries Division -Vs Saleh Ahmed & another and Bangladesh Textile Mills Corporation -Vs- Saleh Ahmed & others reported in 1981 BLD (AD) 91 applied the doctrine of promissory estoppel having

binding effect on the representee with the following observation:

> "In the instant case the Government took the decision on agreement to release the Mill in question. Lack of power on the part of the Government so to do is not the plea; rather a belated plea was taken that the decision had been revised by the Government although no such case was made out. Hence applying the principle of promissory estoppel the least that can be said is that the appellants cannot be allowed to act inconsistently and the decision to release the Mill remains binding on them."

27. The doctrine of promissory estoppel cannot be invoked for the first time before this Division in an appeal without taking a ground on it before the High Court Division or the Appellate Division in Leave Petition. In the case of Grihayan Limited -Vs- Government of Bangladesh and others reported in 47 DLR (AD) 12 this Division held that the doctrine of promissory estoppel is not applicable in the case because neither in the writ petition nor in the leave petition this point was ever mooted. Neither in the writ petition nor in the leave petition the appellant had taken any ground questioning the authority of the Government to pass the impugned orders on the basis of lack of jurisdiction or on the principle of promissory estoppel.

28. The position of law is well settled that the Government may be estopped from refusing any representation made by it on the basis of which any person has acted to his detriment. There is no estoppel against statute or there is no application of estoppel to prevent the performance of any constitutional or statutory duty. We have already observed that the promissory estoppel is an equitable doctrine which has been eloquently pronounced by the Supreme Court of India in the case of M/S. Motilal Padampat Sugar Mills Co. Ltd. -Vs- State of Uttar Pradesh and others AIR 1979 SC 621 at page 644 as under:

> "But it is necessary to point out that since the doctrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires. If it can be shown by the Government that having regard to the facts as they have subsequently transpired, it would be inequitable to hold the Government to the promise made by it, the Court would not raise an equity in favour of the promisee and enforce the promise against the Government. The doctrine of promissory estoppel would be displaced in such a case because, on the facts, equity would not require that the Government should be held bound by the promise made by it. When the Government is able to show that in view of the facts which have transpired since the making of the promise, public interest would be prejudiced if the Government were required to carry out the promise, the Court would have to balance the public interest in the Government carrying out a promise made to a citizen which has induced the citizen to act upon it and alter his position and the public interest likely to suffer if the promise were required to be carried out by the Government and determine which way the equity lies."

29. The doctrine of promissory estoppel cannot be invoked against public interest or any statute. The public interest prevails over promissory estoppel. In the case of U.P. Power Corporation Ltd & Anr –Vs- Sant Steels & Alloys (P) Ltd & Ors AIR 2008 SC 693 the Supreme Court of India having considered various decisions observed as under:

"17. In this background, in view of various decisions noticed above, it will appear that the Court's approach in the matter of invoking the principle of promissory estoppel depends on the facts of each case. But the general principle that emerges is that once a representation has been made by one party and the other party acts on that representation and makes investment and thereafter the other party resiles, such act cannot stated to be fair and reasonable. When the State Government makes a representation and invites the entrepreneurs by showing various benefits for encouraging to make investment by way of industrial development of the backward areas or the hill areas, and thereafter the entrepreneurs on the representations so made bona fidely make investment and thereafter if the State Government resiles from such benefits, then it certainly is an act of unfairness and arbitrariness. Consideration of public interest and the fact that there cannot be any estoppel against a Statute are exceptions."

30. In the case of State of Rajasthan and another –Vs- Mahaveer Oil Industries and others (1999) 4 SCC 357 at page 365 paragraph 14 Supreme Court of India observed thus:

"Public interest requires that the State be held bound by the promise held out by it in such a situation. But this does not preclude the State from withdrawing the benefit prospectively even during the period of the Scheme, if public interest so requires. Even in a case where a party has acted on the promise, if there is any supervening public interest which requires that the benefit be withdrawn or the Scheme be modified, that supervening public interest would prevail over any promissory estoppel."

31. Moreover, the Supreme Court of India in the case of Sales Tax Officer and another – Vs- Shree Durga Oil Mills and another (1998) 1 SCC 572 held that any IPR (Industrial Policy Resolution) can be changed if there is an overriding public interest involved. In this case, it was stated on behalf of the State that various notifications granting sales tax exemptions to the dealers resulted in severe resource crunch. On reconsideration of the financial position, it was decided to limit the scope of the earlier exemption notifications issued under Section 6 of the Orissa Sales Tax Act. Because of this new perception of the economic scenario of the State, the scope of the earlier notifications had to be restricted. They were first abrogated altogether on 20.05.1977. Thereafter, it was decided to grant exemption at a limited scale.

32. The doctrine of promissory estoppel cannot be invoked to carry out a representation which is contrary to law or in the abstract. The doctrine must yield when the equity so demands. In the case of Kasinka Trading and another -Vs- Union of India and another (1995) 1 SCC 274 at page 283 paragraph 12 the Supreme Court of India expounded the doctrine as under:

"The doctrine of promissory estoppel is applicable against the Government also particularly where it is necessary to prevent fraud or manifest injustice. The doctrine, however, cannot be pressed into aid to compel the Government or the public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make. There is preponderance of judicial opinion that to invoke the doctrine of promissory estoppel clear, sound and positive foundation must be laid in the petition itself by the party invoking the

doctrine and that bald expressions, without any supporting material, to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Government would not be sufficient to press into aid the doctrine. In our opinion, the doctrine of promissory estoppel cannot be invoked in the abstract and the courts are bound to consider all aspects including the results sought to be achieved and the public good at large, because while considering the applicability of the doctrine, the courts have to do equity and the fundamental principles of equity must for ever be present to the mind of the court, while considering the applicability of the doctrine. The doctrine must yield when the equity so demands if it can be shown having regard to the facts and circumstances of the case that it would be inequitable to hold the Government or the public authority to its promise, assurance or representation."

