The Federation of Hotel & Restaurant Associations of India

FH/1/TRAI-CP2014/2014
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Sub: **FHRAI VIEWS/COMMENTS ON THE CONSULTATION PAPER NO. 6/2004 DATED 11.6.2014 ON TARIFF ISSUES RELATED TO BROADCASTING AND CABLE TV SERVICES FOR COMMERCIAL SUBSCRIBERS**

Dear Mr. Ahmad,

Greetings from the Federation of Hotel & Restaurant Associations of India(FHRAI)!!

Please find enclosed herewith FHRAI views/comments on the Consultation Paper on Tariff Issues Related to Broadcasting and Cable TV Services for Commercial Subscribers which was issued by TRAI on 11th June, 2014.

Thanking you and with warm regards,

Yours sincerely,

M.D Kapoor
Secretary General

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FHRAI VIEWS/COMMENTS TO THE CONSULTATION PAPER NO. 6/2004 DATED 11.6.2014 ON TARIFF ISSUES RELATED TO BROADCASTING AND CABLE TV SERVICES FOR COMMERCIAL SUBSCRIBERS ON BEHALF OF THE FEDERATION OF HOTEL AND RESTAURANT ASSOCIATIONS OF INDIA

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I. Summary of Suggestions

Telecom Regulatory Authority of India ("TRAI" or "Authority") has circulated a Consultation Paper on "*Tariff Issues Related to Broadcasting and Cable Services for Commercial Subscribers" on 11.6.2014.* We are submitting the present suggestions on behalf of the Federation of Hotel and Restaurant Associations of India ("FHRAI") which is the apex association of Hotels and Restaurants in India and represents over 3800 Hotels and Restaurants.

The consultation paper discusses the background and issues which arise with respect to Tariff for Commercial Subscribers.

At the outset it is submitted that at a policy level, the Authority has been tasked with the responsibility of regulating "broadcasting and cable TV". The reason why such responsibility has been conferred on the authority is that by its very nature, a broadcaster and its channel enjoys a monopoly. Even if there are competing channels, each channel is unique and the channels are not substitute for each other. On the other hand, the consumers are at the mercy of the broadcasters and if they wish to receive any particular channel, they are bound to pay to the broadcaster the price that the broadcaster wants to charge. In the absence of regulation and fixing of tariff, the broadcaster could charge different amounts from different consumers arbitrarily and capriciously, based on whatever the market can bear. Broadcasting is a natural monopoly and is thus required to be regulated and thus the power has been given to the Authority to so regulate the industry.

The question that then arises and which has been raised/ elaborated in the consultation paper is whether the Authority should forebear with respect to all or some customers and whether any distinction can be drawn between different categories of customers.

In brief, FHRAI on behalf of its members submits as follows. It is submitted that the product/service that the broadcaster supplies namely the channel is the same whether the consumer is using it at his/her house or in any other establishment. There is no distinction in the channel being supplied either in terms of quality or in terms of cost to the broadcaster.

As far as the consumer is concerned, in our submission, again there is no real difference. Whether the consumer watches cable at his house or at a hospital or in a club or at a hotel or restaurant, it is the same consumer which is watching the same broadcast.

The real question therefore, in our submission, is whether one or the other category of consumers have a better bargaining power vis–a-vis the broadcaster. It is FHRAI's submission, particularly with the experience in the past that in fact non-residential establishments have no better bargaining power then residential subscribers vis-a-vis the broadcasters. In fact the broadcasters have misused the forbearance of the Authority in the past, as further enumerated, wherein they have increased the tariff from time to time; they charge differing tariffs from different customers and do not allow some platforms to supply their channels (say DTH) to certain kinds of customers. The hotels and restaurants have not been able to assert/ show any bargaining power.

In fact, as far as hotels are concerned, a Television is a necessity. Cable television has been recognised by the Telecom Dispute Settlement and Appellate Tribunal ("TDSAT") as being in the nature of an essential service and a necessity in every household, in its judgment dated 27.02.2007.

At the end of the day, if TV is not availed or some channel is not available, the loss will be of the customer and not to the hotel or the restaurant.

The distinction between one category of consumer and another is also not at all clear or sustainable. As the consultation paper itself observes, the Hon'ble Supreme Court of India has already found that the hotels are consumers or subscribers of cable broadcast.

A few illustrations would show that there is no clear distinction between ordinary and commercial subscribers. Suppose a person calls over a few friends for dinner to watch a cricket match, would he become a commercial subscriber. Similarly, if a government or a charity hospital shows TV in their waiting lounge; but doesn't charge their customer, would they be ordinary subscribers. Again, suppose a Television Set is installed in the waiting lounge of a government Ministry or the District Magistrates office or a police station where people come to lodge their complaints, would it be an ordinary subscriber or a commercial subscriber. Is the Airports Authority of India an ordinary subscriber or a commercial subscriber based on the fact that Television sets display programmes both in the open area as also in executive lounges at the airports? Are the two kinds of TV sets in the airport (one in the paid lounge and the other in the open area) to be treated differently. Are five star hospitals and government or charitable or poor people hospitals to be treated differently? Is a TV

set installed at a government run Tuberculosis clinic to be treated as commercial subscriber or an ordinary subscriber?

It is the submission of FHRAI that there is no real distinction between one category of subscriber and another. If Hotels and Restaurants are put at the mercy of broadcasters, the only ones who will suffer are the customers of the Hotel who will not get to watch their favourite programmes which they are used to watching and for which they have paid for in their own house; but they can't watch the same, as they are not in their own town, either for business or leisure. In fact, there is nothing to show that hotels and restaurants actually recover the cost of cable subscription from their guests. Also, the capacity of different hotels is also different. There are non-starred hotels and one star to five star hotels. Even within the same class, like heritage hotels, some are big and some are small. Not all of them have even similar paying capacity. There are some boutique hotels which may not even have one star; but charge more than what the 5 star hotels charge. As a matter of interest, there are some airport hotels (outside India) which do not have a bathroom or a bed, but they all have cable TV!

The only real distinction that FHRAI believes to be permissible is if any organisation sells tickets for admission to watching any broadcast, then this would amount to commercial exploitation and in such a case, some distinction can be made. However, in this case also, the tariff must be fixed by the Authority as forbearance has not and cannot work.

In fact, FHRAI would also like to bring to the notice of the Authority, the misuse and misbehaviour by various bodies. As enumerated hereafter, various intermediaries have been appointed by broadcasters and MSOs and so called copyright holders. Each one of them seeks to charge separate charge for the same broadcast. It needs to be clarified that there is only one charge that needs to be paid and that also only to the LCO or DTH operator or any other operator as fixed by the Authority.

II. BRIEF FACTUAL BACKGROUND

The broad facts have been given in the consultation papers itself. However, some detailed facts which may be relevant are enumerated hereafter.

1. The issue of tariff payable by commercial cable subscribers was remanded to the Telecom Regulatory Authority of India (hereinafter referred to as "Authority") *vide* the decision of the ld. Telecom Dispute Settlement and Appellate Tribunal (hereinafter referred to as "TDSAT") dated 28.05.2010. This judgment arose from an appeal filed by the Federation of Hotels and Restaurants Association of India (hereinafter referred to as "FHRAI") before the TDSAT challenging the distinction that was made in the then Tariff Orders [vide amendment orders dated 21.11.2006, namely the Telecommunication (Broadcasting and Cable) Services (Third) (CAS areas) Tariff (First Amendment) Order, 2006 and the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Seventh Amendment) Order, 2006 (hereinafter collectively referred to as "Amendment Tariff Orders dated 21.11.2006")] whereby a maximum ceiling on cable charges payable by all commercial subscribers was fixed; other than three categories of hotels: (i) hotels with a rating of three star and above, (ii) heritage hotels and (iii) any other hotel, motel, inn, and such other commercial establishment providing board and lodging and having 50 or more rooms (hereinafter referred to as the "**Aforesaid Three Categories of Hotels**"). With respect to the Aforesaid Three Categories of Hotels, the Authority directed the parties to mutually negotiate the charges payable.

2. By the judgment dated 28.05.2010 in Appeal No. 17(C) and 18(C) of 2006 (copy enclosed as **Annexure A**), the TDSAT set aside the aforesaid distinction and requested the TRAI "*to consider the case of commercial establishments once over again in a broad based manner*". [Para 78(i) of the aforementioned judgment dated 28.05.2010].

3. This judgment has been recently affirmed by the Hon'ble Supreme Court *vide* its judgment dated 16.04.2014 in the case of *M/s ESPN Software India Pvt. Ltd.* v. *Telecom Regulatory Authority of India & Ors.* (copy enclosed as **Annexure B**). The Hon'ble Supreme Court has therein also granted a period of three months to the Authority to look into the matter *de novo*, as directed in the judgment of the TDSAT dated 28.05.2010, and re-determine the tariff after hearing the contentions of all the stake holders. For this period, the distinction created earlier with respect to the Aforesaid Three Categories of Hotels has been directed to continue as an interim measure.

4. The FHRAI is a representative body of the hospitality industry since 1955, and it has as its members, hotels and restaurants from all across the country. The present representation is being sent by the

FHRAI pursuant to the order of the Hon'ble Supreme Court, on the issue of commercial cable subscribers.

5. A brief history of the commercial cable tariff issue and how it arose is relevant for the purposes of the present discussion and is given below:

(a) When the Central Government notified broadcasting services and cable services to be telecommunication services and brought it within the purview of the Telecom Regulatory Authority of India Act, 1995 (hereinafter referred to as "TRAI Act") vide notification dated 09.01.2004 (namely Notification No. 39 issued by Ministry of Communication and Information Technology dated 09.01.2004; S.O. No. 44(E) and 45(E) issued by TRAI); at that time, there was only analog or non-CAS cable available in the country.

(b) Thereafter, the Authority initially issued a provisional Tariff Order dated 15.01.2004 (namely the Telecommunication (Broadcasting and Cable) Services Tariff Order, 2004), which specified that the charges payable by the cable subscriber to cable operators / broadcasters prevalent as on 21.02.2003 shall be the ceiling with respect to both free to air and pay channels until final determination by TRAI.

(c) The Authority thereafter issued "The Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order 2004" - dated 01.10.2004 (hereinafter referred to as the "Principal Non-CAS Tariff Order"), which also froze the cable tariff prevalent as on 26.12.2003 as the ceiling with respect to both free-to-air and pay channels. The Authority also issued an Interconnect Regulation being "The Telecommunication (Broadcasting and Cable Services) Interconnection Regulation 2004" dated 01.12.2004 (hereinafter referred to as "Interconnection Regulation 2004").

(d) None of the Tariff orders or Regulations made any distinction between a commercial and a domestic cable subscriber. However, the broadcasters were demanding higher cable charges from hotels and restaurants, which led the Hotels and Restaurants Association (Western India) (hereinafter referred to as "HRAWI"), a sister concern of FHRAI, to file a petition before the TDSAT against such demands. The TDSAT vide judgment dated 17.01.2006 held that hotels cannot be considered as consumers or subscribers and thus, they are not entitled to the tariff ceiling fixed by the TRAI with respect to cable subscribers.

(e) Soon thereafter on 07.03.2006, in accordance with the aforesaid judgment of the TDSAT, the TRAI issued an amendment to the Principal Non-CAS Tariff Order defining the terms: 'Ordinary cable subscriber' and 'Commercial cable subscriber'. However, a maximum price ceiling was maintained for tariff payable by both categories.

(f) The TDSAT judgment dated 17.01.2006 was carried in Appeal to the Supreme Court on behalf of the hotels and restaurants, and the Supreme Court *vide* final judgment dated 24.11.2006 reported in (2006) 13 SCC 753 as "*Hotel & Restaurant Association & Anr.* vs. *Star India & Ors.*" held that hotels and restaurants are consumers and subscribers of cable signal. It further held that they do no re-transmit the signal received by them by providing it to their guests. This finding of the Supreme Court is relevant for the purposes of the present discussion and is being quoted below for immediate reference:

> *"28. We have noticed hereinbefore that the members of Associations take TV signals either from Respondents - Broadcasters under their respective contracts or agreements or through cable operators. Whereas in the former case, there exists a privity of contract between the broadcasters and the owners of the hotels, the owners of the hotels admittedly would not come within the purview of definition of MSOs. The owners of the hotels take TV signals for their customers/ guests. While doing so, they inter alia provide services to their customers. An owner of a hotel provides various amenities to its customers such as beds, meals, fans, television, etc. Making a provision for extending such facilities or amenities to the boarders would not constitute a sale by an owner to a guest. The owners of the hotels take TV signals from the broadcasters in the same manner as they take supply of electrical energy from the licensees. A guest may use an electrical appliance. The same would not constitute the sale of electricity by the hotel to him. For the said purpose, the 'consumer' and 'subscriber' would continue to be the hotel and its management. Similarly, if a television set is provided in all the rooms, as part of the services rendered by the management by way of an amenity, wherefore the guests are not charged separately, the same would not convert the guests staying in a hotel into consumers or subscribers. They do not have any privity of contract with broadcasters or cable operators. The identity of the guests is not known to the broadcasters or cable operators. A guest may not watch TV or in fact the room may remain unoccupied but the amount under the contract by the owners of the hotels whether with the broadcasters or cable operators remains*

unchanged. We, therefore, are of the opinion that the members of the appellants' associations are consumers.....

40. The members of Appellants - Associations stricto sensu do not retransmit the signals to any other person. It merely makes the services available to its own guests, which in other words, would mean to itself. If the amenities provided for by the management as a subscriber under TRAI Act is inseparable from the other amenities provided to a boarder of a hotel, it remains a subscriber by reason of making the services available in each of the rooms of the hotel. It is not transmitting the signals of cable television network to any other persons." [Emphasis supplied]

(g) Meanwhile, the Authority had introduced Conditional Access System (CAS) in the four metropolitan cities and on 31.08.2006 it had issued Telecommunication (Broadcasting and Cable) Services (Third) (CAS Areas) Tariff Order, 2006 (hereinafter referred to as "Principal CAS Tariff Order") which also defined commercial subscribers as a separate category, however no distinction was made in the tariff payable. Suitable amendments were made to the Interconnect Regulation 2004 to include CAS as well.

(h) Three days before the final judgment of the Hon'ble Supreme Court the TRAI issued Amendment Tariff Orders dated 21.11.2006 to the Principal CAS and Non-CAS Tariff Orders whereby a distinction was carved out vis-a-vis the Aforesaid Three Categories of Hotels, and with respect to these three following categories the protection of price ceiling was lifted:

(i) hotels with a rating of three star and above,
(ii) heritage hotels, and
(iii) any other hotel, motel, inn, and such other commercial establishment providing board and lodging and having 50 or more rooms

(i) This distinction was challenged by FHRAI before the TDSAT by Appeal Nos. 18(C) of 2006. The TDSAT vide final judgment and order dated 28.05.2010 struck down the aforesaid distinction. In doing so, it specifically noted that there was no rationale apparent for singling out the aforesaid three categories of hotels and it noted that one of the reasons cited by Authority in its explanatory memorandum to make this distinction while ignoring other commercial cable subscribers was that it was the hotels who had approached the authorities. The TDSAT observed that this cannot be a valid justification to single out hotels. With *inter alia* these observations, the TDSAT set aside

the Amendment Tariff Orders dated 21.11.2006 and directed the TRAI "*to consider the case of commercial establishments once over again in a broad based manner*". [Para 78(i) of TDSAT judgment dated 28.05.2010]

(j) The broadcasters filed an appeal before the Hon'ble Supreme Court against the judgment of the TDSAT dated 28.05.2010. The Appeals were admitted vide Interim Order dated 16.08.2010, and the judgment of the TDSAT was stayed by an ad interim order (copy enclosed as **Annexure C**). Thus, the distinction created by the Amendment Tariff Orders dated 21.11.2006 continued to operate.

(k) Recently, the Appeals of the broadcasters (Civil Appeal nos. 6040-6041 of 2010, with Civil Appeal nos. 8358-8359 of 2010 & 10476-10477 of 2010) were dismissed and the judgment of the TDSAT dated 28.05.2010 was upheld by the Hon'ble Supreme Court *vide* final order dated 16.04.2014. The order dated 16.4.2014 is quoted below:

> "*Intervention application is allowed.....*
>
> *Heard the learned counsel.*
>
> *Upon hearing the learned counsel and looking at the impugned judgment, we see no reason to interfere with the said judgment and, therefore, confirm the same. The civil appeals are dismissed.*
>
> *However, we direct that for a period of three months, the impugned tariff, which is in force as on today, shall continue. Within the said period, TRAI shall look into the matter de novo, as directed in the impugned judgment, and shall re-determine the tariff after hearing the contentions of all the stake holders.*
>
> *There shall be no order as to costs."*

6. Meanwhile the following developments had also occurred:

a) Direct to Home ("DTH") service was introduced, and the Authority vide amendments dated 03.09.2007 (w.e.f. 01.12.2007) amended the Interconnect Regulation 2004 to include DTH service as well. Though there was no maximum price ceiling fixed for DTH service for either ordinary or commercial subscribers (the Principal CAS Tariff Order covered DTH as well), the clause 13.2A in the Interconnect Regulation 2004 providing for "Reference Interconnect Offers for direct to home service" was amended vide Amendment order dated

17.03.2009, namely the Telecommunication (Broadcasting and Cable Services) Interconnection (Fifth Amendment) Regulations, 2009; to provide for a distinction between the Aforesaid Three Categories of Hotels and other commercial subscribers. It allowed broadcasters to have a different RIO for the Aforesaid Three Categories of Hotels.

b) Thereafter digital addressability was introduced - initially in the metropolitan cities (Phase-I) and later extended to certain other cities as well (Phase-II). Phase III is to be implemented by 30.09.2014 and Phase IV (which will cover all of India) by 31.12.2014.

c) The Authority issued the Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable Systems) Tariff Order, 2010 dated 21.07.2010 which covers all addressable systems (digital cable, DTH etc.) (hereinafter referred to as the "Principal Addressable (Digital) Tariff Order") and the Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulations, 2012 dated 30.04.2012 which covers digital addressable cable specifically (hereinafter referred to as the "Principal Digital Addressable Interconnection Regulation") .

d) The Principal Addressable (Digital) Tariff Order does not fix a maximum retail price that subscribers have to pay for pay channels. Further, it does not contain any provision with respect to commercial cable subscribers.

e) The Principal Digital Addressable Interconnection Regulation covers digital addressable cable television systems, and it continues to make a distinction vis-à-vis the Aforesaid Three Categories of Hotels and other commercial cable subscribers; similar to the provision contained with respect to DTH service in the Interconnect Regulation 2004.

f) In spite of the Principal Non-CAS Tariff Order clearly providing that other commercial cable subscribers than the Aforesaid Three Categories of Hotels, are treated the same as ordinary subscribers and are protected by maximum price ceiling on cable tariff, it was found that the broadcasters were demanding charges even from such subscribers who were members of FHRAI i.e. Restaurants and non-heritage hotels having a star rating lower than three and less than 50 rooms. Thus, the sister concern of FHRAI, HRAWI filed petitions being Petition No. 111 (C) 2011 and others before the TDSAT along with some of such members. The TDSAT vide judgment dated 07.07.2011 in the aforementioned petition (copy enclosed as **Annexure D**) held that the actions on the part of the broadcasters/agents in

sending notices and taking coercive actions against the hotels/restaurants was illegal, and further observed that the broadcasters chose not to proceed against their respective MSO and targeted only the subscriber. The TDSAT also noted that restaurants and hotels have no way of knowing who is an authorised distributor or the broadcaster and further directed the broadcasters to notify their authorised distributors of TV channels within four weeks from date.

g) The Hotels in Non-CAS areas were once again constrained to approach the TDSAT with HRAWI by Petition No. 396 (C) of 2012 and other petitions. This time it was the hotels falling in the Aforesaid Three Categories of Hotels that were constrained to approach the TDSAT as it was found that in non-CAS areas the broadcasters were proceedings against them by causing disconnection/ sending demand notices for exorbitant sums as well as filing criminal complaints on not being paid such exorbitant sums. HRAWI pointed out that broadcasters cannot be permitted to prevent LCOs/MSOs from supplying signal to hotels altogether, particularly having regard to the fact that due to lack of addressability hotels do not have any choice but to take whatever signal is being supplied by their LCO. It was further pointed out that the broadcasters are even preventing DTH Operators from supplying signal to such hotels, and as such the hotels are left with no choice but to either pay the exorbitant sums demanded or to forgo receipt of any signal at all. The TDSAT disposed of the said Petitions by the following order dated 04.09.2013 (copy enclosed as **Annexure E**):

> "*After the matter was heard for some time, counsel representing the broadcasters namely, i) Mr. N. Ganpathy appearing for ESPN Software India Pvt. (Respondent No.9); (ii) Mr.Tejveer Singh Bhatia appearing for Media Pro Enterprise India Pvt. Ltd. and Zee Entertainment Enterprises Ltd. (Respondent No.1 & 3 respectively); (iii) Mr. Abhishek Malhotra appearing for [sic MSM] Discovery Pvt. Ltd. (Respondent No.8); and (iv) Mr. Nitin Sharma appearing for Star India Pvt. Ltd. (Respondent No.2) state that as long as the DTH operators and the Multi System Operators make payments to the broadcasters at the rates, for excluded commercial consumers as shown on the broadcasters' websites and submitted to the TRAI or at any lower rates as mutually agreed between the broadcasters and the DTH operators or the Multi System Operators as the case may be, the DTH operators and the Multi System Operators will be free to negotiate the rates at which they would supply the channels to the petitioners.*

This, to a large extent, redresses the petitioners' grievance. It needs, however, to be clarified here that the petitioners shall not be compelled to take the full bouquets of any broadcaster/DTH Operator/Multi System Operator and it will be open to the petitioners to take only the channels of their choice and to pay for it at rates mutually agreed between the petitioners and the distributors as provided in the regulations relating to a-la-carte channels.