33. In the case of Amrit Banaspati Co. Ltd. and another -Vs- State of Punjab and another AIR 1992 SC 1075 the Supreme Court of India observed that promissory estoppel being extension of principle of equity, the basic purpose of which is to promote justice founded on fairness and relieve a promisee of any injustice perpetrated due to promisor's going back on its promise, is incapable of being enforced in a court of law if the promise which furnishes the cause of action or the agreement, express or implied giving rise to binding contract is statutorily prohibited or is against public policy.

34. This Division in the case of Chairman, Rajdhani Unnayan Kartripakkha -Vs- A. Rouf Chowdhury and others reported in 61 DLR (AD) 28 quoted with approval the decision of the case of Dr. Ashok Kumar Maheshwari -Vs- State of U.P. reported in AIR 1998 SC 966 wherein it was observed that promissory estoppel cannot be invoked for enforcement of a promise or declaration which is contrary to law or outside the authority or power of the Government or person making that promise. Accordingly this Court held that the argument of promissory estoppel fails for the reason that the sanction was given in violation or in contravention of any law and as such the impugned sanction is not a permission in the eye of law and could not operate as promissory estoppel. Further the Supreme Court of India in Union Territory, Chandigarh Admn -Vs- Managing Society Goswami, DGSCE reported in AIR 1996 SC 1759 held that a contract in violation of the mandatory provisions of law can only be read and enforced in terms of the law and in no other way. The question of equitable estoppel does not arise in this case because there can be no estoppel against statute.

35. In view of the above discussions and findings on the decisions of the Apex Courts of the Sub-continent we are very much in respectful agreement with the following principles enunciated in respect of the Doctrine of legitimate expectation:

(1) The doctrine of promissory estoppel being an equitable conception it must yield when equity so requires. If a person who has acted to his detriment relying on the representation made by the representor which transpired to be untrue, the representor is prevented or estopped from denying the truth.

(2) This principle does not create new causes of action where none existed.

(3) The doctrine of promissory estoppel prevents a party from insisting

upon his legal rights when it would be unjust to allow him to enforce them.

(4) Where the representee having acted upon the solemn promise made by the representor incurred huge expenditure and thereby acted to his detriment, the doctrine of promissory estoppel would come in aid of the representee when a representor being the Government or statutory body took a decision to the contrary.

(5) Where a Government or public authority having lack of power agrees to do an act the other party relying on that agreement acted to his detriment yet he would not be able to plead the doctrine of promissory estoppel. Moreover, in the absence of lack of power or statutory prohibition the Government or the statutory body can not be allowed to act inconsistently to it's promise when the other party having relied upon it acted to his detriment and accordingly the doctrine of promissory estoppel will be applicable in that case.

(6) Having considered the facts as they have transpired it would be inequitable to hold the Government to the promise made by it, the Court would not apply the principles of promissory estoppel in favour of the promisee and enforce the promise against the Government when it can be shown that public interest would be prejudiced if the Government were required to carry out the promise made to a citizen the Court would have to balance the public interest in the Government carrying out it's promise made to a citizen who relying upon it changed his position and acted to his detriment and the public interest likely to suffer if the promise were required to be carried out by the Government and determine which way the equity lies.

(7) Excepting the consideration of public interest and estoppel against the statute the doctrine of promissory estoppel would be applicable against the Government or a statutory body who makes a representation and the representee relying on such a representation acted to its detriment.

(8) Even in a case where a party having relied on the promise acted to its detriment if there is any supervening public interest which requires that the benefit be withdrawn or the scheme be modified, that supervening public interest would prevail over any promissory estoppel, inasmuch as, public interest must override any case of private loss or gain.

36. In the instant case the NOC dated 05.02.2002 issued by the MOI is not legally operative for the reasons that an intending television operator in order to commence television broadcasting is required to obtain a licence to establish, maintain or work a telegraph and a licence to possess wireless telegraphy apparatus under Section 4(1) of the Telegraph Act,1885 and Section 3 of the Wireless Telegraphy Act,1933 respectively from the MOPT and that the appellant-company has failed to obtain these two licences from the MOPT and as such the NOC dated 05.02.2002 issued by the MOI cannot form the basis of grounds of promissory estoppel based on which the appellants are claiming entitlement to a licence for broadcasting. The NOC dated 05.02.2002 concerned broadcasting through both terrestrial and satellite system but in view of the promulgation of বাংলাদেশ টেলিভিশনের জন্য টেরিস্ট্রিয়াল টেলিভিশন সম্প্রচার সুবিধা সংরক্ষণ অধ্যাদেশ,২০০৬ (২০০৬ সনের ৩নং অধ্যাদেশ) making provisions for exclusive use of terrestrial system by BTV only and not for any private TV Channel and also by the

subsequent enactment of বাংলাদেশ টেলিভিশনের জন্য টেরিস্ট্রিয়াল টেলিভিশন সম্প্রচার সুবিধা সংরক্ষণ আইন,২০০৯ (২০০৯ সনের ৪৪নং আইন) with the same provisions of law the NOC dated 05.02.2002 issued by the MOI had become and still is invalid and ineffective for being cancelled for broadcasting through terrestrial system and as such the said NOC cannot form the basis / ground of promissory estoppel or legitimate expectation on which the appellants are claiming entitlement to a licence for broadcasting. We have also noticed that according to Clause 2(6) of the বেসরকারী মালিকানায় টেলিভিশন চ্যানেল স্থাপন ও পরিচালনা নীতি-১৯৯৮ hereinafter referred to as the Policy of 1998 a licence may be granted under the Policy of 1998 initially for 5(five) years at best meaning that the NOC dated 05.02.2002 issued by the MOI had expired on 04.02.2007 and as such the said NOC cannot form the basis for grounds of promissory estoppel or legitimate expectation. Having gone through the Memos dated 20.11.2008 and 18.12.2008 issued by the BTRC, we are of the view that these are not legally operative as a result of the appellant-company for not having complied with the terms and conditions of the NOC and for not having obtained a licence to establish, maintain or work a telegraph under Section 4(1) of the Telegraph Act,1885 and a licence to possess wireless telegraphy apparatus under Section 3 of the Wireless Telegraphy Act,1933 respectively from the MOPT and that condition No.9 of the NOC stipulated that the Policy of 1998 will be applicable to the NOC and given that as per Clause 2(1) and Clause 2(4)(kha) of the Policy of 1998 an intending television operator is required to obtain two licences from the MOPT. In this context it is pertinent to quote Clause 2(1) of the বেসরকারী মালিকানায় টেলিভিশন চ্যানেল স্থাপন ও পরিচালনা নীতি-১৯৯৮ which reads as under:

"২। সম্প্রচার সংক্রান্ত আইনগত ও বিধিবদ্ধ ক্রিয়াকলাপঃ-

(১) ১৮৮৫ সনের টেলিগ্রাফ ও বেতার আইনের ৪(১) ধারা অনুযায়ী Within Bangladesh, the Government shall have the exclusive privilege of establishing, maintaining and working telegraphs:

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

Further, Clause 2(4)(kha) of the Policy of 1998 runs as under:

"২। সম্প্রচার সংক্রান্ত আইনগত ও বিধিবদ্ধ ক্রিয়াকলাপঃ-

৪(খ) ১৯৩৩ সালের আইনের ৫ ধারা অনুযায়ী The Director General, Bangladesh Post Office or an officer authorised by him in this behalf shall be the authority competent to issue licences to possess wireless telegraphy apparatus under this Act, and may issue licences in such manner, on such conditions and subject to such payments as many be prescribed."

37. In the facts and circumstances of the case the appellant company was required to obtain allocation of frequency for radio station or television station or broadcasting apparatus or telecommunication apparatus or telecommunication apparatus in combination of broadcasting apparatus. The appellant-company having not fulfilled the precondition by obtaining the aforesaid licences from the MOPT the Memos dated 20.11.2008 and 18.12.2008 issued by the BTRC cannot form the basis of grounds of promissory estoppel or legitimate expectation.

38. The protection of legitimate expectation is at the root of the constitutional principle of the rule of law, which requires regularity, predictability and certainty in government's dealings with the public. In the case of Council of Civil Service Unions and others -Vs-

Minister for the Civil Service (1984) 3 All ER 935 House of Lords observed that for a legitimate expectation to arise, the decision of the administrative authority must affect such person either- (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until some rational ground for withdrawing it has been communicated to him and he has been given an opportunity to comment thereon or he has received assurance from the decision-maker that they will not be withdrawn without first giving him an opportunity of advancing reasons for contending that they should be withdrawn.

39. The Supreme Court of India while explaining the nature and scope of the doctrine of legitimate expectation in the case of Food Corporation of India -Vs- M/s Kamdhenu Cattle Feed Industries (1993) 1 SCC 71 at page 76, paragraph 8 observed as under:

> "The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expection of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent."

40. In the case of Punjab Communications Ltd. -Vs- Union of India and others (1999) 4 SCC 727 the Supreme Court of India held that a change in policy can defeat a substantive legitimate expectation if it can be justified on "Wednesbury" reasonableness. The decision maker has the choice in the balancing of the pros and cons relevant to the change in policy. Therefore, the choice of the policy is for the decision maker and not for the Court. The legitimate substantive expectation merely permits the Court to find out if the change in policy which is the cause for defeating the legitimate expectation is irrational or perverse or one which no reasonable person could have made.

41. The Court would interfere with the decision taken by the authority when the same was found to be arbitrary or gross abuse of power or violation of natural justice. In the case of Sethi Auto Service Station and another -Vs- Delhi Development Authority and others 2009 (1) SCC 180 D.K. Jain,J. observed thus:

> "32. .... A case for applicability of the doctrine of legitimate expectation, now accepted in the subjective sense as part of our legal jurisprudence, arises when an administrative body by reason of a representation or by past practice or conduct aroused an expectation which it would be within its powers to fulfill unless some overriding public interest

comes in the way. However, a person who bases his claim on the doctrine of legitimate expectation, in the first instance, has to satisfy that he has relied on the said representation and the denial of that expectation has worked to his detriment. The Court could interfere only if the decision taken by the authority was found to be arbitrary, unreasonable or in gross abuse of power or in violation of principles of natural justice and not taken in public interest. But a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles."

42. The Court having considered the facts and circumstances of the case further observed as under:

"39. We are convinced that apart from the fact that there is no challenge to the new policy, which seems to have been conceived in public interest in the light of the changed economic scenario and liberalized regime of permitting private companies to set up petrol outlets, the decision of DDA in declining to allot land for resitement of petrol pumps, a matter of largesse, cannot be held to be arbitrary or unreasonable warranting interference. Moreover, with the change in policy, any direction in favour of the appellants in this regard would militate against the new policy of 2003. In our opinion, therefore, the principle of legitimate expectation has no application to the facts at hand."