In case the petitioner(s) make a request to any broadcaster to furnish to them the names of the DTH Operators/Multi System Operators/Local Cable Operators directly authorized by the broadcaster for any particular area or territory, the broadcaster should give the necessary information to the petitioner(s) without objection.

These petitions stand disposed of with the aforesaid observations and directions."

III. SUMMARY OF THE POSITION IN LAW:

II.A Non-CAS/Analog:

7. The Principal Non-CAS Tariff Order makes a distinction with respect to the cable tariff payable by the Aforesaid Three Categories of Hotels and all other commercial cable subscribers. The relevant clauses are quoted below (as amended till date):

"2. Definitions: …

[1]{(f) 'Charges' means and includes

[2][(i) in respect of broadcasting and cable services provided to all ordinary cable subscribers and commercial cable subscribers except those specified in (ii) below, the rates (excluding taxes) payable by one party to the other by virtue of the written/ oral agreement prevailing on the 1st day of December, 2007. The principle applicable in the written/ oral agreement prevailing on the 1st day of

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[1] Sub-clause (f) substituted vide Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Seventh Amendment) Order 2006, (8 of 2006) dated 21.11.2006 from date of publication.

Earlier: *"(f) 'Charges' means*

(i) for all others except commercial cable subscribers, the rates (excluding taxes) payable by one party to the other by virtue of the written/oral agreement prevalent on 26th December 2003. The principle applicable in the written/oral agreement prevalent on 26th December 2003, should be applied for determining the scope of the term "rates"

(ii) for commercial cable subscribers, the rates (excluding taxes) payable by one party to the other by virtue of the written/oral agreement prevalent on 1st March 2006. The principle applicable in the written/oral agreement prevalent on1st March 2006, should be applied for determining the scope of the term "rates"."

Substituted vide Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Fourth Amendment) Order 2006, (2 of 2006) dated 7.3.2006 2006 w.e.f. from date of publication.

Still earlier: *"(f) "charges" means and includes the rates (excluding taxes) payable by one party to the other by virtue of the written/oral agreement prevalent on 26th December 2003. The principle applicable in the written/oral agreement prevalent on 26th December, 2003, should be applied for determining the scope of the term "rates"."*

[2] Substituted vide Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order, 2007 dated 4.10.2007 w.e.f. 1.12.2007.

Earlier: *"(i) for all ordinary cable subscribers and commercial cable subscribers except those specified in (ii) below, the rates (excluding taxes) payable by one party to the other by virtue of the written/oral agreement prevalent on 26th December, 2003. The principle applicable in the written/oral agreement prevalent on 26th December 2003, should be applied for determining the scope of the term "rates"."*

December, 2007, should be applied for determining the said rates.]

(ii) [3][in respect of broadcasting and cable services provided to hotels] with a rating of three star and above, heritage hotels (as described in the guidelines for classification of hotels issued by Department of Tourism, Government of India) and any other hotel, motel, inn, and such other commercial establishment, providing board and lodging and having 50 or more rooms, the charges specified in (i) above shall not be applicable and for these subscribers the charges would be ***as mutually determined by the parties****.*

Explanation [4][1]: It is clarified that in respect of programmes of a broadcaster, shown on the occasion of a special event for common viewing, at any place registered under the Entertainment Tax Law and to which access is allowed on payment basis for a minimum of 50 persons by the commercial cable subscribers, the tariff shall be as mutually determined between the parties.}
.....

3. Tariff:

The charges, excluding taxes, payable by

[5][(a) Ordinary cable subscribers and commercial cable subscribers (except hotels with a rating of three star and above, heritage hotels (as described in the guidelines for classification of hotels issued by Department of Tourism, Government of India) and any other hotel, motel, inn, and such other commercial establishment, providing board and lodging and have 50 or more rooms) to cable operators, multi system operators or broadcasters as the case may be]

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[3] Substituted vide Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order, 2007 dated 4.10.2007 w.e.f. 1.12.2007.

Earlier: "*for hotels*"

[4] Re-numbered Expln 1 vide Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order, 2007 dated 4.10.2007 w.e.f. 1.12.2007.

[5] Sub-clause (a) substituted vide Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Seventh Amendment) Order 2006, (8 of 2006) dated 21.11.2006 w.e.f. date of publication.

Earlier: "*(a) Ordinary cable subscribers to cable operator*"

Substituted vide Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Fourth Amendment) Order 2006, (2 of 2006) dated 7.3.2006 2006 w.e.f. from date of publication.

Still Earlier: "*(a) Cable subscribers to cable operator*;"

(b) Cable operators to multi system operators/ broadcasters (including their authorised distribution agencies); and

(c) Multi system operators to broadcasters (including their authorised distribution agencies)

[6]*[prevalent as on 1st day of December, 2007, and increased by an amount not exceeding four per cent. shall be the ceiling,*

(A) with respect to both free to air and pay channels transmitted or retransmitted by multi system operators to cable operators, and by multi system operators and cable operators to subscribers referred to in sub-clause (a) above;

(B) in respect of bouquets of channels (consisting only of pay channels or both pay and free to air channels) and stand-alone channels not forming part of any bouquet transmitted by broadcasters to multi system operators, cable operators and to subscribers referred to in sub-clause (a) above]

[7]*{Explanation 1: The four per cent. increase referred above shall not apply in cases where the charges, existing as on the 26th December, 2003 as enhanced by 7% permitted with effect from 1st day of January, 2005, have been further increased by four per cent. [being the four per cent. ceiling referred to in clause 3, (as it stood before its amendment by the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order, 2007)] after the 21st December, 2006}*

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[6] Substituted vide Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order, 2007 dated 4.10.2007 w.e.f. 1.12.2007.

Earlier: "*prevalent as on 26.12.2003 as enhanced by 7% permitted w.e.f. 1.1.2005 plus 4% on such enhanced charges w.e.f. 1.1.2006 shall be the ceiling with respect to both free-to-air and pay channels*" Substituted vide Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Third amendment) Order 2005, (8 of 2005) dated 29.11.2005 w.e.f. 1.1.2006.

Still Earlier: "*prevalent as on 26.12.2003 plus 7% shall be the ceiling*"

Substituted vide Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Second amendment) Order 2004.(8 of 2004) dated 1.12.2004 w.e.f. 1.1.2005.

Originally: "*prevalent as on 26th December 2003 shall be the ceiling*"

[7] Expln 1 inserted vide Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order, 2007 dated 4.10.2007 w.e.f. 1.12.2007.

[8]*{Explanation [9][2]: for the purpose of clause 3(a) above the question whether the commercial cable subscriber will pay the cable operator/multi system operator/the broadcaster will be determined by the terms of agreement(s) between the concerned parties, namely*

(i) broadcaster(s)

[10]*[(ii) MSO(s) and cable operator(s) who have been authorized to provide signals to the commercial cable subscribers*

iii) the commercial cable subscribers.]

Explanation [11][3]: for the purposes of clause 3(b) and (c) above the charges will be modified to take into account the payments to commercial cable subscribers where appropriate.}

[12]*[Provided that if any new pay channel(s) that is/are launched after the 1st day of December, 2007 or any channel(s) that was/ were free to air channel on the 1st day of December, 2007 is/are converted to pay channel(s) subsequently, then the ceiling referred to as above can be exceeded, but only if the new*

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[8] Inserted vide Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Seventh Amendment) Order 2006, (8 of 2006) dated 21.11.2006 with effect from date of publication.

[9] Expln 1 & 2 re-numbered as 2 & 3 respectively vide Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order, 2007 dated 4.10.2007 w.e.f. 1.12.2007.

[10] Substituted vide Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order, 2007 dated 4.10.2007 w.e.f. 1.12.2007.

Earlier: "*(ii) MSO(s) and cable operator(s) who have been authorized to provide signals to the commercial cable subscribers on the one hand, and the commercial cable subscribers on the other.*"

[11] Expln 1 & 2 re-numbered as 2 & 3 respectively vide Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order, 2007 dated 4.10.2007 w.e.f. 1.12.2007.

[12] Substituted vide Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order, 2007 dated 4.10.2007 w.e.f. 1.12.2007.

Earlier: "*Provided that if any new pay channel(s) that is/are introduced after 26-12-2003 or any channel(s) that was/were free to air channel on 26-12-2003 is/are converted to pay channel(s) subsequently, then the ceiling referred to as above can be exceeded, but only if the new channel(s) are provided on a stand alone basis, either individually or as part of new, separate bouquet(s) and the new channel(s) is/are not included in the bouquet being provided on 26.12.2003 by a particular broadcaster. The extent to which the ceilings referred to above can be exceeded would be limited to the rates for the new channels. For the new pay channel(s) as well as the channel(s) that were free to air as on 26.12.2003 and have subsequently converted to pay channel(s) the rates must be similar to the rates of similar channels as on 26.12.2003.*"

channel(s) are provided on a stand alone basis, either individually or as part of new, separate bouquet(s). The extent to which the ceilings referred to above can be exceeded would be limited to the rates for the new channels. For the new pay channel(s) as well as the channel(s) that were free to air as on the 1st day of December, 2007 and have subsequently converted to pay channel(s) the rates must be similar to the rates of similar channels existing as on the 1st day of December, 2007 and/ or on the date of such launching of new channel or such conversion of free to air channel into a pay channel;]

Provided further that in case [***][13] a multi system operator or a cable operator reduces the number of pay channels that were being [14][shown on the 1st day of December, 2007], the ceiling charge shall be reduced taking into account the rates of similar channels [15][as on the 1st day of December, 2007 and/ or existing as on the date of such reduction in the number of pay channels].

[16][Provided further that in the case of a commercial cable subscriber, the charges in respect of whom by virtue of clause 2(f)(ii) read with clause 3(a), is determinable as per mutual agreement between the parties, having facilities to get broadcasting services directly from the broadcaster, the later shall at the option of the commercial cable subscriber be obliged to provide channels on ala carte basis. For such consumers whenever bouquets are offered, these shall be subject to the following conditions:

I The maximum retail price of any individual channel shall not exceed three times the average channel price of the bouquet of which it is a part;

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[13] The words "a broadcaster or" deleted vide Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order, 2007 dated 4.10.2007 w.e.f. 1.12.2007.

These words had been inserted by the Telecommunication (Broadcasting and Cable Services (Second) Tariff (First amendment) Order 2004.(7 of 2004) dated 26.10.2004 with effect from date of notification.

[14] Substituted vide Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order, 2007 dated 4.10.2007 w.e.f. 1.12.2007.

Earlier: "*shown on 26.12.2003*"

[15] Substituted vide Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order, 2007 dated 4.10.2007 w.e.f. 1.12.2007.

Earlier: "*as on as on 26.12.2003*"

[16] Inserted vide Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Seventh Amendment) Order 2006, (8 of 2006) dated 21.11.2006 w.e.f. date of publication.

Explanation: if the maximum retail price of a bouquet is Rs."X" per month and the number of channels is "Y" then the average channel price of the bouquet is Rs. X divided by Y

II The sum of the individual maximum retail prices of the channels shall not be more than 150% of the maximum retail price of the bouquet.]

[17]*[Provided also that the charges referred to in sub-clause (a) above shall in no case exceed the maximum amount of charges specified in the Part I or Part II, as the case may be, of the Schedule annexed with this Order.]"* [Emphasis supplied]

II.B <u>Direct to Home service [DTH]</u>

8. There is no maximum price ceiling fixed in DTH for domestic or commercial cable subscribers. The relevant provision in the Interconnect Regulation 2004 for DTH however recognises the distinction between the Aforesaid Three Categories of Hotels and all other subscribers as follows:

"13.2A Reference Interconnect Offers for direct to home service.

13.2A.1 Every broadcaster, providing broadcasting services before the date of commencement of the Telecommunication (Broadcasting and Cable Services) Interconnection (Fifth Amendment) Regulation, 2009 (4 of 2009) and continues to provide such services after such commencement shall, within thirty days from the date of such commencement, intimate to all the direct to home operators existing on that date and coming into existence within the said period of thirty days, its Reference Interconnect Offer specifying, inter-alia, the technical and commercial terms and conditions for interconnection for the direct to home platform, including the terms and conditions listed in Schedule-III to these regulations.

<u>Provided that no broadcaster shall, directly or indirectly, compel any direct to home operator not to make available its direct to home service to any class of subscribers including commercial subscribers.</u>

<u>Provided further that a broadcaster may have a different Reference Interconnect Offer for supply of signals by the direct to home operators----</u>

[17] Inserted vide Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order, 2007 dated 4.10.2007 w.e.f. 1.12.2007.

(a) to the following categories of commercial subscribers, namely:-

(i) hotels with rating of three star and above;

(ii) heritage hotels (as described in the guidelines for classification of hotels issued by Department of Tourism, Government of India);

(iii) any other hotel, motel, inn, and such other commercial establishment providing board and lodging and having fifty or more rooms; and

(b) in respect of programmes of such broadcaster, shown on the occasion of a special event for common viewing, at any place registered under the Entertainment Tax Law and to which access is allowed on payment basis for a minimum of fifty persons.

Explanation: For removal of doubts, it is clarified that the reference interconnect offer containing various terms and conditions including commercial terms, published by a broadcaster for provision of signals to ordinary subscribers shall apply to provision of signals to commercial subscribers not specified in the second proviso."

9. Thus, while broadcasters are enjoined under the DTH regime from preventing any DTH operator from supplying signal to any class of commercial subscriber, they are permitted to have a different RIO with respect to the Aforesaid Three Categories of Hotels alone.

II.C Digital Addressable Cable System [DAS]

10. Like DTH, there is no maximum price ceiling fixed in DAS for domestic or commercial cable subscribers. However the, relevant provision in the Principal Digital Addressable Interconnection Regulation (like for DTH) recognises the distinction between the Aforesaid Three Categories of Hotels and all other subscribers as follows:

"4. General Provisions relating to Reference Interconnection Offer.—

(1) Every broadcaster shall, within thirty days of commencement of these regulations, submit to the Authority its Reference Interconnect Offer specifying the technical and commercial terms and conditions including the terms and conditions as mentioned in Schedule II of this regulation and publish it on its website.

Provided that a broadcaster may submit different interconnect offers for different types of digital addressable system.

(2) No broadcaster shall, directly or indirectly, prohibit any digital addressable cable TV system operator from providing its services to any subscriber.

(3) A broadcaster may specify different Reference Interconnect Offers for supply of signals by the multi system operators to different categories of commercial subscribers such as –

(a) hotels with rating of three stars and above;

(b) heritage hotels, as specified in the guidelines for classifications of hotels issued by the Department of Tourism, Govt. of India ;

(c) any other hotel, motel, inn and other commercial establishments providing boarding and lodging having fifty or more rooms ; and

may also specify different reference interconnect offers for programmes telecast on the occasion of special events and viewed on payment basis by fifty persons or more at a place registered under the applicable law for such viewing:

Provided that the Reference Interconnect Offer applicable for ordinary subscriber shall also apply for the commercial subscribers other than those specified in this sub-regulation.

(4) Every broadcaster shall modify their existing Reference Interconnect Offer within thirty days of commencement of these regulations so as to bring them in conformity with provisions of these regulations.

(5) Any broadcaster, who begins its operation after the commencement of these regulations, shall, thirty days prior to commencement of its operations, submit to the Authority its Reference Interconnect Offer and publish such offer on its website.

(6) Every broadcaster shall submit to the Authority within seven days any amendment made in its Reference Interconnect Offer and simultaneously publish such amendments on its website in the same manner in which the original Reference Interconnect Offer was published.

(7) Every multi system operator shall, within thirty days from the date of commencement of these regulations publish its Reference Interconnect Offer specifying the technical and commercial terms and conditions for providing access to its network by the broadcaster and submit a copy to the Authority.

(8) Every person or firm or company who begins its services as multi system operator shall, before providing its services, publish its Reference Interconnect Offer specifying the technical and commercial terms and conditions for providing access to its network by the broadcaster and submit a copy to the Authority.

[(8A) Every Reference Interconnect Offer submitted to the Authority under sub-regulation (7) and sub-regulation (8) shall also contain the basis on which the carriage fee payable by the broadcaster has been determined.][18]

(9) The Authority may, in order to protect the interest of the consumer and the service provider and to promote and ensure orderly growth of broadcasting and cable services, direct the service provider to modify its Reference Interconnect Offer." [Emphasis supplied]

[18] Inserted vide Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) (First Amendment) Regulations, 2012 dated 14.5.2012.

IV.RESPONSE TO ISSUES/ SUGGESTIONS:

11. It is submitted that the Authority is well aware that the monopolistic practices of the broadcasters towards other players in the field has been one of the major issues that have required intervention and regulation on behalf of the Authority. FHRAI would like to submit that its members have also been suffering from these practices.

12. Hotels and restaurants are subscribers and consumers of cable signal and are entitled to have the protection of the Authority as a regulator like any other class of consumers.

13. A hotel or a restaurant does not have any better level playing field merely by virtue of being a commercial cable subscriber, than any other subscriber. In fact for such establishments and more so for hotels, it is considered essential to be receiving a reasonable bouquet of popular channels. Thus, it is not a matter of choice, as far as this category of commercial subscribers is concerned, whether or not to subscribe to signal; as opposed to other categories of commercial subscribers, such as airports or shopping malls, that are not necessarily expected to have television screens.

14. Following is the response of FHRAI to the Issues in the Consultation Paper issued by TRAI dated 11th June, 2014. Also set put below are the additional issues with respect to hotels and restaurants as commercial cable subscribers that FHRAI requests the Authority to consider and address:

1. Do you agree with the definitions of "commercial establishment", "shop" and "commercial subscriber" as given in para 1.23?

2. If the answer is in the negative, alternate definitions with proper justification may be suggested.

15. FHRAI suggests that the Authority consider all subscribers as the same and only makes an exception with respect to tariff for those subscribers who sell admission tickets and thus make commercial gains by the broadcast. It cannot be denied that the product being supplied by the broadcasters and the cost to the broadcaster is the same irrespective of who receives the signal. There is no reason to make any distinction between the different categories of subscribers. Unlike electricity or other products, there is no subsidy to ordinary consumers which has to be made up by higher charges to other customers.

16. The distinction, as stated above, is not sustainable and is not even free from doubt. Taking an instance, if a person takes paying

guests and allows the paying guest to watch his own TV, would such a person be a commercial consumer or residential. If some person calls his friends home whenever there is a cricket match, would he be a commercial subscriber or an ordinary subscriber. How does one categories government offices and waiting rooms where a TV set is placed?

3. Do you agree that further sub-categorizing the commercial subscribers into similarly placed groups may not be the way to proceed? In case the answer is in the negative, please give details as to how the commercial subscribers can be further sub-categorised into similarly placed groups along with full justifications.

17. FHRAI feels that there is only one product being sold/provided and thus, there should be no categories and sub categories. Only distinction that can be made is in case any establishment charges entry fee for watching the broadcast.

4. Which of the models, discussed in para 1.27 above, should be prescribed for distribution of TV signals to the commercial subscribers? Please elaborate your response with justifications. Stakeholders may also suggest any other model with justifications.

18. FHRAI in the first instance submits that there be no distinction between different categories of subscribers. All subscribers should be prohibited from re-transmitting the signal. This by itself would be adequate. In case any subscriber wants to sell entry tickets to public, they should need separate licence and should pay a higher tariff as fixed by the Authority.

19. In the alternative, and without prejudice to the above, FHRAI requests the Authority NOT to consider Model 1. Model 2 and 3 are slightly better. The discussion and justification for the same is given below:

4.1 Broadcasters do not permit DPOs to supply signal to any hotels/restaurants.

20. In fact, This is one of the important issues that FHRAI desires to highlight to the Authority i.e. one of the major problems being faced by hotels and restaurants is that broadcasters do not permit any platform operators – Local Cable Operators (LCOs), Multi-System Operators (MSOs) and DTH service providers - to supply signals to hotels, and more so those hotels falling in the Aforesaid Three Categories of Hotels. This is in spite of the fact that with respect to DTH and digital cable, there are specific provisions in the respective

DTH and Digital Cable Interconnection Regulations prohibiting broadcasters from doing so. The relevant provisions are quoted below:

(a) Interconnect Regulation 2004 (for DTH):

> *"13.2A Reference Interconnect Offers for direct to home service.*
>
> *13.2A.1 …*
>
> *Provided that no broadcaster shall, directly or indirectly, compel any direct to home operator not to make available its direct to home service to any class of subscribers including commercial subscribers."*

(b) Principal Digital Addressable Interconnect Regulation (for DAS):

> *"4. General Provisions relating to Reference Interconnection Offer. -*
>
> *(1) …*
>
> *(2) No broadcaster shall, directly or indirectly, prohibit any digital addressable cable TV system operator from providing its services to any subscriber."*

21. Even the scheme of the Orders and Regulations formulated and stipulated by the Authority is very clear as to the supply chain-link wherein broadcasters do not have any privity of contract with the subscribers.

22. Hotels and restaurants, as subscribers are expected to be able to obtain signal conveniently by contacting the relevant platform operator. This is clearly the intention behind the Authority introducing the afore-quoted prohibition specifically. Yet, unfortunately it is found that hotels are continually harassed by/at the instance of broadcasters in this regard.