43. This Division in the case of SSA Bangladesh Limited -Vs- Engineer Mahmud-Ul-Islam and others reported in 24 BLD (AD) 92 held as under:

"60. The principle of legitimate expectation as enunciated in Schmidt -Vs- Secretary of State of Home Affairs reported in (1969) 1 Ch.140 imposed upon the Government or the concerned Authorities a duty to act fairly and reasonably in dealing with the rights and / or interest of the people and in case of any breach thereof the Court should act upon in striking down any order in exercise of judicial review of executive action and in case of any unreasonableness or inertness or [even] latches in its part for which some or part of which benefit is lost causing prejudice to the people at large, the Court may direct the concerned to exercise its functions fairly, reasonably and in accordance with law and established principles.

61. Thus the legitimacy of an action / expectation can be inferred only if it is founded on the sanction of law or customs or established practice or procedure in regular or natural sequence, otherwise, it would betray the [expectation] of the public and exercising its function fairly, reasonably and in accordance with law and principles."

44. In the case of the Chairman, Textile Mills Corporation -Vs- Nasir Ahmed Chowdhury and others reported in 22 BLD (AD) 199 this Division quoted with approval the following passages:

"24. A passage in Administrative law (Eighth Edition) by David Foulkes reads thus:

'The right to a hearing, or to be consulted, or generally to put one's case, may also arise out of the action of the authority itself. This action may take one of two, or both forms: a promise (or a statement or undertaking) or a regular procedure. Both the promise and the procedure are capable of giving rise to what is called a legitimate expectation, that is, an expectation of the kind which the courts will enforce. The analogy with estoppel will be apparent. Existence of a

regular practice which could reasonably be expected to continue.'

25. In the said book upon referring to NG's case (1983) 2 All 386= (1983) 2 AC 629) illustration has been given as to enforceable legitimate expectation can arise from a statement or undertaking and then upon referring to the ratio of the case of Council of Civil Service Unions (1985) AC 374, (1984) 3 All ER 935) has observed therein legitimate expectation arose not out of a promise, but out of the existence of a regular practice which could reasonably be expected to continue."

45. Having considered the decisions referred to and the passages quoted in the judgment from the book referred to this Division in the case reported in 22 BLD (AD) 199 at page 220 paragraph 50 observed as under:-

"The doctrine of legitimate expectation comes to arise in the background of the principle that a public authority to bound by its undertaking as to procedure it will follow provided they do not conflict with its duty (1983) 2 AC 629; if the public policy was to be changed the applicant should be given 'full and serious consideration whether there is some overriding public interest' justifying the new departure (1984) 1 WLR 1337; 'a public authority has a duty to act with fairness and consistency in its dealing with the public and that if it makes inconsistent decisions unfairly or unjustly it misuse its power; existence of a regular practice which could reasonably be accepted to continue (1985) AC 374."

46. In the case of Syed SM Hasan -Vs- Bangladesh and another reported in 60 DLR (AD) 76 at page 81 paragraph 31 this Court observed-

"The concept reasonable expectation has imposed a duty on the public authority to act fairly by taking into consideration all relevant factors relating to the expectation as the denial of it would amount to denial of the right guaranteed or secured and would lead to arbitrary, unfair or discriminatory treatment."

47. In view of the above decisions we approve the following principles enunciated by the Apex Courts of the Sub-continent in respect of the Doctrine of legitimate expectation:-

(1) The doctrine of legitimate expectation may arise where the decision of administrative authority affect a person either by altering rights or obligations of that person which are enforceable by or against him in private law or by depriving him of some benefit which he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until some rational ground for withdrawing it has been communicated to him and he has been given an opportunity to comment thereon.

(2) Even legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case.

(3) The legitimate expectation has to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant.

(4) A change in policy can defeat a suspected expectation if it can be justified on "Wednesbury" reasonableness. The choice of the policy is for the decision-maker not for the Court. The legitimate substantive expectation merely permits the Court to find out if the change in policy which is the cause for defeating the legitimate expectation is irrational or perverse or one which no reasonable person could have made. The court would interfere only if the decision taken by the authority was found to be arbitrary, unreasonable or in gross abuse of power or in violation of principles of natural justice and not taken in public interest.

(5) The Doctrine of legitimate expectation has no role to play where the State action is as a public policy or in the public interest unless the action taken amounts to an abuse of power. The Court must not usurp the discretion of the public authority.

48. Further, we find force in the submission of the learned Attorney General in reply to the appellant's contention that the NOC dated 05.02.2002 issued by the MOI is not legally operative and it can not form the basis for grounds of invoking promissory estoppel or legitimate expectation on the basis of which appellants are claiming entitlement to a licence for broadcasting. According to Clause 2(6) of the Policy of 1998 the NOC dated 05.02.2002 having expired on 04.02.2007 cannot form the basis for grounds of promissory estoppel or legitimate expectation based on which the appellants are claiming entitlement to a licence for broadcasting. We are also of the view that the conduct of the appellants in carrying out test transmission since 15.10.2009 and submitting report of the same to the BTRC vide letter dated 01.11.2009 are of no legal effect as a result of non-compliance with the terms and conditions of the Memo dated 20.11.2008 and as such the carrying out test transmission and submission of report by the appellants cannot form the basis for grounds of promissory estoppel or legitimate expectation. In view of above discussions, we are constrained to hold that the appellant cannot invoke the doctrine of promissory estoppel because of their non-compliance with the terms and conditions of the NOC dated 05.02.2002 and also the BTRC's memos dated 20.11.2008 and 18.12.2008. In the premises, it may lead to an irresistible conclusion that the appellants having not acted upon the said representations, the principle of promissory estoppel cannot be invoked by them. Similarly, the question of legitimate expectation does not arise in view of the appellants failure to comply with the NOC dated 05.02.2002 and the BTRC's memos dated 20.11.2008 and 18.12.2008 for not having obtained any of the said two licences from the MOPT. Furthermore, we are also of the view that the MOPT having the exclusive right to grant licence under Section 4(1) of the Telegraph Act,1885, the appellants cannot assert their entitlement to have licence for broadcasting invoking the doctrine of promissory estoppel from the BTRC, inasmuch as, the doctrine of promissory estoppel cannot be allowed to override the expressed provisions of the Telegraph Act,1885 claiming entitlements to have licence for broadcasting from the BTRC. The ground of legitimate expectation is also contradictory to the provisions of Section 3(2) of the B.T. Act,2001 which is not applicable to any broadcasting or any radio broadcasting station or television broadcasting station or licensing of such station or any broadcasting apparatus or any apparatus for receiving any message or other information or a programme transmitted by way of broadcast or the business of such apparatus and as such the appellants cannot invoke the doctrine of promissory estoppel or any legitimate expectation to override and

invalidate the expressed provisions of Section 3(2) of the B.T. Act,2001.

49. In the case of Bangladesh Tele-communication Regulatory Commission –Vs- Ekushey Television Ltd. reported in 58 DLR (AD) 82 this Division has meticulously considered the preambles of the Telegraph Act,1885, the Wireless Telegraphy Act,1933 and the B.T. Act,2001 to decide as to whether the B.T. Act of 2001 has any overriding effect over all other legislations in the field vis-a-vis the applicability of the old legislation in respect of the granting of licence for broadcasting as contemplated in Section 3(2) of the B.T. Act,2001. In this context in the aforesaid reported decision this Division while interpreting the preambles of the these Acts examined Section 4 of the Telegraph Act,1885 which provides for issuance of a licence for the purpose of broadcasting its programmes and Section 5 of the Wireless Telegraphy Act,1933 which provides for regulating the possession of wireless telegraphy apparatus and also the provision of Section 3(2) of the B.T. Act,2001. In doing so this Division set aside the findings of the High Court Division to the effect that the B.T. Act of 2001 is applicable in respect of all the matters mentioned in Section 3 of the B.T. Act and the BTRC is the sole and exclusive authority to grant such licence necessary for the purpose in the manner as prescribed in the B.T. Act and no licence from the MOI would be necessary for the matters mentioned in Section 3 of the B.T. Act of 2001.

50. From a careful reading of B.T. Act,2001, it can be safely construed that the B.T. Act of 2001 has been enacted to cope with the technological advancement and development arising out of deficiencies in the existing laws namely, Telegraph Act,1885 and the Wireless Telegraphy Act,1933. To cope with the existing difficult situations and to meet with the needs of the technological advancement the B.T. Act,2001 has been enacted to provide for establishment of an independent Commission for the purpose of development and efficient regulation of telecommunication systems and telecommunication services and for the transfer of powers and functions of the Ministry of Post and Telecommunication to the Commission and matters ancillary thereto. Having considered the preambles and the substantive provisions of the aforesaid three Acts this Division in the case reported in 58 DLR (AD) 82 at paragraph 37 observed as under:

> "From a comparative study of the aforesaid terms provided in different legislations it appears that the three Acts distinctly and separately detailed about the gradual developments that have taken place through the passage of time in the field of telegraph, wireless communication and telecommunication systems and services."

51. We are of the view that Section 3 of the B.T. Act,2001 contains both inclusion clause and exclusion clause inasmuch as the inclusion clause in the proviso to Sub-Section (2) of Section 3 reads as under:

> "provided that this Act shall apply to the following: (i) allocation of frequency for such radio station or television station or broadcasting apparatus, or control of the allocated frequency; (ii) use of a telecommunication apparatus in combination with broadcasting apparatus or use of telecommunication apparatus for the purpose of broadcasting."

52. It appears that the proviso to Section 3(2) specifically includes the applicability of the Act for allocation of frequency for such radio station or television station or broadcasting apparatus or control of the

allocated frequency, use of a telecommunication apparatus in combination with broadcasting apparatus or use of telecommunication apparatus for the purpose of broadcasting.

53. We know that broadcasting has been defined in Section 2 of the B.T. Act,2001 meaning "transmission of any message, information, signal, sound, image or intellectual expression by media wave, satellite, cable or optical fibre connection for the purpose of receipt by the public, but transmission of anything by internet connection shall not be deemed to be a broadcasting".