23. Broadcasters file criminal complaints against hotels, prevail upon the platform operators not to supply signal to or to disconnect signal to hotels/restaurants, and broadcasters even file civil suits alleging copyright infringement and obtain ex-parte ad interim injunctions against hotels with permission to the broadcaster/Plaintiff to enter premises of the hotels with a Local Commissioner appointed by the Court along with police officials to implement such ex-parte orders. These have very serious repercussions on the reputation and goodwill of the hotel/restaurant.

24. This is in spite of the fact that a hotel is validly taking signal through a cable operator/MSO that has duly represented that he has the authority to supply the signal to the hotel. Needless to state hotels have no privity with the broadcasters and no way of knowing who are the authorised or the unauthorised platform operator for a particular channel. When they take signal from a Local Cable operator, it is with the assurance that such LCO has the due authorisation to supply such signal. Here, it may also be pointed out that in spite of directions from the Hon'ble TDSAT in its judgment dated 07.07.2011 in Petition No. 111(C) of 2011 as well as in its judgment dated 04.09.2013 in Petition No. 396(C) of 2013, to provide their list of authorised platform operators; no such list has been published by the broadcasters.

25. FHRAI/and its sister concerns have time and again had to approach the courts/TDSAT to emphasise this issue, and the TDSAT has also observed that if an unauthorised platform operator is supplying signal to any subscriber, the remedy is always available to the broadcaster to take action against the erring platform operator. However, in practice it is found that the broadcasters invariably proceed against the hotels, whom they apparently find soft targets. [Please refer observations as contained in Para 56 of the judgment of the TDSAT dated 07.07.2011 in Petition No. 111 (C) 2011 - *Hotel Airlines International* vs. *Telecom Regulatory Authority of India*.]

26. It appears that the broadcasters have a standard clause in their agreements with platform operators which purport to prevent the platform operators from supplying signal to commercial subscribers. This is clearly illegal and contrary to the Authority's' mandatory afore-quoted direction. It is requested that the Authority must come down heavily on the broadcasters in this regard and emphasise that such clauses and are not to be retained/ permitted.

27. In practice it is found that on the basis of such clauses the broadcasters insist that any receipt of signal by hotels through a platform operator is illegal and insist that the hotels approach the broadcaster and pay monies to them directly (over and above the charges already being paid by hotels to their respective service provider). Once such monies are paid, the broadcasters take a stand that the very same cable operator/MSO who they were alleging was unauthorised, becomes authorised to supply the signal. Thus, they selectively treat a LCO/MSO/DTH operator as authorised or unauthorised vis-à-vis a commercial subscriber depending on whether or not the subscriber has paid them directly. While it may be clarified that the FHRAI does not support piracy and is not in the least suggesting that hotels may be permitted to receive signals from a cable operator who is genuinely not authorised to receive/supply a particular broadcasters' channels; but this kind of pick and choose authorisation is a complete subversion and by-passing of the mandatory must-supply obligations that the Authority has placed on

the service providers i.e. the broadcasters and the platform operator alike.

28. There are sufficient safeguards provided by the Authority against piracy of broadcasters' signals, and in the event that an unscrupulous person is illegally distributing broadcasters' signal, it is also open to such broadcaster to file civil or criminal action against such platform operator under the Copyright Act, 1957 (hereinafter referred to as "Copyright Act"). However, neither the Copyright Act nor the Authority's regulations/orders envisage targeting of unsuspecting subscribers who may be in receipt of such signal.

29. Thus, it is of the utmost significance that this Authority clarifies that hotels and other commercial cable subscribers are under no obligation to pay anything to the broadcasters directly and are free to take signal from their immediate service provider. It is suggested that the prohibition quoted hereinabove may be made stronger by specifying in the respective Tariff Orders/ Interconnect Regulations, that there is no bar against any commercial subscribers taking signal from any authorised DTH operator/ Cable operator or MSO, and commercial subscribers are not required to approach broadcasters directly if they are taking signal from a platform operator.

30. Also, as regards non-CAS areas, (which is still holding the field in parts of the country) the prohibition clause is altogether missing. Thus, it is requested that the same be introduced in the relevant clause 13 ("Reference Interconnect Offers for non-addressable systems") of the Interconnect Regulation 2004 prohibiting broadcasters from restraining the cable operator from providing its services to any subscriber. Also further protection should be provided in the non-CAS regime, along the lines suggested hereinabove for DTH and DAS.

31. It may be further clarified if the Authority deems necessary that commercial subscribers that choose to have their own equipment to receive signals directly may enter into agreements with the broadcasters directly. This would take care of the situation prevailing with some of the larger hotel chains that have the ability to install and operate their own head-end and have direct agreements with the broadcasters.

4.2 No RIO for commercial subscribers

32. While the Association is in favour of requiring the DPO and broadcaster publishing its commercial tariff, the Association requests the Authority to consider removing the term RIO in this context as it is misleading and unnecessarily creates ambiguity regarding the status of a commercial subscriber as a subscriber and a consumer, and would run counter to the judgment of the Hon'ble Supreme Court in

the case of HRAWI vs. Star India, (2006) 13 SCC 753 [supra]. Hotels and restaurants are not retransmitting or distributing the signal any further. They are consuming it themselves. It is submitted that since a hotel is a consumer there is no question of it entering into any kind of "interconnect" agreement. Even at present all subscribers are negotiating the tariff and receiving signal on that basis from the DPO, without entering into any kind of RIO.

33. Thus, in conclusion, the Association requests the Authority to not make any distinction between different categories of hotels. In the alternative, if the Authority does not accept this, FHRAI considers the second or the third model suggested in para 1.27; however, with the removal of the term "RIO" and substituting it with a requirement of publishing the tariff/rates.

4.3 Additional Issue: Broadcasters' claim for separate charges from hotels purportedly under the Copyright Act:

34. Another important issue that FHRAI would like to highlight is the practice of broadcasters of purportedly proceedings separately under the Copyright Act, 1957 to demand charges from hotels/restaurants.

35. Hotels are frequently being harassed at the instance of broadcasters by filing suits against named and unnamed hotels; by clubbing them with cable operators and MSOs - around the time of popular events such as Cricket tournaments; alleging infringement of their copyright or broadcast reproduction right under the Copyright Act. The broadcasters allege infringement of its copyright with respect to the specified events that may be shown on a channel and infringement of the broadcast reproduction right with respect to the broadcast of their channel. They plead that since the events are coming up and there is no way of knowing which hotels are and which hotels are not receiving signal, an 'Ashok Kumar' or 'John Doe' injunction order be passed authorising them to proceed against any hotel (even those not named as defendants). On this basis, Broadcasters on the first day of hearing, obtain ex-parte ad interim orders prohibiting all hotels from showing certain channels and/or certain events. Such orders also provide for appointment of court Commissioners who are authorised to visit the premises of any of the hotels with police officials to ascertain whether the channel/event is being shown in the premises of the establishment. The broadcasters' representatives then demand payment of "licence fees" to allow the hotel/restaurant to continue to receive the channel. This, naturally, results in grave embarrassment and serious loss to the hotels/restaurants.

36. On being informed that the establishment has been receiving cable from a LCO who has represented to them that it is authorised to

receive signal, the broadcasters take the stand (as discussed in the foregoing section) that no cable operator is authorised to supply their signal to a hotel.

37. Usually in such cases, after the event is over, the broadcasters simply withdraw the suits, only to file another suit the following year when the same event is about to be broadcast. Below is a table containing a list of the various cases filed by the Broadcasters, wherein ex-parte interim orders were obtained and thereafter, the suit was withdrawn.

Sl. No.	**Case Number**	**Date of the Order**	
		Allowing Injunction	**Permitting Withdrawal of Suit**
1.	FAO (OS) 211/2010 *MSM Satellite Singapore Pte. Ltd.* v. *Star Cable Network & Ors.* in respect of CS (OS) 560/2010	01.04.2010	-
	CS (OS) 560/2010 *MSM Satellite (Singapore) Pte. Ltd.* v. *Gujarat Telelink Pvt. Ltd. & Ors.*		16.12.2010
2.	CS (OS) 384/2011 *ESPN Software India Private Limited* v. *M/s Tudu Enterprises and Ors.*	18.02.2011	12.12.2011
3.	CS(OS) 2877/2012 *ESPN Software India Pvt. Ltd.* v. *Sky World Communication & Ors.*	19.09.2012	21.02.2014
4.	CS (OS) 853/2013 *MSM Satellite (Singapore) Pte. Ltd. and Anr.* v. *P. M. Network and Ors.*	08.05.2013	21.05.2014
5.	CS (OS) 374/2014 *Star Sports India Pvt. Ltd.* v. *Mr. Rajendra Kumar Gambhir & Ors.*	07.02.2014	15.04.2014
6.	CS (OS) 412/2014 *Star Sports India Pvt. Ltd.* v. *Mr.*	12.02.2014	02.05.2014

Sl. No.	Case Number	Date of the Order	
		Allowing Injunction	Permitting Withdrawal of Suit
	R. P. Mishra & Ors.		
7.	CS (OS) 411/2014 *Star Sports India Pvt. Ltd.* v. *Mr. Bikram Singh & Ors.*	12.02.2014	02.05.2014

Copies of some ex-parte orders and withdrawal orders passed in suits filed by broadcasters are enclosed herewith as **Annexure F**.

38. Further, below is a table containing a list of various suits (of the nature explained above) filed by the Broadcasters and that are pending adjudication.

Sl. No.	Name of the Matter	Date of order allowing interim injunction	Status
1.	CS(OS) 145/2014 *MSM Satellite Singapore Pte. Ltd. & Ors.* v. *Ashok Country Resort and Ors.*	17.01.2014	PENDING Next date: 14.08.2014
2.	CS (OS) 349/2014 *Star Sports India Pvt. Ltd.* v. *Jagjit Singh Kohli & Ors.*	05.02.2014	PENDING Next date: 13.08.2014 (Service to certain Defendants continues to be pending)
3.	CS (OS) 373/2014 *Star Sports India Pvt. Ltd.* v. *Mr. Sudhir Sinha & Anr.*	07.02.2014	PENDING Next date: 13.08.2014 (Impleadment of proper defendants is pending)
4.	CS (OS) 592/2014 *Star Sports India Pvt. Ltd. & Anr.* v. *Digi Cablecomm Services Pvt. Ltd. & Ors.*	26.02.2014	PENDING Next date: 14.08.2014
5.	CS (OS) 1080/2014 *Multi Screen Media Pvt. Ltd.*	21.04.2014	PENDING Next date:

	& Anr. v. *Abhi Cable Network & Ors.*		14.08.2014

39. The Association has filed application for intervention in three such pending suits before the Hon'ble Delhi High Court – two filed by MSM and one by Star Sports, namely, (i) *MSM satellite (Singapore) Pte. Ltd. & Ors.* v. *Ashok Country Resorts & Ors.* - CS (OS) 145 of 2014, (ii) *Star Sports India Pvt. Ltd. & Anr.* v. *Digi Cablecomm Services Pvt. Ltd. & Ors.* - CS (OS) 592/2014, and (iii) *Multi Screen Media Pvt Ltd and Anr.* v. *Abhi Cable Network and Ors.* – CS (OS) 1080 of 2014.

40. It is submitted that this modus operandi on the part of the broadcasters is clearly contrary to and violative of the entire objective and purpose of bringing broadcasting and cable under the ambit of the TRAI Act and within the regulatory powers of the Authority. To seek to demand payments separately from commercial subscribers under the guise of the Copyright Act is nothing but subverting and circumventing the mandatory provisions of the TRAI Act and the various orders and regulations issued by the Authority thereunder.

41. It stands to reason that copyright is always payable by the person who is supplying/ distributing/ commercially exploiting the copyrighted material. It is submitted that clearly hotels and restaurants (who are recognised as subscribers and consumers of signal) that receive signal at their premises and do not charge anything separately from their guests; therefore, cannot be considered as falling in that category and as such there is no question of them seeking licences from copyright owners or paying royalties with respect to whatever copyrighted works may be comprised in a particular channel. The position of law on the subject is discussed hereinbelow:

4.3.1 Copyright:

42. It is submitted that the neither provisions of the Copyright Act, nor the Cable Television Networks (Regulation) Act, 1995 nor the Cable Television Networks Rules, 1994 [hereinafter collectively referred to as "CTN Act/Rules"], nor the TRAI Act and Orders/Regulations of the Authority thereunder recognise or envisage any liability on a subscriber of a signal to pay any kind of royalty vis-à-vis copyright. On the contrary they provide otherwise. All these laws place the burden of royalty/ licence fees on the distributor of signal i.e. the service provider. At this stage, it may be apposite to mention that the Supreme Court has also clarified the status of hotels and restaurants as subscribers/consumers and not distributors/broadcasters of signal [refer *Hotel & Restaurant Association & Anr.* case supra].

4.3.1.a Copyright Act:

43. The provisions of the Copyright Act when read as a whole make it abundantly clear that the scheme is to levy royalty on the person distributing or commercially exploiting the copyrighted work (i.e. a cinematograph film in the present case).

44. Section 2(ff) defines "communication to public" and is quoted below:

> " *"communication to the public" means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available.*
>
> *Explanation.- For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication* ***to more than one household or place of residence including residential rooms of any hotel or hostel*** *shall be deemed to be communication to the public;"* [Emphasis supplied]

45. Section 14 provides what constitutes a copyright and in so far as is relevant reads as follows:

> *"14. Meaning of copyright. - For the purposes of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:-*
>
> *(a) …*
>
> *(d) In the case of cinematograph film, -*
>
> *(i) to make a copy of the film, including a photograph of any image forming part thereof;*
>
> *(ii) to sell or give on hire, or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;*
>
> *(iii) to communicate the film to the public; …"*

46. Section 51 speaks of infringement and in so far as is relevant reads as follows:

> *"51. When copyright infringed. -Copyright in a work shall be deemed to be infringed-*

(a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act-

(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or

(ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright;"

47. On a conjoint reading of the aforesaid provisions it is clear that any liability with respect to cable television is on the person who is communicating the cable to the household, hostel or hotel i.e. the cable operator and not the subscriber.

4.3.1.b CTN Act/Rules:

48. Furthermore, even under the Cable Television Networks (Regulation) Act, 1995 the responsibility of obtaining copyright licence/permission is that of the service provider/platform operator i.e. the cable operator. Rule 6(3) of the Cable Television Networks Rules, 1994 reads as follows:

"(3) No cable operator shall carry or include in his cable service any programme in respect of which copyright subsists under the Copyright Act, 1957 (14 of 1957) unless he has been granted a licence by owners of copyright under that Act in respect of such programme."

4.3.1.c TRAI Act and Orders and Regulations thereunder:

49. It is submitted that the Regulations and orders of the Authority passed in exercise of its role as a Regulator under the TRAI Act already encompass the issue of copyright as well. The TRAI Regulations in fact have extensive provisions regarding anti-piracy obligations on the platform operator i.e. the DTH operator/MSO/LCO in the relevant Interconnect Regulations. It is but obvious that the monies paid by a LCO/MSO to a broadcaster as per the Interconnect Agreement are inclusive of any copyright charges and there is no question of anything over and above being paid by platform operators to broadcasters. It is submitted that the same principle applies equally to commercial cable subscribers. Thus, whatever charges are being paid by cable subscribers under their valid agreement to their

platform operator as provided under the TRAI's Regulations and Orders are inclusive of all charges payable, and there is no question of a subscriber being called upon to pay anything over and above that under the guise of copyright charges to the broadcasters directly.

50. Thus, it is submitted that the law is clear that hotels and restaurants (or any commercial subscribers for that matter) are not liable to pay copyright or broadcast reproduction right royalties.

51. The broadcasters however allege that royalty/licence fees for copyright is payable on the basis of each programme or event and for the broadcast reproduction right is payable on the basis of the channel.

52. Even in practical terms it stands to reason, that a hotel/restaurant as a subscriber of a channel has no control over the content shown on such channel, and thus cannot be expected to pay copyright charges for the same to an alleged owner of the copyright (broadcaster or producer as the case may be).

4.3.2 Broadcast Reproduction Right (BRR):

53. The above-mentioned principle applies even with greater force to the argument of the broadcasters with respect to BRR. It is simply absurd to suggest that a subscriber will have to chase down and pay a BRR owner each time a specific show or event is broadcast on his TV set (over which he has no control whatsoever). In fact the Authority has already taken care of BRR for special events in its Interconnect Regulations by making the following provisions:

(a) For Non-CAS:

Explanation to clause 2(f) defining "charges" in Tariff Order, 2004:

> *"Explanation 1: It is clarified that in respect of programmes of a broadcaster, shown on the occasion of a special event for common viewing, at any place registered under the Entertainment Tax Law and to which access is allowed on payment basis for a minimum of 50 persons by the commercial cable subscribers, the tariff shall be as mutually determined between the parties."*

(b) For DTH:

Proviso to Clause 13.2A of Interconnect Regulation, 2004:

"*Provided further that a broadcaster may have a different Reference Interconnect Offer for supply of signals by the direct to home operators----*

(a) …

(b) in respect of programmes of such broadcaster, shown on the occasion of a special event for common viewing, at any place registered under the Entertainment Tax Law and to which access is allowed on payment basis for a minimum of fifty persons."

(c) For DAS:

Clause 4(3) of the Digital Interconnect Regulation, 2012:

"*A broadcaster may specify different Reference Interconnect Offers for supply of signals by the multi system operators to different categories of commercial subscribers such as --*

(a) hotels with rating of three stars and above;

(b) heritage hotels, as specified in the guidelines for classifications of hotels issued by the Department of Tourism, Govt. of India ;

(c) any other hotel, motel, inn and other commercial establishments providing boarding and lodging having fifty or more rooms ; and

may also specify different reference interconnect offers for programmes telecast on the occasion of special events and viewed on payment basis by fifty persons or more at a place registered under the applicable law for such viewing:" [Emphasis supplied]

54. FHRAI is in complete agreement with same. The broadcasters seeking to extend it to receipt of signal by a restaurant in ordinary course (without charging anything to its guests for it) is clearly illegal and unreasonable.

55. The Copyright Act provides conditions for constituting infringement of BRR. These are provided in Section 37(3) of the Copyright Act and are quoted below:

"During the continuance of a broadcast reproduction right in relation to any broadcast, any person who, without the licence of

the owner of the right does any of the following acts of the broadcast or any substantial part thereof,-

(a) re-broadcasts the broadcast; or

(b) causes the broadcast to be heard or seen by the public on payment of any charges; or

(c) makes any sound recording or visual recording of the broadcast; or

(d) makes any reproduction of such sound recording or visual recording where such initial recording was done without licence or, where it was licensed, for any purpose not envisaged by such licence; or

(e) sells or hires to the public or offers for such sale or hire, any such sound recording or visual recording referred to in clause (c) or clause (d)

shall, subject to the provisions of section 39, be deemed to have infringed the broadcast reproduction right."

56. It is clear that the Copyright Act also envisages infringement of a BRR only when a special event is screened for payment of charges. A hotel/restaurant does not fall within any of the aforesaid categories. Thus, even on an analysis of the Copyright Act there is no infringement by a hotel/restaurant of a BRR. It may be reiterated here that the Supreme Court has already expressly held that a hotel/restaurant does not re-transmit signal to its guests [refer para 40 of *Hotel & Restaurant Association & Anr.* case supra].

57. It is clear from the aforesaid discussion that neither on a reading of the legal provisions nor having regard to the practicalities and industry practices, can commercial cable subscribers be held liable separately for payment of royalties under the Copyright Act; and the actions on the part of the broadcasters in filing civil suits and criminal complaints against hotels under the Copyright Act, are clearly *mala fide* and violative of the intent and objective of The TRAI Act and the orders and regulations of the Authority.

58. Thus, in view of the aforesaid it is suggested that it is imperative to clarify that the charges paid by a commercial subscriber are inclusive of all monies payable by such subscriber for receipt of signal, including but not limited to charges, if any, payable under the Copyright Act. This may be done by adding the italicised words in the respective tariff orders as follows:

(a) Clause 2(f) of the Tariff Order, 2004 may be amended as follows:

"(f) '**Charges**' means *charges paid by a subscriber to the service provider for receipt of signal, and includes all monies payable by a subscriber for receipt of signal, including but not limited to charges, if any, payable under the Copyright Act …"*

(b) Clause 3(n) of the Tariff Order, 2010 may be amended as follows:

"*(n) "charges", with reference to-*

(i) *subscribers, means the rates (excluding taxes and including all monies payable by a subscriber, including but not limited to charges, if any, payable under the Copyright Act) payable by subscribers to distributor of TV channels, for the broadcasting services or cable services received from such distributor; …"*

TARIFF PAYABLE BY COMMERCIAL CABLE SUBSCRIBERS:

This issue has been set out in the Consultation paper as issue nos. 5, 6 & 7 as follows:

5. In your view which of the 4 alternatives mentioned in para 1.28 above, should be followed? Please elaborate your response with justifications.

6. In case your answer is "alternative (ii)" as mentioned in para 1.28 above, please give full details with justifications of as to what should be the tariff ceiling/dispensation for each category/ group of commercial subscribers.

7. If in your view, none of the 4 alternatives mentioned above are to be followed, stakeholders may also suggest any other alternative with justifications.

59. FHRAI urges the Authority to adopt alternative (i). FHRAI urges the Authority not consider Alternative (iv) under any circumstances as this would entirely leave the class of commercial subscribers at the mercy of the broadcasters and exacerbate the problems already being faced by hotels and restaurants at the hands of the broadcasters.