54. From the discussions made hereinabove it appears that Section 3(2) provides that the B.T. Act of 2001 is not applicable to any broadcasting, a radio broadcasting station, or a television broadcasting station, or licensing of such station, or broadcasting apparatus, or an apparatus for receiving any message etc. This view of ours has been fortified by the decision of this Division in the ETV case [58 DLR (AD) 82 at page 91 paragraph 53]. In this case this Division having elaborately considered the provisions of Telegraph Act,1885, the Wireless Telegraphy Act,1933 and the B.T. Act,2001 held that the Wireless Telegraphy Act authorizes the Director-General, Bangladesh Post Office or an Officer authorised by him to issue licence only to possess wireless telegraphy apparatus on such conditions and subject to such payments as may be prescribed and hence nothing to do with the object mentioned in Section 3(2) of the B.T. Act,2001. Section 4 of the Telegraph Act,1885 provides for exclusive privilege of establishing, maintaining and working telegraphs by the Government, who shall grant a licence to any person on such conditions and in consideration of such payments to establish, maintain or work a telegraph within any part of Bangladesh and that the Government is authorised by rules made under the Act to permit, subject to such restrictions and conditions as it thinks fit, the establishment, maintenance and working of wireless telegraphs on ships within Bangladesh territorial waters and on aircraft within or above Bangladesh or Bangladesh territorial waters and of telegraphs other than wireless telegraphs within any part of Bangladesh. It is to be noted that a licence is to be obtained for exercise of the privilege of establishing, maintaining and working telegraph on certain terms and conditions from the Government under the provisions of Telegraph Act,1885 and that the provisions of B.T. Act,2001 have also expressly and specifically excluded the application of the said Act in respect of any broadcasting or a radio broadcasting station or a television broadcasting station or licensing of such station, broadcasting apparatus or an apparatus for receiving any message or other information or a programme transmitted by way of broadcast or the business of such apparatus. Moreover, the provisions of the Wireless Telegraphy Act,1933 regulate the possession of wireless telegraphy apparatus.

55. In order to find out the object and the scheme of the B.T. Act of 2001 we having examined the provisions of Sections 4, 5, 6, 29, 30, 31, 35, 36 and 51 of the B.T. Act of 2001 in respect of functions of the Ministry (MOPT) and power of the Government respectively vis-a-vis the powers and functions of the Commission (BTRC) for the purpose of development and efficient regulation of telecommunication system services in Bangladesh and matters ancillary thereto formed the opinion that the B.T. Act,2001 shall apply to the allocation of frequency of such media station or television station or broadcasting apparatus or control of allocated frequency, use of a telecommunication apparatus in combination with broadcasting apparatus or use of telecommunication apparatus for the purpose of broadcasting. Having elaborately examined the different

provisions of the relevant laws this Division in ETV case at paragraph 79 observed as under:

> "Thus, from the above, it is apparently clear that Bangladesh Telecommunication Act,2001 has not been made applicable to any 'broadcasting', a radio broadcasting station or a television broadcasting station or licensing of such station, broadcasting apparatus or an apparatus for receiving any message or other information or a programme transmitted by way of broadcast or the business of such apparatus, which job have been preserved to the Govt. of Bangladesh under the provisions of Telegraph Act,1885 to provide for the issuance of licence or no-objection for the purposes inasmuch as the Wireless Telegraphy Act,1933 regulates the possession of Wireless Telegraphy apparatus in Bangladesh empowering the Director General, Bangladesh Post Office or an officer authorised by him to issue licences for the purpose." Admittedly the appellants did not pray for issuance of licence either under the Act of 1885 or the Act of 1933. Mr. Ajmalul Hossain, learned Advocate straneously argued that no such licences are now required for operating a television channel in Bangladesh and therefore, the appellants did not apply for issuance of such licences. When his attention is drawn to the above observations of this Division, the learned Advocate relented and submitted that due to inadvertent mistake the appellants did not apply for such licences.

56. In view of the aforesaid discussions and findings we have no hesitation in holding that Bangladesh Telegraph Act,1885, Wireless Telegraphy Act,1933 and B.T. Act,2001 have been enacted for separate, distinct and specified purposes as detailed above and each Act has its own object, characteristics and specified field of operation as has been spelt out in the respective preambles and the contents. In the decision reported in 58 DLR (AD) 82 this Division held that the writ-petitioner-appellant should have applied for licence or NOC for Broadcasting to the MOI and after obtaining the same then could approach the BTRC for allocation of frequency and other ancillary matters detailed above. The question of permission for importation of apparatus and issuance of licence for allocation of frequency are within the power and jurisdiction of the BTRC under the provisions of B.T. Act,2001. Thus, BTRC is obliged under the law, on an appropriate application for licence, etc, to issue the same under the B.T. Act,2001.

57. In the instant case before us admittedly the appellant-company applied to the MOI on 08.10.2009 for re-issuance of fresh NOC. But the said application has not yet been disposed of. Rather the appellants are claiming entitlement to licence for broadcasting from the BTRC without having obtained the requisite licences issued by the MOPT under the Telegraph Act,1885 and the Wireless Telegraphy Act,1933 and fresh NOC by the MOI against their application dated 08.10.2009. But as per Section 55 of the B.T. Act,2001, the appellant-company needs frequency to be allocated by the BTRC and a licence from the BTRC for establishing, operating or using radio apparatus for the purpose of radio communication and such licence is not a licence concerning broadcasting apparatus but is separate and different from the licences to be granted by the MOPT and the NOC from the MOI for the purpose of broadcasting.

58. In the instant case without having obtained requisite licence and the NOC from the concerned Ministries, the appellant-company shall not be allocated frequency or

issued licence for the establishment, operation and use of radio apparatus for the purpose of radio communication as it has failed to obtain requisite licences and NOC issued by the concerned Ministries and as the formalities in issuing licence for radio apparatus and allocation of frequency stipulated in Section 56(8) and (9) of the B.T. Act,2001 are yet to be complied with.

59. However, it has been asserted that the appellant-company has invested huge amount of money for installation of the TV station and employed three thousand employees and also went on test transmission and that subsequently the impugned orders dated 19.11.2009 (Annexure-A series) were issued to stop the test transmission of the Jamuna Television Channel and to cancell the allocated satellite frequency and using of earth station and SNG / DSNG machineries and that the equipments and machineries of the appellant-company were seized by the respondent Nos.3 and 4 under the seizure list dated 19.11.2009 (Annexure-A-2).

60. We find that the appellant-company admittedly has neither exhausted the forum for disposal of the application dated 08.10.2009 by the MOI nor obtained requisite licences and NOC from the MOPT and the MOI respectively for broadcasting television before obtaining frequency and licence for establishing, operating or using radio apparatus for the purpose of radio communication from the BTRC under Section 55 of the B.T. Act,2001. For the aforesaid reasons we do not find any illegality in the aforesaid orders passed by the respondents as contained in Annexures-A and A1 to stop the test transmission of their TV Channel and the seizure of the appellants' machineries and equipments installed in the television station under the seizure list (Annexure-A2). Since long time has elapsed the appellants failed to take proper steps in obtaining necessary licences and NOC from the concerned Ministries before obtaining frequency and licence for using broadcasting apparatus, there is no illegality in the actions taken by the respondents. Considering the huge amount of money invested by the appellant-company in importing machineries and equipments and installation of the same in the Television Station the subsequent seizure of the same for indefinite period seems to be too harsh and therefore, to ameliorate the situation, we may invoke Article 104 of the Constitution for doing complete justice in the present case.

61. Under Article 104 of the Constitution in the exercise of its jurisdiction this Division is entitled to issue such directions, orders, decrees or writs as may be necessary for doing complete justice in any cause or matter pending before it. It confers very wide powers on this Division to do complete justice in a matter pending before it. In the case of Khandker Jillul Bari -Vs- The State 2009 BLT (AD) 28 this Division held that it's exclusive power under Article 104 the Constitution applies as special and extraordinary jurisdiction to avoid miscarriage of justice by establishing complete justice and that this extraordinary power has been given to it and not to the High Court Division. The object of this Article is to enable this Division to give such directions or pass such orders as necessary to do complete justice. This inherent power has been conferred upon this Division to do the right and to undo the wrong and to act ex-debito justicia to do the real and substantial justice for which they exists. The conferment of power is under special circumstances and for special reasons. Article 104 gives a power to this Division where it has jurisdiction but it does not confer a new jurisdiction. In the case of Raziul Hasan -Vs- Bodiuzzaman Khan and others 16 BLD (AD) (1996) 253 this Division held that when it is found that a gross injustice has been done to the appellant for no fault or laches of his own and a valuable right accrued to him is being

lost and no other remedy is available to him for redress of his grievance, this Division found it to be a fit case to exercise its jurisdiction under Article 104 of the Constitution for doing complete justice.

62. This is an extra ordinary power conferred by the Constitution upon this Division. The term "complete justice" cannot be defined; any attempt to define it would defeat the very purpose of such power. The word complete justice has no definite meaning. In the case of National Board of Revenue, Dhaka -Vs- Nasrin Banu and 5 others 1996 48 DLR (AD) 171 at page 178 paragraph 26 this Division observed:

> "The words "complete justice" do not yield precise definition. Cases vary, situations vary and the scale and parameter of complete justice also vary. Sometimes it may be justice according to law, sometimes it may be justice according to fairness, equity and good conscience, sometimes it may be in the nature of arbitration, sometimes it may be justice tempered with mercy, sometimes it may be pure commonsense, sometimes it may be the inference of an ordinary reasonable man and so on. ---------- ---------- ------- ---------- ---------- ---------- ---------- ---------- ----------. "

63. The expression 'complete justice' contained in Article 104 is of wide amplitude. Article 104 does not envisage any limitation regarding causes or the circumstances in which power is to be exercised. The exercise of such power is left completely to the discretion of this Division. The power of passing any order or decree in the interest of justice has been conferred upon this Division under Article 104. The powers of this Division under Article 104 are inherent and are complementary to those powers which are specifically conferred on this Division by various statutes.

64. The inherent power under Article 104 cannot be invoked when alternative remedy is available. The phrase 'complete justice' as per Article 142 of the Indian Constitution was expressed by the Supreme Court of India in S. Nagaraj -Vs- State of Karnataka reported in (1993) Suppl. (4) SCC 595 in the following words:

> "The phrase 'complete justice' engrafted in Article 142(1) is the word of width couched with elasticity to meet myriad situations created by human ingenuity or cause or result of operation of statute law or law declared under Articles 32, 136 and 141 of the Constitution and cannot be cribbed or cabined within any limitations or phraseology."

65. We are of the view that the power granted under Article 104 of the Constitution is an important constitutional power granted to this Division to protect the citizens. While exercising its inherent power under Article 104 this Division can not override the statutory provisions. In the case of Laxmidas Morarji (dead) by L.Rs. -Vs- Behrose Darab Madan reported in (2009) 10 SCC 425 at page 433 paragraph 25 the Supreme Court of India observed:

> " ..... The power under Article 142 of the Constitution is a constitutional power and hence not restricted by statutory enactments, the Supreme Court would not pass any order under Article 142 of the Constitution which would amount to supplanting substantive law applicable or ignoring express statutory provisions dealing with the subject, at the same time these constitutional powers cannot in any way, be controlled by any statutory provisions. However, it is to be made clear that this power cannot be used to supplant the law applicable to the case. This means that acting under Article 142

> the Supreme Court cannot pass an order or grant relief which is totaly inconsistent or goes against the substantive or statutory enactments pertaining to the case. The power is to be used sparingly in cases which cannot be effectively and appropriately tackled by the existing provisions of law or when the existing provisions of law cannot bring about complete justice between the parties."