60. The product supplied is the same. Broadcasters/DPOs do not incur a higher cost in supplying signal to a commercial subscriber as opposed to an ordinary one. None of the other suppliers such as

vegetable suppliers, milk suppliers, newspaper vendors etc. differentiate between a residential consumer and a hotel. Thus, there is no reason to provide for a separate tariff for commercial subscribers than for ordinary subscribers, and the Association urges the Authority to adopt alternative (i). It may be mentioned here that Electricity tariff operates on the principle of cross-subsidisation which does not apply to cable signal, apart from the fact that the drawal of power is also different.

61. Further, it is submitted that commercial subscribers such as hotels do not have a choice, and broadcasters are monopolists vis-a-vis their channels. Cable television has been recognised by the TDSAT as being in the nature of an essential service and a necessity in every household, in its judgment dated 27.02.2007 in the case of *Set Discovery* v. *Telecom Regulatory Authority of India & Others*. Particularly for hotels, irrespective of whether it is a business hotel or a leisure hotel, cable facility for its guests is a must. Thus, it is submitted that it is essential that the tariff and modality of receiving signal by commercial subscribers is regulated. The TDSAT in the judgment dated 28.05.2010, upheld by the Supreme Court on 16.04.2014 has noted that there is a wide range that hotels are paying, and observed as follows:

> *"47. It is, therefore, evident that although according to Mr. Meet Malhotra that there are several safeguards provided for TRAI itself to keep an eye over the development in the market, nothing has been brought on record to show that in fact the same had been carried out. Had it been so, it was expected of TRAI to bring on records some materials before us to show that in fact, it had been doing so. It could not have also become oblivious of the fact that according to broadcasters the upper limit has gone upto Rs.2099/- for all the 62 channels. What has been missed by Mr. Ganpathy in the aforementioned submissions is that admittedly there are about 500 channels in India. It may be true that some of the channels are regional ones and/or the local ones but there cannot be any doubt or dispute that the owners of all categories of hotel try to cater to the need and taste of all types of customers.*
>
> *48. Although, it has been contended by the learned counsel appearing on behalf of the respondents that in terms of the guidelines issued by the Ministry of Tourism, it is not obligatory on the part of the appellants and/or other hotels to subscribe to the pay channels as the only requirement prescribed therefor is to provide TV which requirement would be met by providing even free-to-air channels. We are, however, of the opinion that the said submission is too simplistic to be accepted in as much as the ground reality from which we cannot shut our eyes is that all hotels worth its name whether it has been placed in the category*

of star hotel or not, cannot afford not to provide the channels of the major broadcasters and that too the popular ones. It is, therefore, idle to contend that for the purpose of meeting the requirements of the guidelines fixed by the Ministry of Tourism, the appellants and/or the other hoteliers need not for all intent and purport arrive at any negotiated settlements with the broadcasters whatsoever. The very nature of submissions made by the learned counsel for the respondent clearly goes to show that they cannot afford to do so. It is in fact an agreement in desperation. Whereas on the one hand, the respondents talk of market force vis-à-vis the bargaining power of the hoteliers, it is beyond any controversy now that depending upon the need of each category of hoteliers there exists such an inconsistency in the rate, meaning thereby from Rs.20 to Rs.2100/-. This in our considered opinion, may not lead to a conclusion that the appellants had been very successful in utilizing their so called bargaining power and/or their position to fend for themselves."

62. Additionally, the charges which Hotels and Restaurants have been paying to Broadcasters have increased substantially over the years. In fact, in Chennai there has been an exponential increase in the charges paid by the Hotels and Restaurants (copy enclosed as **Annexure G**). This also substantiates FHRAI's submission that in fact the Hotels and Restaurants do not enjoy much bargaining power as far as the broadcasters are concerned.

63. Thus, it is clear that tariff regulation is absolutely necessary. At present there is no maximum price ceiling fixed by TRAI even for ordinary subscribers. Hotels pay per room connection, thus, even when hotels pay at the same rate as ordinary subscribers a hotel actually pays several times over what is paid by a domestic household. Thus, it is submitted that there is absolutely no reason to allow or provide for a different tariff for commercial subscribers.

64. As regards non-CAS regime, there is a price ceiling for all subscribers except the Aforesaid Three Categories of Hotels. It is submitted that there is no rationale for excluding the Aforesaid Three Categories of Hotels, as has been held by the Ld. TDSAT vide its judgment dated 28.05.2010; that has been affirmed by the Hon'ble Supreme Court vide its judgment dated 16.04.2014. It is submitted that the non-CAS regime is going to be phased out by the end of this year, and it would be appropriate to remove the aforesaid distinction and allow these hotels also to be protected by the price ceiling available to all other commercial cable subscribers.

65. As regards addressable systems such as DAS and DTH, the Authority, has decided not to fix any MRP for pay channels even for ordinary subscribers. However, it continues to maintain a distinction

against the Aforesaid Three Category of Hotels by providing that broadcasters may have a different RIO with respect to supply of signal by an MSO/DTH operator to them. Relevant clauses are quoted hereinbelow:

(a) For DTH:

Clause 13.2A.1 of Interconnect Regulation, 2004:

> *"Provided that no broadcaster shall, directly or indirectly, compel any direct to home operator not to make available its direct to home service to any class of subscribers including commercial subscribers.*
>
> *Provided further that a broadcaster may have a different Reference Interconnect Offer for supply of signals by the direct to home operators----*
>
> > *(a) to the following categories of commercial subscribers, namely:-*
> >
> > > *(i) hotels with rating of three star and above;*
> > >
> > > *(ii) heritage hotels (as described in the guidelines for classification of hotels issued by Department of Tourism, Government of India);*
> > >
> > > *(iii) any other hotel, motel, inn, and such other commercial establishment providing board and lodging and having fifty or more rooms; and …"*

(b) For DAS:

Clause 4 of the Digital Interconnect Regulation, 2012:

> *"… (2) No broadcaster shall, directly or indirectly, prohibit any digital addressable cable TV system operator from providing its services to any subscriber.*
>
> *(3) A broadcaster may specify different Reference Interconnect Offers for supply of signals by the multi system operators to different categories of commercial subscribers such as --*
>
> > *(a) hotels with rating of three stars and above;*
> >
> > *(b) heritage hotels, as specified in the guidelines for classifications of hotels issued by the Department of Tourism, Govt. of India ;*

(c) any other hotel, motel, inn and other commercial establishments providing boarding and lodging having fifty or more rooms ; and …"

66. It appears that the distinction was retained under the addressable regime in order to comply with the interim stay order of the Hon'ble Supreme Court dated 16.08.2010 (now vacated by virtue of the judgment of the Supreme Court dated 16.04.2014), which in effect brought back into operation the distinction between the Aforesaid Three Categories of Hotels created by the Amendment Tariff Orders dated 21.11.2006. It is submitted that in view of the forbearance on the part of the Authority in fixing any MRP for pay channels vis-à-vis broadcasters and platform operators; and vis-à-vis platform operators and subscribers; there is absolutely no need to continue to make any distinction between any sub-group of commercial subscribers, and to provide for a different RIO with respect to such group.

67. Thus, the provision for a different RIO with respect to the Aforesaid Three Categories of Hotels unnecessarily creates an anomalous situation, wherein the broadcasters continue to contravene the immediately preceding prohibition i.e. continue to prohibit platform operators from supplying signal to commercial subscribers. Thus, it is suggested that these provisions making a distinction with respect to RIO for supplying signal to the Aforesaid Three Categories of Hotels may be done away with altogether.

68. It is always open to the broadcasters to suggest to the platform operator a different rate with respect to commercial subscribers, and the platform operator is at liberty in turn to negotiate with the commercial subscriber. For instance with respect to hotels, as already submitted hereinabove, the same is usually based on number of rooms (each room is counted as separate connection) and occupancy. This arrangement also automatically accounts for other relevant factors, such as location of the commercial subscribers, the ordinary tariff prevalent there, prices being offered by other platform operators etc. and will allow for greater competition and choice.

69. At present it is found that DPOs insist on annual contracts with hotels. This must not be permitted, and it must be clarified that commercial subscribers are entitled to the minimum subscription period applicable to ordinary subscribers.

70. Also, the Association requests the Authority to consider strengthening the safeguards for the relationship between a-la carte and bouquet pricing which has been provided as follows:

1. The maximum retail price of any individual channel shall not exceed three times the average channel price of the bouquet of which it is a part;

Explanation: if the maximum retail price of a bouquet is Rs. "X" per month and the number of channels is "Y" then the average channel price of the bouquet is Rs. X divided by Y.

2. The sum of the individual maximum retail prices of the channels shall not be more than 150% of the maximum retail price of the bouquet.

71. It is submitted that this however does not prevent a broadcaster from pricing its popular channels for a-la-carte use at an exorbitant monopolistic price. Neither does it prevent the broadcaster to use this monopolistically, to sell its bouquet.

72. Under these circumstances, it is requested that an additional condition be imposed that the price for a-la-carte channels be a percentage of the maximum rate for a bouquet of FTA channels offered by the DPO, or some other formula that limits the rate of any one channel.

73. Another anomaly with regard to commercial subscribers is in relation to the provision for Retail Tariff in the Principal Addressable (Digital) Tariff Order, namely, the heading to clause 6 and sub-clause (1) thereof speaks only of "ordinary subscribers" whereas the rest of the clause mentions subscribers per se. Clause 6 is quoted hereinbelow:

"6. Mandatory offering of pay channels on a-la-carte basis to ordinary subscribers and charges therefor.

[19][(1) Every multi-system operator or DTH operator or IPTV operator or HITS operator providing broadcasting services or

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[19] Substituted vide the Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable Systems) Tariff (First Amendment) Order, 2012 (3 of 2012) dated 30th April , 2012 w.e.f. the date of publication.

Earlier:

"(1) Every service provider providing broadcasting services or cable services to its subscribers using an addressable system shall, from the date of coming into force of this Order, offer or cause to offer all pay channels offered by it to its subscribers on a-la-carte basis and shall specify the maximum retail price for each pay channel, as payable by the ordinary subscriber:

Provided that in the case of direct to home service, a direct to home operator who is unable to offer all its pay channels to its subscribers on a-la-carte basis on the date of coming into force of this order due to any technical reason, shall offer all its pay channels on a-la-carte basis to its subscribers with effect from a date not later than the 1st day of January, 2011."

cable services to its subscribers using an addressable system shall, from the date of coming into force of this Order, offer or cause to offer all channels offered by it to its subscribers on a-la-carte basis and shall specify the maximum retail price for each channel, as payable by the ordinary subscriber:

Provided that the a-la-carte rate of free to air channels shall be uniform.]

[20][Provided further that in case a multi-system operator or DTH operator or IPTV operator or HITS operator providing broadcasting services or cable services to its subscribers, using a digital addressable system, offers channels as a part of a bouquet, the rate of such channels forming part of that bouquet shall be subject to the following conditions, namely:-

(a) the sum of the a-la-carte rates of the channels forming part of such a bouquet shall in no case exceed one and half times of the rate of that bouquet of which such channels are a part; and

(b) the a-la-carte rate of each channel forming part of such a bouquet shall in no case exceed three times the average rate of channel of that bouquet of which such channel is a part;

Provided also that every multi-system operator or DTH operator or IPTV operator or HITS operator, providing broadcasting services and cable services, through digital addressable systems, before the date of commencement of this Tariff Order and continues to provide such services after such commencement shall, within sixty days from the date of such commencement, comply with the provisions of the second proviso.]

[21][(1A) Every multi-system operator providing cable services to the subscribers, using digital addressable cable TV system, directly or through its linked local cable operator, shall offer a package of a minimum of one hundred free to air channels as basic service tier including the channels of Prasar Bharati, namely DD-Bharati, DD-Malyalam, DDPodhigai, DD-Odiya, DD-Bangla, DD-Saptagiri, DD-Chandana, DD-Sahyadri, DD-Girnar, DD-Kashir, DD-NE , DD-Punjabi.

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[20] Inserted vide the Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable Systems) Tariff (First Amendment) Order, 2012 (3 of 2012) dated 30th April , 2012 w.e.f. the date of publication.

[21] Inserted vide the Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable Systems) Tariff (First Amendment) Order, 2012 (3 of 2012) dated 30th April , 2012 w.e.f. the date of publication.

(1B) It shall be open to the subscriber to choose any combination of free to air channels up to one hundred channels, in lieu of the basic service tier offered by the multi-system operator.

Provided that it shall be open to the multi-system operator to specify a minimum monthly subscription, not exceeding one hundred rupees (excluding taxes) per subscriber, towards the basic-service tier or the free to air channels chosen by the subscriber in lieu of the basic service tier.

(1C) The basic service tier offered by the multi-system operator shall include at least five channels of the each genre namely news and current affairs, infotainment, sports, kids, music, lifestyle, movies and general entertainment in Hindi, English and regional language of the concerned region.

Provided that in case sufficient number of free to air channels of a particular genre is not available, the multi-system operator shall include in the basic service tier the channels of the other genres.

(1D) It shall be open to the subscriber of the digital addressable cable TV to subscribe to basic service tier or basic service tier and one or more pay channel or only free to air channels or only pay channels or pay channels and free to air channels.

(1E) If a digital addressable cable TV subscriber subscribes to the pay channels, in a-la-carte or bouquet or a combination of a-la-carte and bouquet, with or without free to air channels, it shall be open to the multi-system operator to specify a minimum monthly subscription, not exceeding one hundred and fifty rupees (exclusive of taxes) per month.]

(2) It shall be open to a service provider, while offering its pay channels on a-la carte basis and specifying a-la-carte rates for each of them under clause (1), to specify a minimum subscription period, not exceeding three months, for subscribing to a pay channel on a-la-carte basis by a subscriber.

(3) Every service provider providing broadcasting services or cable services to subscribers using an addressable system may, in addition to the offering of pay channels on a-la-carte basis under sub-clause (1), also offer bouquets of channels, in which case, it shall specify the maximum retail price for each such bouquet applicable to its ordinary subscribers.

(4) It shall be open to the service provider to specify a minimum monthly subscription, not exceeding one hundred and fifty rupees (exclusive of taxes) per month per subscriber, towards channels

chosen by the subscriber, either a-la-carte or bouquet, for availing the services of such service provider.

Explanation: It shall be mandatory for all service providers, who are providing broadcasting services or cable services to subscribers through addressable systems, to transmit or retransmit the channels of Doordarshan required to be transmitted compulsorily under section 8 of the Cable Television Networks (Regulation) Act, 1995 (7 of 1995), to each subscriber on its network.

[22]*[Provided that nothing contained in sub-clause (4) shall apply to the subscribers of the digital addressable cable TV systems.]*"

74. It is submitted that there is no reason whatsoever to restrict this provision to ordinary subscribers. It is submitted that the obligation to supply channels a-la carte and to specify the maximum retail price for each channel ought to apply irrespective of whether the subscriber is commercial or ordinary.

75. Similarly, there appears to be no reason for denying benefits of other provisions, such as the provisions regarding "Customer Premises Equipment" [clause 7 of the Principal Addressable (Digital) Tariff Order] to commercial subscribers, which at present speak of only "ordinary subscribers".

76. Thus, in the present scenario, FHRAI is in support of alternative (i) wherein the distinction between ordinary and commercial in terms of payment of tariff is done away with.

The Federation of Hotel and Restaurant Associations of India

M. D. Kapoor
Secretary General

[22] Inserted vide the Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable Systems) Tariff (First Amendment) Order, 2012 (3 of 2012) dated 30th April , 2012 w.e.f. the date of publication.

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 28th May, 2010

APPEAL No.17(C) OF 2006
(M.A. Nos.24 of 2007, 8 & 13 of 2008 and Caveat No.4 of 2006)

East India Hotel Ltd. … Appellant

Versus

Telecom Regulatory Authority of India & Ors. …Respondents

AND

APPEAL No.18(C) OF 2006
(M.A.Nos. 65, 66 of 2008 and Caveat No.5 of 2006)

The Connaught Prominent Hotels Limited … Appellant

Versus

Telecom Regulatory Authority of India & Ors. …Respondents

BEFORE:

HON'BLE MR.JUSTICE S.B. SINHA, CHAIRPERSON
HON'BLE MR. G. D. GAIHA, MEMBER
HON'BLE MR. P.K.RASTOGI, MEMBER

For Appellant **(In Appeal No.17(C) of 2006)** **:** Mr.Ramesh Singh, Advocate
Mr. Nikhil Goel, Advocate

For Respondent No.1 (TRAI) **:** Mr. Meet Malhotra, Advocate
Mr. Ravi S. S. Chouhan, Advocate

For Respondent No.2 (Star Den Media Services Pvt. Ltd.)	:	Mr. Maninder Singh, Senior Mr. Gopal Jain, Advocate Mr. Prateek Kumar, Advocate Ms.Garima Sharma, Advocate
For Respondent No.3 (SET Discovery Pvt. Ltd)	:	Mr.Aditya Narain, Advocate
For Respondent No.4 (Zee Turner Limited)	:	Mr. Maninder Singh, Senior Advocate Mrs.Prathiba M. Singh, Advocate Mr.Nikhil Mehra ,Advocate Mr.Arjun Natarajan,Advocate Ms. Nitya Thakur, Advocate
For Respondent No.5 (ESPN)	:	Mr. N. Ganpathy, Advocate
For Respondent No.6(HAI)	:	Mr.Ayushya Kumar,Advocate
For Appellants (**In Appeal No.18(C) of 2006)**	:	Mr.Ramji Srinivasan,Senior Advocate Mrs.Rukmini Bobde,Advocate
For Respondent No.1	:	Mr. Meet Malhotra, Advocate Mr. Ravi S. S. Chouhan, Advocate
For Respondent No.2	:	Mr.Gopal Jain,Advocate Mr. Prateek Kumar, Advocate Ms.Garima Sharma, Advocate
For Respondent No.3	:	Mr.Aditya Narain,Advocate
For Respondent No.4	:	Mr. Maninder Singh, Senior Advocate

Mrs.Prathiba M. Singh,Advocate
Mr.Nikhil Mehra,Advocate
Mr.Arjun Natarajan,Advocate
Ms. Nitya Thakur,Advocate

For Respondent No.5 : Mr.N. Ganpathy,Advocate

For Respondent No. 6 : Mr.Arjun Garg,Advocate

JUDGMENT

S. B. Sinha

1. These two appeals involving common questions of law and fact were taken up for hearing together and are being disposed of by this common judgment.

2. The petitioners herein are owners of hotels. They are aggrieved by a determination made by the Telecom Regulatory Authority of India (TRAI) purported to be in terms of Section 11(1)(a)(ii), (iii) & (iv) of the Telecom Regulatory Authority of India Act, 1997 (the Act).

The brief factual background involved in this matter is not in controversy.

3. The Parliament enacted the said Act to provide for the establishment of the TRAI and this Tribunal to regulate the telecommunications services, adjudicate disputes, dispose of appeal and to protect the interests of the service providers of the consumers of the telecom sector to promote and ensure orderly growth of telecom sector or the matters connected therewith and incidental thereof.

Section 2 provides for the interpretation section. Section 2(j) defines service provider to mean the Government as a service provider and includes a licensee.

Section 2(k) defines telecom services. By reason of the provisions of the said definition of telecom services, the broadcasting services were excluded. However, by reason of Section3 of the Amended Act of 2003, a proviso was appended thereto in terms whereof the Central Government was empowered to notify other services to be telecommunication services including the broadcasting services.

4. It is beyond any dispute that such a notification was issued on 01.09.2004 pursuant whereto and in furtherance whereof the

broadcasting and cable services were brought within the ambit of telecommunication services. By reason of an order known as the Telecommunication (Broadcasting & Cable Services) Tariff Order 2004, the TRAI sought to freeze the cable subscription charges i.e. the tariff prevalent on 26.12.2003, till final determination by it on the various issues concerning those charges.

5. A new tariff order was issued on 01.10.2004 by the TRAI, inter alia, laying down the definition of various terms such as 'multi service operator', 'broadcasting and cable operator', 'broadcasting services', 'cable service', 'cable television network' and reiterated the ceiling/freeze prescribed by the former tariff order. In regard to the tariff, it was stated:-

> "The charges, excluding taxes, payable by –
>
> (a) Cable subscribers to cable operator;
>
> (b) Cable operators to multi system operators/ broadcasters (including their authorized distribution agencies); and
>
> (c) Multi system operators to broadcasters (including their authorized distribution agencies)

prevalent as on 26 December, 2003 shall be the ceiling with respect to both free-to-air and pay channels."

6. By reason of the said tariff order dated 01.10.2004 no distinction was made between a commercial and non-commercial subscribers.

7. The Hotel Association of India and Hotel Federation & Restaurant Association of India intervened before TRAI. They filed petitions before this Tribunal on or about 08.08.2005 praying inter alia, for a declaration that the actions of the respondent asking them and its members to execute fresh agreements with the broadcasters and/or authorized distributors subject to payment of increased subscription fee beyond that was prevalent on 26.12.2003 was illegal and arbitrary and violative of the 2004 Tariff Order read with the Interconnection Regulations. The said applications were registered as Petition Nos.32(C) of 2005 and 80(C) of 2005.

By an order dated 17.01.2006, this Tribunal disposed of the said applications, inter alia, holding:-

"31. We, therefore, quite easily conclude that members of Petitioner Associations are not subscribers as contemplated under the Cable TV Network Regulations Act.

……..

33. In view of the above, we are of the considered opinion that the management of the hotels in Petition Nos. 32(C) and 80(C) cannot be termed as subscribers. Similarly, various restaurants using cable service for public viewing cannot be treated as consumers. There is no gain saying that this use is entirely different from the domestic use of cable service. The use of cable service at a public viewing place is to attract more customers / clients which gives it the colour of use of its service for commercial purpose.

……..

36. Now we come to the question whether the tariff laid down by the TRAI notification of 26th December, 2003 is applicable to the members of the petitioner associations. The said Tariff order covers the following in its ambit – the charges payable by (a) Cable subscribers to cable operator; (b) Cable operators to multi service operators/broadcasters (including their authorized

distribution agencies); and (c) Multi service operators to broadcasters (including their authorized distribution agencies). In the petition before us we find that the commercial relationship is between the members of the petitioner associations (viz., hotels, restaurants etc.) on the one hand and either cable operators or broadcasters on the other. We have already concluded that the members of the petitioner associations cannot be regarded as subscribers or consumers. As such we are of the view that the above tariff notification of the TRAI would not be applicable. It seems that TRAI has found it necessary to fix the tariff for domestic purpose. We think the Regulator should also consider whether it is necessary or not to fix the tariff for commercial purposes in order to bring about greater degree of clarity and to avoid any conflicts and disputes arising in this regard.

37. In view of the above, we are of the opinion that the respondents are well within their rights to demand the members of the petitioner associations to enter into agreements with them or their representatives for the receipt of signals for actual use of their guests or clients on reasonable terms and conditions and

in accordance with the regulations framed in this regard by the TRAI."

8. The matter was carried in appeal to the Supreme court of India. During pendency thereof, however, the TRAI issued a 4th Amendment Order in the second tariff order on or about 07.03.2006 whereby and whereunder commercial consumers were defined. A further declaration was made that that the commercial cable subscriber would pay subscription fees at rates prevailing on 01.03.2006. The petitioners herein contend that the said notification was issued in line with the judgment of this Tribunal in the aforementioned petitions Nos.32(C) of 2005 and 80(C) of 2005, as noticed hereinbefore.

9. We may, however, notice the Explanatory Memorandum appended thereto. Clause 4 of the Explanatory Memorandum reads as under:

"4. In the meanwhile keeping <u>in view the observations of Hon'ble TDSAT</u> and the representation of FHRAI, the Authority has considered appropriate, in the interim, to extend the protection of ceiling to the commercial consumers as well……"

10. The Supreme Court admitted the appeals on 28.04.2006 and an order of status quo as existed on that date was directed to be maintained until further orders. It may, however, be noticed that prior thereto, namely, on 21.04.2006, the TRAI had issued a Consultation Paper in line with the directions issued by this Tribunal. We may furthermore notice that on 31.08.2006 TRAI issue tariff for CAS areas called the Telecommunications (Broadcasting & Cable Services)(3rd)(CAS Areas) Tariff Order 2006 in terms whereof the ceiling in respect of maximum rental price payable by a subscriber to a multi-service operator/cable operator as Rs.5 per pay channel per month (exclusive of taxes) was determined. The said tariff order came into effect on and from 31.12.2006. In terms of the aforementioned notification therefor, the price ceiling as on date applied to all consumers.

11. We may furthermore notice that after hearing the counsels for the parties, the Supreme Court of India while reserving the order said to be on an application filed by TRAI itself directed as under:

> "We in modification of our said order dated 28.4.2006 direct the TRAI to carry out the processes for framing the tariff. <u>While doing so, it must exercise its jurisdiction under Section 11 of the Act independently of the Act and not relying on or on</u>

the basis of any observation made by the TDSAT to this effect."

12. In terms of the said order dated 19.10.2006, TRAI inviting the comments of all stakeholders on 02.11.2006, by reason whereof two notifications dated 21.11.2006 (the impugned notifications) were issued.

13. By reason of the said amendment, the hotels with rating of three stars and above, heritage hotels and other hotels, motels and inns and commercial establishments providing for boarding and lodging and having 50 or more rooms were excluded from the protection of price regulation which was extended to millions of commercial establishments and minor cable subscribers across the country. On or about 24.11.2006, the Supreme Court of India delivered its judgment in Cable Operators' Association of India & Ors. Vs. UOI & Ors. - 2003(3) SCC 186. We would refer to the relevant portions of the said judgment at an appropriate stage.

14. These appeals were filed questioning the legality and/or validity of the said impugned notifications dated 21.11.2006.

15. Mr.Ramji Srinivasan, the learned senior counsel appearing on behalf of the petitioners in Appeal No.18(C) of 2006 would contend:

(i) The impugned orders are contrary to and inconsistent with the judgment of the Supreme Court in so far as the TRAI failed and/or neglected to apply its own independent mind as would appear from various paras in the Explanatory Memorandum and simply followed the judgment of this Tribunal which was set aside.

(ii) The TRAI was under a statutory obligation to protect the consumers, particularly, having regard to the provisions contained in Section 11(1)(b), Section 12 and Section 13 of the Act.

(iii) The TRAI, keeping in view of the fact that it has role of a Regulator to play, has committed an illegality by refraining from regulating the tariff in respect of the specific categories of hotels.

(iv) The purported clarifications made by TRAI amongst the consumers and one group of commercial consumers with the other was illegal and without jurisdiction.

(v) The TRAI, for the purpose of determining the said order, has failed to state any rationale therefor. In doing so, it has failed to consider that broadcasters being the monopolistic, the prices cannot be left to free market forces.

(vi) No reason has been assigned as to why other similarly situated commercial establishments like five star nursing homes, executive class airport lounges, shopping malls, large corporate offices would be left out from the purview of Regulations.

(vii) The explanation offered in relation thereto purported to be Clause 3.2.5, 3.2.6 and 3.2.7 are based on wholly irrelevant considerations not germane for the purpose of taking the same into consideration and failed to take into consideration the relevant factors.

(viii) The hotels having the star ratings and other heritage hotels have no other options but to enter into the subscription agreement with the respondent broadcasters on their dictate.

(ix) The arbitrary and unreasonable discrimination being not based on any intelligent differentio must be held to be ultra vires Article 14 of the Constitution of India.

(x) Tariff being not a tax, the socio economic approach or grant of cross-subsidies to the broadcasters is against the concept of the power to regulate tariff.

(xi) TRAI in passing the impugned directions have failed to take into consideration that the broadcasters and distributors have acted in an unreasonable and high-handed manner.

16. Mr.Ramesh Singh, the learned counsel appearing on behalf of the respondent in Appeal No.17(C) of 2006, urged:

(a) Section 11(2) of the TRAI Act providing for a power on TRAI in terms whereof it may undertake the exercise for fixing different tariffs for different classes but, cannot refuse to fix tariffs for a particular class and it thus, must be said to have committed an illegality in passing the impugned orders.

(b) The judgement of this Tribunal excluding the commercial establishments for the purpose of making the aforementioned tariff could not have been followed by TRAI and thereby directing a forebearance in the matter.

(c) Despite the order of the Supreme Court, the TRAI while going into the aforementioned exercises found that there was need therefor, it failed to consider that it could not have refused to extend the protection to a particular class.

(d) Sub-section (2) of Section 11 providing for making tariff for different persons or different classes of persons clearly go to show that although TRAI was entitled to fix different rates for different classes, it could not have directed forebearance in respect of a particular class.

17. Mr.Meet Malhotra, the learned counsel appearing on behalf of first respondent herein, on the other hand, urged:

I. It is wrong to contend that the TRAI in its impugned orders failed and/or neglected to determine the tariff independently and merely followed the decisions of this

Tribunal. Keeping in view the fact that the owners of the Hotel Associations came before TRAI, it started with their case and if necessary, undoubtedly would consider to bring in the cases of others, if any occasion arises therefor progressive steps for protection are being taken by it. The TRAI upon considering the cases of all concerned as also the viewpoints of the appellants, the broadcasters, arrived at its own view which, in the facts and circumstances of this case cannot be considered to be unreasonable or violative of Article 14 of the Constitution of India.

II. A bare perusal of the impugned orders would clearly go to show that not only the TRAI was not influenced in any manner by the judgment of this Tribunal but had considered the criteria for need of protection and inter alia in view of the fact that the appellants can negotiate on their own having the requisite bargaining power and furthermore they can afford to pass on the burden to their customers, prescribed forebearance for them.

18. Mr.N.Ganpathy, the learned counsel appearing on behalf of the ESPN would urge:

A. It is wrong to say that the broadcasters have been charging the hotels on the basis of 100% occupancy and the agreement entered into by and between the ESPN and the appellant, The Connaught Prominent Hotels Limited, would clearly go to who that the same was entered into for 76 rooms although the appellant had 87 room situated in a very busy area of New Delhi and, thus, has about cent per cent occupancy.

B. The broadcasters considered the areas in question for the purpose of fixing tariff as for example, in the hill areas occupancy may be lesser but in metropolitan town occupancy would be more than 70 to 75%.

C. Only two hotels being before this Tribunal and their associations having been relegated to the position of the respondent, the hotel owners as a class cannot be said to be aggrieved by the order of the TRAI. The consultation process being not over even they can participate therein.

19. Mr.Maninder Singh, the learned senior counsel appearing on behalf of the two of the broadcasters, namely, M/s Zee Turner Ltd. And M/s Star Den Network, submitted:

1. Associations being not parties in their appeal, they cannot take the benefit of any judgment of this Tribunal.
2. The petitioners having not made any factual averments as to how classification can be said to be invalid cannot be granted any relief. The classification being a broad one is not hit by Article 14 of the Constitution of India nor can it be stated to be wrongful classification as similar establishments cannot be said to have been left out.
3. Classifications on the basis of income status and other relevant factors can be the basis for making valid classifications by a legislature and the same by itself would not lead to a conclusion that the same is illegal.
4. TRAI being a Regulator, it was for it to consider as to who would require protection and who would not and having regard to the fact that it in order to arrive at a

conclusion had undertaken a detailed exercise, the classification cannot be faulted.

20. Mr.Aditya Narain, the learned counsel appearing on behalf of the MSM Discovery in a written submission filed before us state that in view of the several decisions of the Supreme Court of India, it is evident that the petitioners holding status of a definite class having the rating of three-star and above cannot be heard to contend that the classification is bad in law. The appellant, East India Hotel Ltd., being a part of a big group of hotels, which are 815 in number, cannot be said to be representing all the Hotels.

21. The principal questions which arise for consideration are:

(i) Whether the TRAI having regard to Section 11(2) of the Act has the requisite jurisdiction to direct forebearance in relation to a class of commercial consumers;

(ii) Whether the TRAI was justified in treating hotels having the category of three-star and above, the heritage hotels and the hotels above 50 rooms in a separate category;

(iii) Whether the classification is legal and valid.

Before, however, adverting to the aforementioned questions, we may notice the statutory scheme.

22. We have noticed the preamble of the Act in terms whereof TRAI is required to protect the interest of the service providers as also the consumers of the telecom sector. As a Regulator, the TRAI has a very significant role to play. Its recommendations carry a great weight, and ordinarily should be accepted by the Government of India. It was so held in Cable Operators' Association of India & Ors. Vs. UOI & Ors. – 2003(3) SCC 186.

23. It was obligatory on its part to consider all aspects of the matter and cover its recommendations from all angles including the plight of the ultimate viewers. It started exercising its jurisdiction within a period of two weeks from the date of issuance of the notification by the Government of India by promulgating a freeze order which continued. The TRAI in regard to the charges excluding taxes stated:

"The charges, excluding taxes, payable by –

(d) Cable subscribers to cable operator;

(e) Cable operators to multi system operators/ broadcasters (including their authorized distribution agencies); and

(f) Multi system operators to broadcasters (including their authorized distribution agencies)

prevalent as on 26 December, 2003 shall be the ceiling with respect to both free-to-air and pay channels."

24. It only increased the tariff by 7% by an order dated 01.12.2004 and 4% more by an order dated 29.11.2005. The definition of consumer in 2004 Regulations was a broad one being whosoever a subscriber of the broadcaster in the country. By and large even the broadcasters adhered thereto. There appears, however, to be some dispute in regard to the stand taken by the parties hereto as to whether the petitioners came within the purview thereof. Our attention in this behalf has been drawn to a letter issued by M/s Zee Turner to the appellant in Appeal No.17(C) of 2006 which reads as under:

"Zee Turner

16 November 2004

THE OBEROI TOWERS
VIKRAM CHAUBAL
NARIMAN POINT
MUMBAI
MAHARASHTRA

Dear Vikram Chaubai,

As you may probably be aware, recently, the TRAI announced an amendment of allowing for a 7% increase in subscription rates on account of inflation.

We'd like to inform you that effective January 1, 2005 incorporating a hike of 7% the price of Zee Turner's existing bouquet would stand at Rs.181.90. We request you to get in touch with the nearest Zee Turner Regional Office to sign the Agreement for the revised rate of your existing package.

Thank you for your interest and support for Zee Turner.

With kind regards,

sincerely,

Zee-Turner Ltd."

25. However, the broadcaster contends that the said freeze order was never applied to the petitioners. In fact, submissions have been made before us that the broadcasters in their agreement with the local cable operators always kept the subscribers, where public viewing is permitted, outside the purview of the agreements. The TRAI, however, does not appear to have taken this aspect of the matter in its consideration. It is, however, not much in dispute that whereas some of the big hotels have put head-ends on their roof-top upon entering into agreements in this behalf with the respective broadcasters, a large number of hotels like any other commercial establishments take supply only from the local cable operators. Although, it has vehemently been suggested by the learned counsel appearing on behalf of the broadcasters that most of the owners of the hotels have acted contrary to the said agreements by taking supplies of signals from the local cable operators, we think that at this stage, we are not concerned therewith.

26. There cannot, however, be any doubt or dispute that the owners of the hotels of the categories mentioned in the impugned order of the TRAI are indisputably dependent only upon the broadcasters. They exercise monopoly. It is in the aforementioned situation, the justifiability and

workability of impugned order issued by TRAI must be considered. This Tribunal in the aforementioned Petitions No.32(C) of 2005 and 80(C) of 2005, were of the opinion that the commercial subscribers do not come within the purview of the provisions of the orders made by the TRAI. It was so held in the following terms:-

> "35……On facts, we have noticed that the hotel managements, who are members of the petitioner associations, receive signals either from the broadcaster or their agents directly or from the cable operators directly which is further transmitted to rooms and parlours for the purpose of viewing by their guests or clients, it is at that stage that the signals actually get consumed. Therefore, as per the judicial and dictionary definition of the consumer referred to hereinabove, we have no doubt that the members of the petitioner associations are not the end-users of the signals received by them. Hence, these members of the petitioner associations on the facts of this case cannot be treated as either subscribers or consumers for the purpose of relief sought in this petition.

36. Now we come to the question whether the tariff laid down by the TRAI notification of 26th December, 2003 is applicable to the members of the petitioner associations. The said Tariff order covers the following in its ambit – the charges payable by (a) Cable subscribers to cable operator; (b) Cable operators to multi service operators/broadcasters (including their authorized distribution agencies); and (c) Multi service operators to broadcasters (including their authorized distribution agencies). In the petition before us we find that the commercial relationship is between the members of the petitioner associations (viz., hotels, restaurants etc.) on the one hand and either cable operators or broadcasters on the other. We have already concluded that the members of the petitioner associations cannot be regarded as subscribers or consumers. As such we are of the view that the above tariff notification of the TRAI would not be applicable. It seems that TRAI has found it necessary to fix the tariff for domestic purpose. We think the Regulator should also consider whether it is necessary or not to fix the tariff for commercial purposes in order to bring

about greater degree of clarity and to avoid any conflicts and disputes arising in this regard."

27. We have also noticed heretobefore, however, for all intent and purport TRAI while undertaking fresh exercise in the matter as directed by the Supreme Court of India was directed to do so afresh wholly independently, without in any way being influenced by the order passed by the TDSAT. As directed by us, the concerned file of TRAI was produced before us. The perusal of the same shows that two draft tariff orders were issued on 2.11.2006 and the same were put on website also seeking comments of stakeholders by 10.11.2006. TRAI conducted a meeting also with broadcasters and Hotel Associations on 9.11.2006.

28. We may at this juncture also notice the impugned order dated 21.11.2006 of the TRAI which at page 70 of the compilation of documents. By reason of the said order the TRAI made the following amendment in the 2006 order, clause (ii) whereof reads, thus:-

"Provided that the provisions of this sub-clause shall not apply to the following types of commercial subscribers:

i) Hotels with rating of three star and above

ii) Heritage hotels (as described in the guidelines for classification of hotels issued by Department of Tourism, Government of India)

iii) Any other hotel, motel, inn, and such other commercial establishment, providing board and lodging and having 50 or more rooms."

By a reason of the said order, inter alia, in place of sub-clause (f) of Clause 2 and the entries relating thereto, the following was added:

"(f) **"charges"** means and includes the rates (excluding taxes) payable by one party to the other by virtue of the written/oral agreement prevalent on 26th December 2003. The principle applicable in the written/oral agreement prevalent on 26th December, 2003, should be applied for determining the scope of the term "rates"."

Amended

"(f) 'Charges' means and includes

(i) for all ordinary cable subscribers and commercial cable subscribers except those specified in (ii) below, the rates (excluding taxes) payable by one party to the other by virtue of the written/oral agreement prevalent on 26th December, 2003. The principle applicable in the written/oral agreement prevalent on 26th December 2003, should be applied for determining the scope of the term "rates".

(ii) for hotels with a rating of three star and above, heritage hotels (as described in the guidelines for classification of hotels issued by Department of Tourism, Government of India) and any other hotel, motel, inn, and such other commercial establishment, providing board and lodging and having 50 or more rooms, the charges specified in (i) above shall not be applicable and for these subscribers the charges would be as mutually determined by the parties.

Explanation: It is clarified that in respect of programmes of a broadcaster, shown on the occasion of a special event for common viewing, at any place registered under the Entertainment Tax Law and to which access is allowed on

payment basis for a minimum of 50 persons by the commercial cable subscribers, the tariff shall be as mutually determined between the parties."

29. By reason of Regulation 3, sub-clause(a) of clause 3 was substituted:

"3. Tariff:

The charges , excluding taxes, payable by

(a) Cable subscribers to cable operator;"

Amended

"3. In the Principal Order, the existing sub-clause (a) of clause 3 and the entries relating thereto shall be substituted with the following sub-clause (a) and entries relating thereto;

"(a) Ordinary cable subscribers and commercial cable subscribers (except hotels with a rating of three star and above, heritage hotels (as described in the guidelines for classification of hotels issued by Department of Tourism, Government of India) and any other hotel, motel, inn, and such other commercial establishment, providing board and lodging and

have 50 or more rooms) to cable operators, multi system operators or broadcasters as the case may be."

30. By reason of clause 4, after the clause 3 two explanations were added:

Original

"(c) Multi system operators to broadcasters (including their authorized distribution agencies) prevalent as on 26th December 2003 shall be the ceiling with respect to both free-to-air and pay channels."

Amended

"4. In the Principal Order, after the existing clause 3(c) and entries relating thereto, the following explanations and entries relating thereto, namely Explanation –1 and Explanation –2 shall be inserted:

"Explanation 1: for the purpose of clause 3(a) above the question whether the commercial cable subscriber will pay the cable operator/ multi system operator/the broadcaster will be determined by the terms of agreement(s) between the concerned parties, namely

i) broadcaster(s)

ii) MSO(s) and cable operator(s) who have been authorized to provide signals to the commercial cable subscribers on the one hand, and the commercial cable subscribers on the other.

Explanation 2 : for the purposes of clause 3(b) and (c) above the charges will be modified to take into account the payments to commercial cable subscribers where appropriate""

31. By reason of clause 5, the existing second proviso below clause 3(c) was added:

"Provided further that in case a multi system operator or a cable operator reduces the number of pay channels that were being shown on 26.12.2003, the ceiling charge shall be reduced taking into account the rates of similar channels as on as on 26.12.2003."

Amended

"5. In the Principal Order , after the existing second proviso below clause 3(c) the following proviso shall be inserted

"Provided further that in the case of a commercial cable subscriber, the charges in respect of whom by virtue of clause 2(f)(ii) read with clause 3(a), is determinable as per mutual agreement between the parties, having facilities to get broadcasting services directly from the broadcaster, the later shall at the option of the commercial cable subscriber be obliged to provide channels on ala carte basis. For such consumers whenever bouquets are offered, these shall be subject to the following conditions:

I The maximum retail price of any individual channel shall not exceed three times the average channel price of the bouquet of which it is a part;

Explanation: if the maximum retail price of a bouquet is Rs."X" per month and the number of channels is "Y" then the average channel price of the bouquet is Rs. X dividedby Y.

II The sum of the individual maximum retail prices of the channels shall not be more than 150% of the maximum retail price of the bouquet."

32. Clause 6 directs deletion of existing clause 3A and the entries relating thereto:

"3. In clause 3 of the Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order 2004, (6 of 2004), the existing subclause (a) and the entries relating thereto shall be substituted with

the following: -

"(a) Ordinary cable subscribers to cable operator.""

Amended

"6. In the Principal Order, the existing clause 3A and entries relating thereto shall be deleted."

33. Clause 7 provides for the Explanatory Memorandum as contained in Annexure A thereto:

"7. Explanatory Memorandum:

This Order contains an Explanatory Memorandum attached as **Annex- A."**

The Explanatory Memorandum contained several heads.