66. It has been stated that for doing complete justice the Court can even ignore the statutory provisions regulating the matter in dispute but normally the Court cannot. In the case of the Delhi Judicial Service Association -Vs- State of Gujarat reported in (1991) 4 SCC 406 at page 463, para.51 the Supreme Court of India observed as follows:

> "No enactment made by Central or State legislature can limit or restrict the power of this Court under Article 142 of the Constitution, though while exercising power under Article 142 of the Constitution, the Court must take into consideration the statutory provisions regulating the matter in dispute."

67. In view of the provisions of Section 20 (1) of the Telegraph Act,1885 which provides for punishment with imprisonment which extend to 3 years with fine for establishing, maintaining or working Telegraph without licence and Section 6 of the Wireless Telegraphy Act which provides that whoever possesses any wireless telegraphy apparatus without licence he shall be punished with fine and also confiscation of the apparatus in respect of which an offence has been committed and Section 35(2) of the B.T. Act,2001 which provides for punishment with imprisonment for a term not exceeding 10 years or to a fine not exceeding taka ten lac or both for operating telegraphy system in Bangladesh or outside Bangladesh by telecommunication service without licence and Section 55(7) of B.T. Act,2001 which provides for punishment with sentence of imprisonment for a term not exceeding 10 years or to fine not exceeding taka 10 lac or both for installing operating or using any radio apparatus without licence, the respondents rightly issued the memos dated 19.11.2009 (Annexure-A series).

68. There is no illegality in the finding of the High Court Division to the effect that the appellant-company is not entitled to broadcast or transmit any telecommunication without any licence and NOC granted under the relevant provisions of law as stated above and that there are punitive measures for such violation of law. The High Court Division rightly found that the MOI being in-charge of managing and controlling the contents of broadcasting or transmitting issued the order dated 19.11.2009 whereby some machineries and equipments were seized under a seizure list dated 19.11.2009. We find that the MOI rightly discharged its' statutory duty by requesting the appellants to stop illegal broadcasting and in furtherance thereof the Ministry referred the matter to the Commission (BTRC) who in carrying out its statutory duties and obligations as envisaged in Section 30 (2) (d) (o) and Section 34 (b) and (c) of the B.T. Act,2001 rightly cancelled the allocation of frequency. In order to effectuate total stoppage of the illegal broadcasting the BTRC rightly seized machineries and equipments under a seizure list dated 19.11.2009. In the facts and circumstances of the case we are of the view that there is no illegality in issuing the memos dated 19.11.2009 and seizing the machineries and equipments. It has been asserted that the appellant-company invested huge amount of money for installation of the TV station and employed three thousand employees and also went on test transmission and installed machineries and equipments. But because of failure of the appellant-company to obtain necessary licences and NOC from the concerned Ministries and authorities, the

respondents by the orders dated 19.11.2009 rightly cancelled the allocation of satellite frequency and use of earth station and SNG / DSNG machineries and equipments and seized those machineries and equipments. The appellant-company said to have obtained allocation of frequency and permission for importing machineries and equipments and invested huge amount of money in importing those machineries and equipments and installed the same in it's premises. But it has already been noticed that the appellant-company did not obtain the requisite licences and NOC from concerned Ministries as a result of which the respondent authority cancelled the allocation of frequency and use of earth station and SNG / DSNG machineries and equipments and seized those machineries and equipments under a seizure list dated 19.11.2009. There was no illegality in the cancellation of allocation of frequency and seizure of the machineries and equipments to stop the unauthorised broadcasting. The appellant-company said to have invested huge amount of money and employed three thousand employees and it has asserted that it will be seriously prejudiced if the seized machineries and equipments be kept for indefinite period and not properly maintained in good condition. As this Division held that "complete justice may be justice tempered with mercy", in the facts and circumstances of the case, we do hereby invoke the extra ordinary powers under Article 104 of the Constitution to do complete justice to the appellant-company for releasing the machineries and equipments seized from the appellant-company by the respondents.

69. However, considering the anxiety of the appellants as to the present condition of the machineries and equipments seized by the respondents and to facilitate them for making best use of the same after obtaining requisite licences and NOC from the concerned Ministries and authorities in accordance with law, we therefore, invoke Article 104 of the Constitution to do complete justice by directing the respondents to release the machineries and equipments seized from the appellants' TV station as per seizure list dated 19.11.2009 (Annexure-A2) for proper maintenance, safety and keeping in good condition of the same.

70. In the light of the above findings and discussions we do not find any illegality in the impugned judgment and order passed by the High Court Division in disposing the Rule with the direction. There is no illegality in the order dated 19.11.2009 to stop test transmission of the appellant-company's Television Channel cancelling the allocated satellite frequency and using of earth station, SNA and DSNA machineries and equipments and seizing the machineries and equipments under the seizure list dated 19.11.2009. However, in view of the observations and findings made hereinabove, the appeal is allowed-in-part in doing complete justice, the respondents are hereby directed to release the machineries and equipments seized from the appellant-company's TV stations as per seizure list dated 19.11.2009 (Annexure-A2) and to dispose of the appellants' application dated 08.10.2009 in accordance with law within 1(one) month from the date of receipt of a copy of the judgment.

However, at this stage the appellants are not entitled to broadcast or transmit any telecommunication without having obtained requisite licences and NOC in accordance with law from the concerned Ministries and authorities.

Ed.