Section 1 provides for Introduction and Background, clause 1.1 whereof reads as under:

"1.1 The Authority had issued a Tariff Order on 15th January 2004, which provided that the ceiling of cable charges shall be at the levels prevailing on 26th December 2003.for both FTA and Pay channels. This interim order was subject to final determination. Subsequently after extensive consultations a detailed Tariff Order was issued on 1.10.2004 (hereinafter referred to as Principal Tariff Order) which maintaining the sanctity of the ceiling of cable charges prevailing on 26.12.2003 provided a window for introduction of new pay channels and conversion of existing FTA Channels to pay subject to certain conditions. The underlying objective in both these orders was to provide relief to the cable subscriber who has no mechanism to protect himself against the hike in cable television charges."

32. We may notice that in terms of the order issued on 21st April, 2006, the TRAI provided for a uniform ceiling of cable charges. The said

philosophy had been continuing. The last sentence of clause 1.1 provide for the underlying objective which indisputably, the petitioners were satisfied. The matter relating to consultation process starts at Section 2, the relevant portions whereof read as under;

> "The consultation paper also pointed out that the question of categorization and having a separate definition for commercial cable subscribers is closely linked to the question of approach to tariff regulation ie. Whether it is necessary to have tariff regulation at all or a differential set of tariff regulation for different categories of cable subscribers. The question of categorization depends and comes after the decision on the need or otherwise to have different sets of tariff regulation."

33. We may notice that no answer thereto has been attempted to be given as to why a change in the freeze order was contemplated. In Sections 2.3, 2.4 and 2.5, TRAI had noticed the directions in the appeals by the Supreme Court of India. Section 3 provides for definition of commercial cable subscribers and issues relating thereto. Clause 3.1.1 provides for the history and the subsequent changes made in relation thereto. We may, at this juncture, also notice that there is nothing on

record to show as to on what materials the TRAI had arrived at a conclusion that the commercial establishments had the mechanism and wherewithal to protect themselves.

34. The TRAI had taken into consideration in paragraph 3.1.1 one major issue for the purpose of arriving at its conclusion in the aforementioned order that the question for a separate distinction or otherwise for those establishments who avail broadcasting and cable services not for their own domestic use but for the benefit of his/her clients. This sentence, it has not been disputed, before use has been lifted from the judgement of the TDSAT.

35. We will consider hereinafter as to whether the said question was a right question or the same should have been an objective of the TRAI.

Clause 3.1.2. reads as under;

> "3.1.2 However, subsequently the question of need for categorization and applicability of the principal tariff order of 1.10.2004 arose in respect of hotels before the TRAI when representations from a hotel association seeking relief against the hike in cable charges by broadcasters was received well before the matter came up before hon'ble TDSAT. While

examining the issue it was felt that the principal tariff order of 1.10.2004 needed clarity on the real intent of applicability or otherwise to establishments who do not use the broadcast and cable services for their own use. However, before the decision could be taken matter had become sub-judice. There were also a couple of references from establishments (other than hotels) seeking clarification on the issue of applicability of tariff regulation and as to the interpretation."

36. One of the questions which would arise for our consideration, was it meant to be applicable to the petitioners?

The use of availing the broadcasting services, in common parlance, may not also have any relevance.

The views of the TRAI have been stated in Clause 3.1.5 from which we have to notice in extenso:

"3.1.5 The comments received from the stakeholders on the issue of need or otherwise of a separate definition and retention

of the existing definition has been analyzed and the Authority's views are given below:

i) TRAI had noted that there are bound to be more disputes between establishments who received signals for the use of clients etc and the service providers including broadcasters and therefore the need to bring in clarity to the interpretation of the principal tariff order. But the TRAI before taking a final view decided to deliberate in detail through a consultation process as envisaged under Section 11(4) of the TRAI Act 1997, on the various issues relating commercial tariff for cable television services. Considering that the principal tariff order of 1.10.2004 required clarity in regard to its applicability to the commercial establishments in the context of the underlying objective stated above there is a necessity to identify the commercial establishments and provide for the manner of regulation of cable charges for these establishments. In either case whether to extend the protection of ceiling on cable charges in any form or not to extend protection at all, would require such establishments to be identified separately. Therefore, the need

to define the terms ordinary cable subscriber and commercial cable subscriber. The views of the hotel and its associations stating that there is no need for a separate definition is therefore not acceptable.

ii) The distinction sought to be made in the existing definition between an ordinary cable subscriber and commercial cable subscriber is justified from the point of view of the underlying premise that the need and extent of protection for a commercial establishment compared to that of an ordinary cable subscriber is not the same.

iii) It is an admitted fact that particularly hotels who had given details of prices paid by them that the charges paid by them is different and higher than the ordinary cable consumer. Thus even at the ground level the commercial establishments particularly the hotels and such other similar establishments, as a prevailing business practice, are treated differently.

iv) In regard to the approach one option is to adopt a definition which is wide in scope cum inclusive in nature as done in the existing definition which uses the criterion of usage as the basis to categorise the cable subscribers. In this approach the task of identification of specific categories of commercial cable subscribers is done for the purpose of extending or otherwise of the tariff regulation depending upon the assessment of the need for protection. The other approach is to adopt a definition, which is exhaustive identifying specific categories and sub-categories for the purpose of tariff regulation and indicating the type

of regulation intended for each such defined category. The

Authority has chosen to adopt the first approach

for the reason that it is extremely complex to evolve objective criterion for categorization. Even in the approach to the categorization the Authority has used the method to exclude certain categories of commercial cable subscribers for the purpose of keeping out of the ambit of tariff regulation thereby leaving the residual category of commercial cable subscribers within the fold of the tariff regulation. Any approach to define

specific category is bound to leave out some and include certain unintended ones. The stakeholders in their responses have also echoed similar views on the difficulty in evolving criterion for categorization of cable subscribers. It would be simpler and better to identify specific broad groups within this generic definition while providing for the differential dispensation in tariff regulation. Such an approach would also minimize the scope for disputes. Having a wide approach in defining a commercial cable subscriber would ensure that all are covered; those that do need protection could be specifically excluded. The Authority has therefore adopted this approach of having a definition, which is wide in scope and to identify specific groups for the purpose of tariff regulation based on the need for protection.

v) It is not denied that the product is same whether is a ordinary cable consumer or commercial establishments but the value derived from the product in the case of TV channels may not be the same in the situations where it is put to self use compared to a situation where it is meant for the purpose of its clients,

customers. The television channels or programmes, even though may not be sold as a standalone service by commercial establishments particularly like hotels, etc. but as a means of entertainment do possess the potential to give an enhanced value to their packaged services. Therefore, the manner how the broadcasting services are being used becomes relevant for differentiating between an ordinary cable subscriber and a commercial cable subscriber.

vi) In regard to the suggestion of identifying specific categories within the group of commercial cable subscribers for definition or extending protection it is viewed that existing definition based on the type of use is wide enough and would cover such specified categories as well.

vii) Considering the ground realities where 99% of the subscribers are receiving signals through the multi system operators or cable operators the suggestion of broadcasters that the commercial subscribers would be required to indicate the place where the signal is required to only to broadcasters and

not to operators is not acceptable. The existing definition gives flexibility as otherwise the restriction as suggested would create difficulties in regard to the vast majority of current arrangements of hotels etc with the operators.

viii) The amendments suggested for inclusion of the word agent and intermediary (of the broadcaster) has been examined and is not considered necessary as such intermediary would be acting only under authorization and would representing the broadcaster even otherwise.

ix) As also expressed by some of the stakeholders the Authority is of the view that no single approach to categorization will be ideal and attempts of micro management will only add to the distortions in the market, creating fresh grounds for raising disputes. On the other hand the vast majority of commercial establishments would fall within the scope of the existing definition yet would require protection as that of an ordinary cable subscriber

x) It has been pointed out that pay TV broadcasters for commercial usage should have separate interconnect agreements and that the Authority should direct the broadcasters that such agreements are entered into at the price that is being charged in the locality for an ordinary cable consumer. The Authority has noted that largely the broadcasters entering into interconnect agreements with the MSOs and independent cable operators exclude specified establishments such as hotels etc from the applicability and stipulates a prior permission requirement. Thus the issue of separate arrangement is in place and no change is warranted in this aspect of the present arrangements.

xi) One suggestion is that the product being same the license fee cannot be different for different consumers and that it should be determined on the basis of cost plus margin. Ideally a uniform price for a product of similar quality could be a situation if there is definite functional relationship between the cost of content and the value attached for the content and the

cost of content itself is easily amenable to evolve a standard set of cost. In the case of broadcasting industry it may not be so. More importantly the argument is not based on proper appreciation of the prevailing system of determination of margin particularly in a non-CAS environment and without considering the complexities involved, as stated above, in costing of content.

xii) Contrary to the claims of the hotel association, the Authority is of the view that big hotels providing variety of services have the capacity to protect their interests and cannot be treated at the same level as that of an ordinary cable consumer or even as that of large variety of commercial establishments which may require protection as that of the ordinary cable consumer. Many from this type of establishment may not be putting to use such services for the benefit of clients, customers etc. It was pointed out by the broadcasters that the cable charges as a portion of the revenue of the hotels forms a very insignificant portion and this has not been contested by the groups representing the hotels during the

consultation process. In other words the impact of keeping this identified category out of the ambit of protection is unlikely to hurt their interests adversely.

xiii) It is noted that that the suggestion of categorization based on the source of feed will not be a reflection of ground realities and there can be situation where it is not possible to have head end to receive the television signals and that such an approach would force the hotels to go to cable operators to receive signals instead of entering into contract with the broadcasters."

Paragraph 14 of the said Section refers to the definition of consumer under the Consumer Protection Act which admittedly is irrelevant.

37. Clause 3.1.6, however, may be noticed:

"3.1.6 The Authority has after examining the views put forth and for the reasons indicated above has come to a conclusion that an approach to definition based on specifically identifying categories would be more complex and problematic to implement and is bound to give rise to new grounds for dispute.

Therefore, an exhaustive approach to the question of definition would be more desirable. Those groups who may not need protection can be excluded from the applicability of the tariff protection and group the rest as a residual category requiring protection. Therefore, the Authority has decided to retain the existing definition of 'commercial cable subscribers' contained in the tariff amendment order of 7th March. 2006"

38. Section 3.2 provides for the conclusion. It reads "note for fixation of commercial tariff and related issues, types of commercial establishment to be covered and method of identification of such commercial establishments for regulations".

39. Clauses 3.2.1 and 3.2.2 read as under:

"3.2.1 In terms of the facility to choose channels of choice under a non-addressable regime the commercial cable subscribers are in the same position as that of the ordinary cable consumer excepting that they have the potential to settle for a negotiated settlement with the broadcaster albeit the level of

potential may not be the same across all types of commercial cable subscribers**.**

3.2.2 But the difference is that the former, particularly the hotels and other big commercial establishments who receive the broadcasting and cable services as a value addition to their own package of services have the potential to pass on the burden to their own clients. There may not be a direct functional relation between add on services such as that of the television channels and the business strength in as much as a client of a hotel or pub or club may not come to a hotel or club or pub etc with the sole objective of watching TV channels. But is it to be largely admitted, despite the claims to the contrary by the stakeholders representing the hotels, that such value added services definitely help to sustain and strengthen business relationship of such commercial establishments with their clients. If it had not been so, there was perhaps no need for the hotels to go to the appellate authority or the apex court or for TRAI to be deliberating on this issue of tariff for commercial cable subscribers particularly the hotels."

40. Different viewpoints of the representative of the petitioners and broadcaster have also been noted therein. The view of TRAI reads as under:

> "3.2.6 The Authority is of the view that it would be incorrect to draw a strict analogy between the identified group of commercial cable subscribers comprising hotels above a given grading etc, and hospitals as the former as a group need to be treated on a different footing. Most importantly, the Authority has taken conscious decision for the present not to club hospitals, educational institutions, big or small, along with the group consisting of hotels etc above a particular grading from the perspective of the socio economic causes such institutions are expected to serve. Moreover it may be more difficult to evolve a reasonable objective criterion to differentiate between two luxury hospitals. While the Authority is clear that the intention of protection is not to facilitate profit making by even such commercial hospitals, for the present and to begin with the Hospitals need to be given protection.

3.2.7 The Authority is however not closed to the option of revisiting the issue of categorization for the purpose of tariff regulation on the basis of experience gained if necessary. It is also to be recognized that there are a vast majority of establishments which do not receive the signals of television channels for their own use but they may not be commercially exploiting the services for furtherance of their own business. In this category would come educational institutions, Government hospitals, religious charitable and other philanthropic institutions, small shops, dhabas etc and this is not exhaustive list. During the interactions with the broadcasters it was clear that these commercial establishments, though in terms of the contract are not to be given signals without the prior permission of the broadcaster have not been targeted by the broadcasters due to sheer volume and difficulties in enforcing the agreements. Though some of the broadcasters have appointed agents to prevent and monitor of the giving signals by the MSOs to commercial establishments, it was still clear that this group is not the target of the broadcasters."

Clause 3.2.8 refers to specific comments/suggestions made by the stakeholders as also the specific findings of TRAI. We would only notice clauses 1,3,5,7 of the said paragraph:

"3.2.8 The Authority has also examined the various specific comments/ suggestions made by the stakeholders and has found that

i) The approach to identify each category of establishment for exclusion or inclusion for the purpose of tariff regulation is extremely complex and no such list can be exhaustive.

iii) In regard to the request for inclusion of clubs, malls, cinema halls, the proposal has not been agreed to for the reasons already indicated earlier. The proposal for reduction in the number of rooms from 50 to 25 has not been found to reasonable.

v) As was noted during the consultation process the vast majority of commercial establishments in the group of commercial establishments other than the identified categories

are actually not being targeted by the broadcasters perhaps for the reason of difficulties in enforcement of the clause of prior permission.

vii) The hotels as a group particularly big hotels in the view of the Authority do not need protection. These are large subscribers and the broadcasters too would stand to lose large sums of money if their negotiations with them are not successful."

41. The directions which were based on the said findings, are as under:

"3.2.9. In view of the above it has been proposed that there would be one category of commercial cable subscribers consisting of hotels with a rating of 3 star and above, heritage hotels, and any other hotel, motel, inn, and such other commercial establishment providing board and lodging and having 50 or more rooms. The Tariff in respect of this group would be as per the mutual agreement. For all other commercial establishments which is outside this identified category the ceiling shall be the charges as prevailing on 26.12.2003.

However for the both categories of commercial cable subscribers, the tariff for showing programmes on special event in public viewing area shall be as per mutual agreement.

3.2.11 The group representing the hotels have expressed concerns particularly those who fall in the identified category of commercial establishments that the broadcasters would use the mutual agreement route to arbitrarily increase prices. The Authority believes that the category of commercial establishments which have been identified for forbearance would ordinarily be in position to deal with the broadcasters on an even keel in the negotiations. Yet the Authority is also not impervious to their concerns. Therefore the Authority would be closely watching the movement of prices in respect of this segment and would review its decision if considered necessary on the basis of inputs received. Similarly, there could be a number of similar institutions, which in terms of capacity to negotiate a mutual agreement may be similar, and these could be revisited later and if necessary the identified list could be reviewed. The Authority would separately be asking the

broadcasters to report their tariffs for the commercial cable subscribers, to start with on a monthly basis, to gauge the extent of the increase in the rates. If found necessary the Authority would intervene in this matter

3.2.12 One of the issues raised by the Hotel Associations and their response to the Draft Tariff Order is that TRAI has to necessarily to fix a tariff in terms of the order of the Hon'ble Supreme Court. This point has been examined. The Supreme Court has only directed the TRAI to carry out the process for framing the tariff. The Tariff Order that has been proposed by the Authority includes the fixation of tariffs for certain categories whereas for the hotels above particular grading this has been left to mutual negotiations. It has also been indicated elsewhere that the outcome of mutual negotiation would be closely watched and if necessary, intervention would be made later. The Consultation Paper that had been issued in April 2006 also clearly provides one of the alternatives as excluding certain categories from the ambit of tariff regulations. One of the specific questions that had been framed was whether

commercial tariff should at all be brought under the ambit of tariff regulation. Further, it was specifically asked whether the tariff regulation should cover all kinds of commercial establishments or whether some categories should be left out. Thus, this objection is not valid at all."

42. We are not concerned with the method for fixing the rates for commercial consumers. We have referred to the said Explanatory Memorandum in great details only because the parties have referred thereto before us with their respective comments again and again.

It succinctly stated the reasons for putting the petitioners' hotels in a separate class and excluded the same from the purview of the regulatory regime are inter alia based on the following reasonings:

(i) The process of excluding others would be a complex one.

(ii) There is likelihood of more disputes between establishments who receives signals for the use of clients and the broadcasters;

(iii) It was needed for bringing in clarity.

(iv) The usage of the service is different.

(v) They do not require any need for protection although the code value of the contents are the same as the television channels cannot be sold as a stand alone programme, having regard to the commercial purpose for which the supply is taken there for more value.

(vi) A macro management may only add to the distortions in the market creating fresh grounds for raising dispute.

(vii) Uniform pricing is not possible as there is no defined functional relationship between the cost of content and the value attached thereto.

(viii) The hotels providing valued service have the capacity to pay.

(ix) The cable charges as a portion of revenue of the hotels forms a very insignificant portion as has been contended by the broadcasters.

(x) The petitioners have the potential to settle for a negotiated settlement.

43. So far as issue relating to the complexities involved in the exercise for the purposes of framing of tariff is concerned, the same in our

considered opinion, cannot be said to be a good reason. The first respondent is an expert body. It was required to take into consideration very complex issues.

44. Mr.Meet Malhotra would contend that this Tribunal should keep in mind the fact that where the regulatory regime in relation to the telecommunication services grew with the market and, thus it was not a very difficult task for the TRAI to lay down regulations regulating the industry as and when need arose therefor; but so far as the broadcasting and cable services industry is concerned, it was not so in view of the fact that only in the year 2004, the Central Government came out with a notification and thus the TRAI had no other option but to issue the first freeze order within a couple of weeks therefrom. Although it has been conceded that for all intent and purport, the TRAI apart from issuing the freeze orders had not been able to lay down any tariff in respect of the channels of various broadcasters, Mr.Malhotra would point out that TRAI had made its best efforts to so do so firstly by laying down the maximum charge per channel and also by responding to the need of the broadcasters for increase thereof by issuing two notifications in terms whereof the rate of the pay

channel had been increased by 7% and 4% respectively. According to Mr.Malhotra, TRAI had also laid down the ceiling for the free-to-air channels.

45. It may be true that having regard to the contents of different broadcasters may be valued differently but it appears to us, with all respect to the TRAI, that no serious attempt appears to have been made in relation thereto. The TRAI in a matter like the present one, was required to apply its mind more thoroughly as to whether it was necessary to provide for a regulatory regime be it for their domestic consumers or the commercial consumers. The Act provides therefor. But the need and extend therefore was required to be considered. One cannot compare selling a piece of bread in a dhaba with the one in a five star hotel. All selling the same product may have to spend differently on a large number of things including hygiene. There cannot, however, be any doubt or dispute that different rates could be fixed for the different consumers. There cannot however, be any doubt or dispute that different types of rates can be provided for different categories of consumers. The consultation paper itself proceeds on the basis that even as on 17.01.2006, the TRAI noticed

from the documents furnished by the Hotel Associations that rates per room charged vary from as low as from Rs.20/- to as high as Rs.1300/- per room per day. It has specifically been noted in paragraph 3.6 that the Authority had indicated that price control will be lifted once there is effective competition.

46. Before, however, we proceed to consider the other and further submissions of the learned counsel appearing on behalf of the parties, we may place on record that ESPN Software India Pvt.Ltd. has in its written submissions categorically stated that although the broadcasters charge from 35 to 85% of the occupancy, the agreement entered into by and between it and the appellant in Appeal No.18(C) of 2006 would go to show that out of 86 rooms in the said hotel, in terms of the said agreement the said appellant is required to pay for about 76 rooms. It has furthermore been accepted that in the event the hotels offered for 62 pay channels of Star, MSM, ESS, ZEE TV, BBC, Neo TV, CNN, Star News Bouquet and ZEE, the appellants are required to pay for about Rs.2099/- per month, the cost for all pay channels per day would be Rs.68.82.

47. It is, therefore, evident that although according to Mr.Meet Malhotra that there are several safeguards provided for TRAI itself to keep an eye over the development in the market, nothing has been brought on record to show that in fact the same had been carried out. Had it been so, it was expected of TRAI to bring on records some materials before us to show that in fact, it had been doing so. It could not have also become oblivious of the fact that according to broadcasters the upper limit has gone upto Rs.2099/- for all the 62 channels. What has been missed by Mr.Ganpathy in the aforementioned submissions is that admittedly there are about 500 channels in India. It may be true that some of the channels are regional ones and/or the local ones but there cannot be any doubt or dispute that the owners of all categories of hotel try to cater to the need and taste of all types of customers.

48. Although, it has been contended by the learned counsel appearing on behalf of the respondents that in terms of the guidelines issued by the Ministry of Tourism, it is not obligatory on the part of the appellants and/or other hotels to subscribe to the pay channels as the only requirement prescribed therefor is to provide TV which requirement would be met by providing even free-to-air channels. We are,

however, of the opinion that the said submission is too simplistic to be accepted in as much as the ground reality from which we cannot shut our eyes is that all hotels worth its name whether it has been placed in the category of star hotel or not, cannot afford not to provide the channels of the major broadcasters and that too the popular ones. It is, therefore, idle to contend that for the purpose of meeting the requirements of the guidelines fixed by the Ministry of Tourism, the appellants and/or the other hoteliers need not for all intent and purport arrive at any negotiated settlements with the broadcasters whatsoever. The very nature of submissions made by the learned counsel for the respondent clearly goes to show that they cannot afford to do so. It is in fact an agreement in desperation. Whereas on the one hand, the respondents talk of market force vis-à-vis the bargaining power of the hoteliers, it is beyond any controversy now that depending upon the need of each category of hoteliers there exists such an inconsistency in the rate, meaning thereby from Rs.20 to Rs.2100/-. This in our considered opinion, may not lead to a conclusion that the appellants had been very successful in utilizing their so called bargaining power and/or their position to fend for themselves.

49. We may now consider some of the other issues on which TRAI had relied upon to arrive at its aforementioned decision. It is not necessary, particularly, in the manner it has been sought to be done to bring in more clarity to avoid any dispute. TRAI has also while emphazising only underlying objective to identify the commercial establishment, in our opinion, has not assigned any cogent reason as to why a necessity was felt to change the definition. On the one hand the TRAI thought it to provide to some sort of a relief to the cable service operators as would appear from clause 1.1 of the Explanatory Memorandum, it failed to take into consideration that no prohibition had been laid down from the regime of the first freeze order framed by TRAI.

50. TRAI has also not made any serious effort to identify different establishments separately. It reiterated the old reasons for the purpose of considering the cases of the appellants. In fact, the viewpoint of the Supreme Court of India had not been taken seriously. Although it had provided on an underlying premise as contained in clause(ii) of Section 3.1.5, it is obviously not the case of the TRAI that all

commercial establishments are situated similarly. No basis for taking the said purported underlying premise has been spelt out.

51. The manner of usage, in our opinion, although may not be very relevant for the purpose of putting a clause of users of the cable and broadcasting services as out of the purview of the regulatory retime, any assessment of the need for protection should have, in our considered opinion should have been supported by other cogent and valued reason.

52. We appreciate that all types of service providers cannot be put in water-tight compartments for the purpose of evolving the objective criteria of categorization. Evidently the approach of the TRAI had not been very clear in this behalf. From clause (iv) of Section 3.1.5, it is evident that the broadcasters themselves wanted a wider definition. Although according to TRAI the need for protection did not exist for the appellants, there is nothing to show as to how the said need was assessed.

53. So far as the micro-management vis-à-vis macro management aspect is concerned, we are of the opinion that the question of requirement of protection having been felt so far as the cable subscribers are concerned which is evident from clause 9, we are of the opinion that no basis had been laid down therefor. It is true that functional relationship between the cost of content and the use thereof may be different. But in our opinion it cannot be said that as the task is difficult, therefore, no serious attempt in that behalf need be resorted to.

54. Capacity to protect their own interests which have been attributed by the TRAI so far as the appellants are concerned, we may only point out that it is not the case that others are not in a position to do so.

55. Whether the contention that the appellants may pass on their portion of the revenue, in our opinion, may not be valid act in as much as even otherwise the payment of charges for the cable services by almost every subscriber may be except a few, had been a major part of the total expenditures incurred by it.

56. The economic interest, we would assume, matters. But whether or not a turnover would do is a matter of serious debate in a situation of this nature. We find force in the submissions made on behalf of the appellants that others who fulfill the said criteria were not brought within the net.

57. Similarly, any existing potential to settle a negotiated settlement by itself cannot be a ground as cable services cannot be said to be an essential services. It is true that for a sizeable section of the people having regard to the number and nature of programmes that are broadcasted, it is almost a household affairs and thus, may be held to be very necessary, but constitutionalism, if taken into consideration, must lead to a legal conclusion that it is not an essential commodity or essential service so as to consider as to whether the same would come within the purview of the statues specifically framed by the Parliament in this behalf.

58. TRAI bringing out the commercial hospitals and other commercial establishments have referred to socio-economic causes. Luxury hospitals which may be costlier than three to five star hotels, in our

opinion do not serve any socio-economic purpose apart from the fact that such a consideration in the context of fixing the tariff for cable service may be irrelevant. Even assuming that the hospitals required protection on the ground of socio-economic causes, we fail to see any reason as to why the luxury clubs, malls, other commercial establishments have been found to be belonging to the different class on that ground alone.

59. It is difficult to understand as to why the clubs, malls and cinema halls, where the viewers again are different from the owners of the premises were to be treated differently and bracketted together with the hospitals/nursing homes. Why the restaurants have been kept out of the purview of the order is difficult to comprehend.

60. Even for the purpose of having headends in their own establishments which admittedly some of the hotels have admitted, require agreements with the broadcasters.

61. We, however, have no doubt in our mind that the TRAI in exercise of its provisions contained in the said Act is entitled to directed

forebearance in respect of a particular service or for a particular category of consumers. We may, however, notice the submissions of Mr.Malhotra that the hotels came up for consideration of TRAI for the purpose of excluding them from the regulatory regime as they came to it first. This, with the greatest of respect cannot be a valid ground. They represented to the TRAI because they had some grievances. Only because they had grievances, the same cannot by itself be a ground for placing them outside the regulatory regime. We, therefore, reiterate that only because the appellants had a deep pocket or they can bargain or they can pass on their burden to their customers may not by itself be a ground for keeping them outside the protective regime.

62. We may notice that the Supreme Court of India in State of Kerala v. T.M. Peter, (1980) 3 SCC 554, held as under:

> "16. The more serious submission pressed tersely but clearly, backed by a catena of cases, by Shri Viswanathan merits our consideration. The argument is shortly this. As between two owners of property, the presence of public purpose empowers the State to take the lands of either or both. But the *differential*

nature of the public purpose does not furnish a rational ground to pay more compensation for one owner and less for another and that impertinence vitiates the present measure. The purpose may be slum clearance, flood control or housing for workers, but how does the diversity of purposes warrant payment of differential scales of quantum of compensation where no constitutional immunity as in Article 31-A, B or C applies? Public purpose sanctions compulsory acquisition, not discriminatory compensation whether you take A's land for improvement scheme or irrigation scheme, how can you pay more or less, guided by an irrelevance viz. the *particular* public purpose? The State must act equally when it takes property unless there is an intelligent and intelligible differentia between two categories of owners having a nexus with the object, namely the scale of compensation. It is intellectual confusion of constitutional principle to regard classification good for one purpose as obliteration of differences for unrelated aspects. This logic is neatly applied in a series of cases of this Court.

18. In *Durganath Sharma case*[4], a special legislation for acquisition of land for flood control came up for constitutional

examination. We confine ourselves to the differentiation in the rate of compensation based on that accident of the nature of the purpose where the court struck a similar note. In *Nagpur Improvement Trust case* and in *Om Prakash case*, this Court voided the legislation which provided differential compensation based upon the purpose. In the latter case the court observed: (SCC p. 633 para 15 and pp. 633-34, para 16)

> "There can be no dispute that the Government can acquire land for a public purpose including that of the mahapalika or other local body, either under the unmodified Land Acquisition Act, 1894, or under that Act as modified by the Adhiniyam. If it chooses the first course, then the land-owners concerned will be entitled to better compensation including 15% solatium, the potential value of the land etc. nor will there be any impediment or hurdle such as that enacted by Section 372(1) of the Adhiniyam in the way of such land-owners, dissatisfied by the Collector's award, to approach the court under Section 18 of that Act.

63. Adequacy of difference or validity of difference may also not be a ground for the said purpose has been stated by the Supreme Court of India in Om Kumar v. Union of India,(2001) 2 SCC 386, in the following terms:

> "32**.** So far as Article 14 is concerned, the courts in India examined whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of the legislation. Obviously, when the courts considered the question whether the classification was based on intelligible differentia, the courts were examining the validity of the differences and the adequacy of the differences. This is again nothing but the principle of proportionality. There are also cases where legislation or rules have been struck down as being arbitrary in the sense of being unreasonable [see *Air India* v. *Nergesh Meerza* (SCC at pp. 372-373)]. But this latter aspect of striking down legislation only on the basis of "arbitrariness" has been doubted in *State of A.P.* v. *McDowell and Co."*

It has further been held:

> "58**.** Initially, our courts, while testing legislation as well as administrative action which was challenged as being discriminatory under Article 14, were examining whether the classification was discriminatory, in the sense whether the criteria for differentiation were intelligible and whether there was a rational relation between the classification and the object sought to be achieved by the classification. It is not necessary to give citation of cases decided by this Court where administrative action was struck down as being discriminative. There are numerous."

64. The learned counsel for both the parties have referred to a large number of case laws on the question as to whether there can be as to whether macro classification is permissible be it on the ground of income, the need for protection, the amount of rent and so on and so forth.

65. While concealing that such micro classification is permissible in law, we must not forget that the macro classification or sub-classification is permissible when those who are sought to be put in different

categories and classified separately must form a homogenous group, unless all the requisite classes forming commercial establishments, be it on any of the grounds noticed hereinbefore are said to be not forming a homogenous group, the classification may be permissible. Furthermore for such classification, nexus and object sought to be achieved must be taken into consideration.

66. We, however, as at present advised need not delve deep into the matter. Suffice to say that this Tribunal while exercising its jurisdiction under Section 14 read with Section 14A of the Act need not confine itself to the ingredients of judicial review, this Tribunal exercises an appellate power. The power of judicial review of administrative action and legislation and the power of the appellate authority are different. The later confers a wider power. It has been so held in Cellular Operators Association (supra).

With regard to jurisdiction of this Tribunal it was stated in COAI (supra):

> "34. Statutory recommendations made by it are normally accepted by the Central Government, as a result of which the

rights and obligations of the parties may seriously be affected. It was in the aforementioned premise the Parliament thought of creating an independent expert tribunal which, if an occasion arises therefore, may interfere with the finding of fact, finding of law or a mixed question of law and fact of the Authority. Succinctly stated the jurisdiction of the tribunal is not circumscribed in any manner whatsoever."

It was also held:

"33. The regulatory bodies exercise wide jurisdiction. They lay down the law. They may prosecute. They may punish. Intrinsically, they act like an internal audit. They may fix the price, they may fix the area of operation and so on and so forth……"

67. The Supreme Court of India on the appeals preferred thereagainst by the respondents' association reversed the said findings to which we may refer a little later.

So far as the jurisdiction of this Tribunal, the Supreme Court of India in Hotels & Restaurant Association Vs. Star India 2006(13)SCC753 stated as under:

> "28. The learned Attorney General has relied upon a decision of this Court in Union of India v. Parma Nanda - (1989)II LLJ 57 SC but the said decision has no application at all to the fact of the matter.
>
> 31. The rule as regard deference to expert bodies applies only in respect of a reviewing court and not to an expert tribunal. It may not be the function of a court exercising power of judicial review to act as a super-model as has been stated in Administrative Law by Bernard Schwartz, 3rd edition in para 10.1 at page 625; but the same would not be a case where an expert tribunal has been constituted only with a view to determine the correctness of an order passed by another expert body. The remedy under Section 14 of the Act is not a supervisory one. TDSAT's jurisdiction is not akin to a court issuing a writ of certiorari. The tribunal although is not a court, it has all the trappings of a Court. Its functions are judicial.

32. In 'Jurisdiction and Illegality' by Amnon Rubinstein a judicial power in contrast to the reviewing power is stated thus:

> A judicial power, on the other hand, denotes a process in which ascertainable legal rules are applied and which, therefore, is subject to an objectively correct solution. But that, as will be seen, does not mean that the repository of such a power is under an enforceable duty to arrive at that solution. The legal rules applied are capable of various interpretations and the repository of power, using his own reasoning faculties, may deviate from that solution which the law regards as the objectively correct one.

34. Statutory recommendations made by it are normally accepted by the Central Government, as a result of which the rights and obligations of the parties may seriously be affected. It was in the aforementioned premise the Parliament thought of creating an independent expert tribunal which, if an occasion arises therefore, may interfere with the finding of fact, finding of law or a mixed question of law and fact of the Authority.

Succinctly stated the jurisdiction of the tribunal is not circumscribed in any manner whatsoever.

40. Even in West Bengal Electricity Regulatory Commission v. C.E.S.C. Ltd.- AIR 2002 SC 3588 whereupon the learned Attorney General has placed reliance, this Court specifically stated:

> "102. We notice that the Commission constituted under Section 17 of the 1998 Act is an expert body and the determination of tariff which has to be made by the Commission involves a very highly technical procedure, requiring working knowledge of law, engineering, finance, commerce, economics and management. A perusal of the report of the ASCI as well as that of the Commission abundantly proves this fact. Therefore, we think it would be more appropriate and effective if a statutory appeal is provided to a similar expert body, so that the various questions which are factual and technical that arise in such an appeal, get appropriate consideration in the first stage also. From Section 4 of the 1998 Act, we

notice that the Central Electricity Regulatory Commission which has a judicial member as also a number of other members having varied qualifications, is better equipped to appreciate the technical and factual questions involved in the appeals arising from the orders of the Commission. Without meaning any disrespect to the judges of the High Court, we think neither the High Court nor the Supreme Court would in reality be appropriate appellate forums in dealing with this type of factual and technical matters. Therefore, we recommend that the appellate power against an order of the state commission under the 1998 Act should be conferred either on the Central Electricity Regulatory Commission or on a similar body. We notice that under the Telecom Regulatory Authority of India Act 1997 in Chapter IV, a similar provision is made for an appeal to a special appellate tribunal and thereafter a further appeal to the Supreme Court on questions of law only. We think a similar appellate provisions may be considered to make the relief of appeal more effective.””

It was held

> "36. It is one thing to say that TRAI recognizes the need for making such a distinction probably pursuant to or in furtherance of the observations made by TDSAT but therefor a final decision is yet to be taken. The Notification dated 7-3-2006 has been issued as an interim measure. By reason of the said notification, broadcasters have been injucted from increasing the rates. So long as a final determination in the matter does not take place, not only the members of the appellant Associations but also a vast number of similar commercial subscribers would remain protected.
>
> 37. It is not disputed that the nature of supply of TV signals is not distinct and different, It is same both for domestic consumers and commercial consumers."

It was observed

> "50. We, therefore, are of the opinion that it would not be correct to contend that the commercial cable subscribers would be outside the purview of regulatory jurisdiction of TRAI. If such a contention is accepted, the purport and object for which the TRAI Act was enacted would be defeated. TDSAT, with great respect, therefore, was not correct in opining that the regulators should also consider whether it is necessary or not to fix

the tariff for commercial purposes in order to bring greater degree of clarity and to avoid any conflicts and disputes arising in this regard.

53. We are, however, sure that TRAI while exercising its jurisdiction under sub-section(2) of Section 11 of the TRAI Act shall proceed to e53. We are, however, sure that TRAI while exercising its jurisdiction under sub-section(2) of Section 11 of the TRAI Act shall proceed to exercise its jurisdiction without in any way being influenced by the said observations. It must apply its mind independently.

54. It may be true that TRAI in its Tariff order dated 7.3.2006 sought to define ordinary cable subscribers and cable subscribers separately but the same is yet to be adopted finally. It is not conclusive. It must while laying down new tariff take into consideration all the pros and cons of the matter. It must apply its mind afresh as regards not only the justifiability thereof but also the workability thereof.

56. The role of a regulator may be varied. A regulation may provide for cost, supply or service on non-discriminatory basis, the mode and manner of supply making provisions for fair competition providing for a level playing field, protection of consumers' interest, prevention of monopoly. The services to be provided for through the cable operators are also recognized. While making the regulations, several factors are, thus required to be taken into account. The interest of one of the players in the field would not be taken into consideration throwing the interest of others to the wind.

59. It is nowo also not in dispute, as would appear from the explanatory memorandum issued by TRAI, that the interim protection has been extended also to commercial consumers."

68. This Tribunal, thus, is entitled to go into the question not only of legality or procedural irregularity and/or reasonableness part of which but also may go into the question inter alia in a case of this nature

with regard to the justifiability. It is entitled to see not only the justifiability of the order of TRAI but also the workability thereof.

69. We appreciate the Authority for the great effort it had made but then it, in our opinion, in determining the issues between two groups of consumers have failed to take into consideration relevant factors and took into consideration irrelevant one not germane for arriving at a decision.

70. We have also pointed out heretobefore that the Authority in arriving its opinion has posed unto itself a wrong question.

71. We again with utmost respect may observe that the TRAI appears to have acted in a bit haste.

72. It floated a consultation paper only on 21.04.2006 and for long period namely from 28.04.2006 to 19.10.2006 in view of the order of stay passed by the Supreme Court of India, it had not been able to proceed and advisedly at its opinion within a period one month. We, however, hasten to add that expedition is needed in the matter of decision of

TRAI. We, however, are of the opinion it would have been in a situation of this nature could have waited for a few days more with a view to note the reasonableness of the Supreme Court of India. We have no doubt in our mind that the TRAI did so with best of an intention but we have made those observations only because a peculiar situation involved in these matters.

73. We have noticed heretobefore the comments made by Mr.Ramji Srinivasan that TRAI was greatly influenced, although ordained by the Supreme Court of India not to do so, by the decision of TDSAT. In fact, Mr.Srinivasan has pointed out various paragraphs to show that the TRAI in arriving at its decision at a number of places had either used the same language which has been used by this Tribunal or merely paraphrased the same.

74. We appreciate the comments made by Mr.Malhotra that even assuming that in the action of TRAI there was a method of madness but it was a bonafide exercise of power and it acted in accordance with law, although, we do not see that the Authority did not do so nor its approach could have been casual.

75. The appellant approached the TRAI only because it thought that it would be protected by it. It a matter of record that various criminal cases were instituted by the cable operators and/or agents of the broadcasters. The Supreme Court no doubt did not make any comment about the criminal cases as it was concerned with an appeal preferred from the decision of this Tribunal who had proceeded on the basis that the orders framed by the TRAI were not applicable to the case of the commercial establishments and, thus, the appellants herein were not entitled to any protection. The said reasoning did not find favour to the Supreme Court. It dealt with all the reasonings of this Tribunal.

76. In that view of the matter and that too in retrospect, we have made an observation that it would have been better if the TRAI would have taken into consideration a reasonings of the Apex Court.

77. Two other questions which have been canvassed before us may also be taken note of.

(i) The alleged non-compliance of the order of the Supreme Court of India.

So far as the same is concerned, it is accepted at the Bar that the broadcasters had filed a contempt of court application before the Supreme Court. Notice was issued in relation thereto. Cause having been shown by the hotel owners that there has been a substantive compliance, the contempt petitioner was dropped. Notice was also taken that those who had not furnished the details as per the directions issued by the Supreme Court, have been expelled from the membership of the Association.

We, therefore, are of the opinion that no direction in this behalf is required to be issued as at present advised.

(ii) The learned counsel appearing on behalf of the broadcasters as also Mr.Meet Malhotra have raised a contention that keeping in view the orders passed by this Tribunal relegating the associations to the position of the respondent as they failed and/or neglected to pay the due court fee and thus, only two individual hotels are before us in whose favour, no order need be passed, particularly as they have been entering into agreements with the broadcasters.

78. The two associations had been agitating the case of their members form the very beginning. They preferred appeals from the decisions of the TRAI. They preferred appeals also in the Supreme Court of India. They along with present appeals also filed these appeals. However, at a later stage, at the instance of registry of this Tribunal or at the instance of the TRAI, admittedly, an objection was raised that the said associations having more than 3500 members, court fees should be paid as if all of them are parties before us. An objection was taken in relation thereto by the associations. Only, however, at a later stage, they filed an application for relegating themselves to the category of the respondents which according to Mr.Srinivasan was done for avoiding time lapse. Before us, the counsels of their associations were also present, although they have not addressed us separately but we have satisfied ourselves thereabout.

a. As the associations are still supporting the case of the appellants, we are of the opinion that the contentions raised by the learned counsel for the respondents have no merit. They are rejected accordingly.

b. It matters not as to whether the associations are in the category of the petitioners or the respondents but it matters that they

continue to support the appellants, whether directly or indirectly the case of the members of their respective associations. It is, therefore, not a case where either the associations had ceased to represent the members and they have lost all interest in the matter.

c. It also is not a case where the majority of the hotels are not interested in the subject matter of the present dispute.

d. We, therefore, would direct that the associations concerned may be permitted to represent their members before TRAI, in the future proceedings.

e. Another contention has been raised as noticed hereinbefore by Mr.Ganpathy that the appellant in Appeal No.18(C) of 2006 cannot be permitted to raise any contention as even for the financial year 2010-2011, it has entered into an agreement with ESPN.

f. It is not in controversy that this Tribunal although did not pass any interim order staying the operation of the impugned orders/directions issued by TRAI, but nearly directed the broadcasters not to take any coercive steps against the appellants. It is not in controversy that whereas the broadcasters have by and large entered into the agreements with the owners of the hotels, they have not taken any coercive steps in the sense that they have not disconnected the supply on one ground or the other.

g. We have noticed heretobefore, however, that the parties had negotiated for arriving at a rate which is ordinarily three to five times higher than the normal market rates offered by the domestic consumers. As indicated hereinbefore, TRAI itself has noticed that the rates vary from Rs.20 to Rs.1300/-.

h. Keeping in view the limited nature of contentions and furthermore having regard to the nature of necessity of the owners of the hotels for the purpose of obtaining the supplies of signals of the pay channels from various broadcasters, we are of the opinion that neither the principle of acquiescence nor the

principle of estoppel would be applicable in this case. The submission of Mr. Ganpathy to the aforementioned effect is rejected.

i. We, therefore, are of the opinion that it is a fit case where the impugned orders are required to be set aside. We direct accordingly. We, however, do not wish to issue any direction with regard to the refund of any amount but we would request the Authority to consider the case of commercial establishments once over again in a broad based manner.

j. These appeals are allowed but in the facts and circumstances of the cases, there shall be no order as to costs.

……J
(S.B. Sinha)
Chairperson

……
(G.D. Gaiha)
Member

……
(P.K.Rastogi)
Member

ITEM NO.110 COURT NO.11 SECTION XVII

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CIVIL APPEAL NOs.6040-6041 OF 2010

M/S ESPN SOFTWARE INDIA P.LTD. Appellant (s)

VERSUS

TELECOM REGULATORY AUTH.OF INDIA & ORS Respondent(s)
(With appln(s) for vacating stay, amendment of memo of parties, intervention and office report)

WITH

Civil Appeal NOS.10476-10477 of 2010
(With appln. for c/delay in filing SLP and office report)
Civil Appeal NOS.8358-8359 of 2010
(With appln. for c/delay in filing SLP)

Date: 16/04/2014 These Appeals were called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE ANIL R. DAVE
HON'BLE MR. JUSTICE VIKRAMAJIT SEN

For Appellant(s) Mr. N. Ganpathy,Adv.
Mr. Manpreet Lamba,Adv.

Ms. Liz Mathew,Adv.(Not present)
M/s. Fox Mandal & Co.,Advs.

For Respondent(s) Ms. Rukhmini Bobde,Adv.
Ms. Nandita Bajpai,Adv.
for M/s. Parekh & Co.,Advs.

Mr. A. Venayagam Balan,Adv.(Not present)

Ms. Sumedha Dang,Adv.
Ms. Madhu Sikri,Adv.(Not present)

Mr. Gaurav Sharma,Adv.(Not present)
Ms. Meera Mathur,Adv.(Not present)

Mr. Rakesh Dwivedi,Sr.Adv.
Mr. Sanjay Kapur,Adv.
Mr. Anmol Chandan,Adv.
Ms. Priyanka Das,Adv.

1

UPON hearing counsel the Court made the following

O R D E R

Intervention application is allowed.

The civil appeals are dismissed in terms of the signed order.

There shall be no order as to costs.

(Sarita Purohit)
Court Master

(Sneh Bala Mehra)
Assistant Registrar

2

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.6040-6041 OF 2010

M/S ESPN SOFTWARE INDIA P.LTD. ...APPELLANT(s)

VS.

TELECOM REGULATORY AUTHORITY
OF INDIA & ORS. ...RESPONDENT(s)

WITH
CIVIL APPEAL NOS.8358-8359 OF 2010 & 10476-10477 OF 2010

O R D E R

Intervention application is allowed.

Heard the learned counsel.

Upon hearing the learned counsel and looking at the impugned judgment, we see no reason to interfere with the said judgment and, therefore, confirm the same. The civil appeals are dismissed.

However, we direct that for a period of three months, the impugned tariff, which is in force as on today, shall continue. Within the said period, TRAI

shall look into the matter de novo, as directed in the impugned judgment, and shall re-determine the tariff after hearing the contentions of all the stake holders.

There shall be no order as to costs.

.....J.
[ANIL R. DAVE]

.....J.
[VIKRAMAJIT SEN]

New Delhi;
16th April, 2014.

ITEM NO.4 COURT NO.1 SECTION XVII

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CIVIL APPEAL NOS.6040-6041 OF 2010
(For Prel. Hearing)

M/S ESPN SOFTWARE INDIA P.LTD. Appellant (s)

VERSUS

TELECOM REGULATORY AUTH.OF INDIA & ORS Respondent(s)

(With appln(s) for ex-parte stay and office report)

Date: 16/08/2010 These Appeals were called on for hearing today.

CORAM :
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE K.S. RADHAKRISHNAN

For Appellant(s) Mr. C.A. Sundaram,Sr.Adv.
Mr. N. Ganpathy,Adv.

For Respondent(s) Mr. Sameer Parekh,Adv.
Mr. Arjun Garg,Adv.
Ms. Rukmini Bobde,Adv.
for M/s. Parekh & Co.,Advs.

Mr. Rakesh Dwivedi,Sr.Adv.
Mr. Sanjay Kapur,Adv.
Ms. Shubhra Kapur,Adv.
Mr. Abhishek Kumar,Adv.
Ms. Ashmi Mohan,Adv.

UPON hearing counsel the Court made the following
O R D E R

The civil appeals are admitted.

There shall ad-interim order of stay of the impugned judgment of TDSAT, till further directions.

Liberty is given to Respondent No.7 to move an interlocutory application, if so advised, for vacating the ad-interim order.

[T.I. Rajput]
A.R.-cum-P.S.

[Madhu Saxena]
Assistant Registrar

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Petition No. 111 (C) 2011 & 176 (C) of 2011
and
Petition No.136 (C) of 2011

Dated 7th July, 2011

Petition No. 111 (C) 2011 & 176 (C) of 2011

Hotel Airlines International ... Petitioner

Vs.

Telecom Regulatory Authority of India ... Respondent

Petition No. 136 (C) of 2011

Gaylord Restaurant and Ors. ... Petitioners

Vs.

Telecom Regulatory Authority of India ... Respondent

BEFORE:

HON'BLE JUSTICE S.B. SINHA, CHAIRPERSON
HON'BLE MR. G. D. GAIHA, MEMBER
HON'BLE MR. P.K.RASTOGI, MEMBER

For Petitioner : Mr. Ramji Srinivasan, Sr. Advocate
Mr. Arjun Garg, Advocate
Ms. Rukhmani Bobde, Advocate
Mr. Debojyoti Bhattacharya, Advocate
Mr. Zeyaul Haque, Advocate
Mr. Sameer P Parekh, Advocate
Ms. Sonali Basu Parekh, Advocate

For Respondent (TRAI) : Mr. Saket Singh, Advocate

For Respondent (ESPN)	: Mr. N. Ganapathy, Advocate Mr. Kartik Yadav, Advocate
For Respondent (MSM Discovery)	: Mr. A.C. Mishra, Advocate Mr. Jasmeet Singh, Advocate Mr. Sheeva, Advocate Mr. Mazag Andrabi, Advocate
For Respondent No.3 (Novex)	: Mrs. Meenakshi Ogra, Advocate Ms. Kanika Sharma, Advocate Ms. Shilpi Chowdhry, Advocate

J U D G E M E N T

S. B. Sinha

Introduction

An important question relating to interpretation of some of the provisions of the Telecommunication (Broadcasting and Cable Services) (2nd) Tariff (7th) Amendment Order, 2006 and Telecommunication (Broadcasting and Cable) Services (3rd) (CAS Areas) Tariff (1st Amendment) Order, 2006 ('The Tariff Orders'), including that of the 'Explanation' appended to Clause 2 (f) thereof is involved in these petitions.

The Parties herein

2. The petitioners, in the first case who are six in number consist of 'Hoteliers' and the Hotel and Restaurant Association of Western India.

In the second case, three restaurants are before us as petitioners besides the Hotel and Restaurant Association of Western India.

The respondent No.1 is the 'Regulator' within the meaning of the provisions of the Telecom Regulatory Authority of India Act, 1997.

The respondent No.2 in each of the cases are Broadcasters.

The respondent No.3 in each of the cases are the distributor/agent of the broadcasters.

Background Facts

3. The Hotel Association of India has filed a petition before this Tribunal in the year 2005 questioning the demands of the broadcasters charging higher fees. The said matter was carried to the Supreme Court of India.

In its judgement and order dated 24th November 2006, the Apex Court opined that the issues raised by the parties thereto should be considered afresh by this Tribunal.

The decision of the Supreme Court of India is reported in (2006) 13 SCC 753.

In that case, the locus standi of the Association to represent their members before this Tribunal as also the Supreme Court of India was upheld.

Upon remand, the said Petition No. 80 (C) of 2005 was disposed of by this Tribunal by an order dated 10.09.2007, holding :-

"That remanded Petition No. 80 (C) of 2005 was finally disposed of by this Hon'ble Tribunal on 10.9.2007. Relevant extract is given below :-

> *"We make it clear that the members of the petitioner Association will be free to have arrangements for supply of signals with Cable operators whom they choose for which purpose they will be free to enter into fresh arrangements as they may be advised."*

4. A Review Application was filed thereagainst by ESPN, which was marked as R.A No. 16 of 2007. With some observations, the said Review Application was dismissed by this Tribunal.

The respondent No.2 in each of these cases filed appeals before the Supreme Court of India, which have been admitted for consideration but no order of stay has been passed.

5. We may, at the outset, notice that the respondent No.2-broadcaster had entered into internal arrangements for retransmission of channels to the Hotels and Restaurants belonging to petitioners herein (other than the Association), principally through two or three Multi Service Operators who have a Pan India presence.

The cause of action for these petitions are said to be the letters of demands issued by their broadcasters/their authorised representatives asking them to pay charges in addition to the subscription charges which

are being paid to the respective cable operators/MSOs by petitioners during 2009-2011.

They furthermore received notices from the distributors/agents of the broadcasters calling upon them to obtain licenses and payment of tariffs on mutually agreed terms.

By reason of the said notice, it was inter alia contended :-

> *"7. That my client further states that neither any cable operator, DTH/PTV service provider nor any person running hotel, restaurant, pub, bar and such other commercial establishment is authorized to receive and transmit signals of aforesaid Channels through any means in any hotel, restaurant, pub, bar and such other commercial establishment, without obtaining a licence in this regard from them.*
>
> *8. That it has been distressing to my client to find that despite knowledge, you have neither shown any interest to obtain licence nor have you stopped receiving and transmitting/communicating signals of aforesaid channels of my Client in your restaurant/premises.*
>
> *In the circumstances, I call upon you to*
>
> *(a) Immediately cease and desist from receiving and displaying signals of aforesaid Channels;*
>
> *(b) Immediately contact distributor of my client Novex for obtaining licence required to receive and display aforesaid Channels;*
>
> *(c) Give an undertaking that you shall not receive and display aforesaid channels in your restaurant premises without*

valid licence and payment of tariff (the terms of which can be mutually arrived at), and

(d) To pay for the illegally receiving and displaying aforesaid channels in your restaurant premises and acts of infringements committed by you, immediately on receipt of this letter, failing which my Client may be in painful necessity to initiate appropriate legal proceedings against you, directors and all other responsible persons of a company which is owner of said restaurant without any further notice and in that case you and your company shall be further liable for all cost and consequences thereof which may please be noted very carefully."

6. A public notice was also issued on or about 4th May 2010, stating :-

"ATTENTION : HOTELS & COMMERCIAL ESTABLISHMENTS
PLEASENOTE THAT ESPN SOFTWARE INDIA PVT LTD ("ESIPL") HOLDS THE SOLE AND EXCLUSIVE RIGHTS TO BROADCAST AND DISTRIBUTE ESPN, STAR SPORTS & STAR CRICKET PROGRAMMING ("CHANNELS") IN THE TERRITORY OF INDIA.
This is to caution all Hotels and Commercial establishments that broadcasting/distribution/reception/viewing of the Channels in India, without authorization from ESIPL is illegal. Further, please note that carriage/reception/distribution of the Channels by any MSO/Cable Operator/Sub-Operator/DTH Operator/IPTV operator without written authorization from ESIPL having its corporate office at 7th Floor, Tower-C, Infinity Towers, DLF Phase-II, Gurgaon-122002 and its registered office at S-405 (LGF) Greater Kailash Part-II, New Delhi-110048 is a violation of copyrights and hence an illegal activity. If any person(s), entitles are found to be resorting to such activities, legal action shall be initiated against such person(s)/entities.

ESIPL reserves the right to take all necessary and appropriate steps to prevent such unauthorized and illegal use of the Service."

Some of the respondents replied to the said legal notice denying and disputing the said demands contending that they form part of the protected category of subscribers in terms of the notification dated 21.11.2006 issued by the TRAI.

The petitioners, on the aforementioned premise, have filed these petitions.

7. We may notice the reliefs prayed for by them in the first matter :-

"(i) declare that all restaurants and all hotels except for the categories mentioned in the notifications dated 21.11.2006 are entitled to pay cable subscription charges as per the price ceiling fixed by the TRAI from time to time for CAS and Non CAS areas as the case may be;

(ii) Pass an order permanently restraining the respondents by themselves or through their agents/authorized representatives from demanding cable subscription charges from the Petitioners higher than the price ceiling fixed by the TRAI from time to time;

(iii) Pass an order, permanently restraining the respondents by themselves or through their agents/authorized from taking any coercive action against the Petitioners for non payment of cable subscription charges higher than the price ceiling fixed by the TRAI from time to time."

8. The petitioners, by their letter dated 16 September 2009, stated as under :-

> *"2. We fail to understand as to under what authority you are addressing the said letter under reference and in the absence of the same your said letter under reference has no legal value.*
>
> *3. You are well aware that pursuant to Order dated 10/09/2007 passed by the TDSAT, we are entitled to take cable feed from any cable operator/s of our choice. Therefore, the question of your authorized Cable operators does not concern us at all. However, by our letter dated 12th September 2009, we have already furnished to you the name address and contact no. of local cable operator. You may take up the issue with the Cable Operator of our establishment, and we deny you claim of alleged his/her right.*
>
> *4. Also please note that our Hotel consist of 27 rooms only and, therefore, having regard to the latest tariff order of TRAI, your letter under reference, demands are illegal.*
>
> *5. We deny that we have conspired with the Local Cable Operator, as is alleged or otherwise.*
>
> *6. So far as your threats of prosecution under Copyright Act is concerned, the same is in any event subject to you establishing your rights, which please note. As regards allegations of theft of signals is concerned, the same is totally baseless having regard to the fact that all the cable feed is provided to us by the local cable operator on payment of monthly subscription charges.*

7. Without prejudice to what is stated hereinabove, we have to state that you and or the Broadcasters may take up the issue of blocking the said channels, as mentioned in your letter under reference and ensure that the local cable operators does not give us the feed thereof. This is subject to you establishing your exclusive ownership of any Copyright alleged by you or at all."

9. It is pertinent to note that respondent No.3 issued a notice on or about 21.09.2009, the relevant portions whereof read as under :

"4. We would further like to draw your attention to our letter with regard to our status and to whom we represent. Your cable operator is authorized to distribute signals of aforesaid channels only to home viewers and does not have any authorization for commercial establishments.

5. We further state that inspite of asking us to disclose our identify and/or authority to addressing notices to you, you better question your cable operator who admittedly distributing signals of channels of aforesaid company in your hotel premises has been authorized or not?

6. If your cable operator is of the view that he has got commercial licence or authorization them only we will take the matter with your local cable operator and till then it is you who is committing offence by receiving signals of channels of aforesaid company, contrary to the agreement with cable operator. Further, you have not asked your cable operator to reply to our letter dated 28.08.2009 addressed to you till today.

7. Hence, it is necessary for us to mention that we are authorized distributor of aforesaid M/s. ESPN Software India Pvt. Ltd. which has also published public notices from time to time in the leading news papers throughout India about our authority and warning to all those who are indulging in committing offences under The Copyright Act. A copy of the notice is enclosed herewith, which will show our bonafide representation for aforesaid company. Hence, before asking us, when you admit that you have been receiving signals of channels of aforesaid company from local cable operator after looking into our notices and in this reply please clarify from your cable operator about your unauthorized use of the signals of channels of aforesaid company for using them for commercial purpose and not home viewing purpose.

8. Further, with regard to TDSAT order, we admit that the said order authorizes you to take cable feed from any Cable Operator of your choice. Kindly point out where it is stated that you are authorized to take cable feed from an unauthorized cable operator and commit offence of infringement of broadcast reproduction right/copyright tor theft of signals in the said order.

10. Further, we have clearly furnished all the relevant documents to Mr. V.V. Godgil, Inspector of Police, Social Service Branch, Crime Branch, CID, Mumbai and established our rights.

11. We hope now the matter is clear to you and you will not indulge in infringement of broadcast reproduction right/copyright by receiving signals of channels of aforesaid company for commercial purpose and will also ask your local cable operator as to why he has not replied to our communication dated 16.09.2009, failing which we shall be constrained to initiate appropriate legal proceedings against you and your local cable

operator as per law entirely at your risks and to the costs and consequences, which please note seriously."

10. ESPN, one of the broadcasters before us, in its reply raised a contention that petitioner No.4 has more than 45 rooms. It was furthermore stated that the petitioner No.2 is a restaurant with a capacity of 200 when World Cup matches were being transmitted for viewing by their customers while drinking and dining.

The petitioner No.3 is said to be owner of a restaurant having a seating capacity of 98 and not 68 as claimed by it.

So far as petitioner No.4 is concerned, it is contended that it is having a restaurant with a seating capacity of 168.

It is furthermore contended that the petitioner No. 4 was subject to Entertainment Tax. The further contention of the said respondent is that as a commercial user the said petitioner was liable to pay the commercial charges for utilising the services of the answering respondent.

According to it, under the service contract entered into by and between the said respondent and the MSO, a prohibition exists so far as supply of signals to the commercial establishments is concerned as they are not specifically authorised therefor.

According to it, actions have been initiated to realise the broadcaster's share of revenue which have been denied by the commercial establishments. It is furthermore contended that the intention of respondent was to realise

the appropriate subscription fee from different consumers and not to cause any loss of business or reputation of petitioners.

11. 'MSM Discovery' in its reply contends that apart from 'Hathway' and 'In Cable" they had entered into an agreement with 'CR Cable' also for supply of signals in the concerned areas where petitioners are carrying out their business.

We may, however, notice the following :-

> *"13. That the contents of para 5 of the petition are admitted to the extent that the protected hotels and restaurants are only liable to pay tariff to the broadcasters/cable operators as fixed by TRAI from time to time and that under the notification dated 21.11.2006 the protected category of the hotels, restaurants, etc. are not required to pay anything over and above what is payable by any ordinary (non-commercial) subscriber to the broadcasters or their agents.*
>
> *14. That the contents of the para 6 of the petition are denied as incorrect. It is submitted that in the year 2009 it came to the knowledge of the answering Respondent that several commercial establishments such as hotels, restaurants, bars, hospitals, etc. were openly telecasting the channels of the Respondent herein without the requisite license. In pursuance thereof, the answering Respondent published a notice in the newspaper called 'Mid-Day' on 24.04.2009 informing all such commercial establishments about the requirement of the license. However, a number of commercial establishments ignored the said notice and continued to telecast the channels of the answering Respondent without the*

requisite license and this came to the knowledge of the answering Respondent recently. Thereafter, the answering Respondent, through its distributor 'Novex Communications Pvt. Ltd.', addressed letters to, inter alia, the Petitioners herein requesting them to refrain from indulging in unauthorized telecasting of the channels of the broadcasters and to obtain proper authorization/copyright license from the answering Respondent. It is denied that any threats were given to any of the commercial establishments.

17. The answering Respondent has initiated action to realize their revenues which was being denied to them by commercial establishments acting hand in glove with MSO's/LCO's. The answering Respondent has issued notices only to those establishments which despite being covered by the Tariff Notification of 21.11.2006 are resorting to avoiding the same. It is submitted that the notices were served upon the Petitioners, amongst others, solely with the intention of bringing to their knowledge the fact that they are required either to obtain a license from the answering Respondent or to get signals from an authorized MSO/LCO for the purpose of telecasting the channels of the answering Respondent."

12. It furthermore contended :-

1. All the petitioners belong to the category of 'Commercial Cable Subscribers' as laid down by the TRAI through its notification dated 07.03.2006 and as such were required to obtain supply of signals only

from a MSO duly authorized by a broadcaster therefor to the commercial subscribers.

2. The petitioners have continued to telecast its channels illegally and thereby causing huge loss of revenue and business to them despite being aware of the said public notice dated 20.04.2009.

3. It is implicit that 'Cable Operators' referred to in the Order of this Tribunal dated 10th September, 2007 in Petition No. 80 (C) of 2005 would only mean those cable operators who are duly authorized therefor by the broadcasters.

It is, however, admitted that the hotels and restaurants which come within the purview of the protected category as laid down by the TRAI in its notification dated 21.11.2006 are not required to pay anything over and above what is payable by any ordinary (non-commercial) cable subscriber to the Broadcasters or their agents.

It is further stated in the reply of 'MSM Discovery' that it had issued notices only to those establishments which despite being covered by the Tariff Notification of 21.11.2006 are resorting to avoiding the same and that they were issued solely with the intention of letting petitioners know that they were required either to obtain a license from respondent No.2 or to get signals from an authorised MSO/LCO for the purpose of telecasting the channels of the answering respondent.

13. The TRAI in its reply has categorically stated that need to amend the Tariff Order dated 24.03.006 arose when it came to know that some commercial establishments were exploiting the provisions of Clause 3A as inserted by the Amendment Tariff Order dated 07.03.2006 to receive and exhibit cable TV services without a valid license in an unauthorised manner. It was only to cover the said cable operators that the Amendment dated 07.03.2006 was carried out.

It, in no uncertain terms stated that for all commercial establishments other than the category of commercial cable subscribers consisting of Hotels with a rating of three star and above, the ceiling shall be the charges as prevailing as on 26.12.2003 and only for special events in the public viewing area, was to be as per mutual agreement. It has been stated that the Tariff Order dated 21.11.2006 are applicable to the present case.

Questions

14. The questions which arise for our consideration are :-

1. Whether the respondent No.2 can levy any additional charge on the petitioners who come within the purview of the protected category of commercial subscribers?

2. Whether the broadcasters are justified in taking action against the petitioners for receiving signals from LCO's/MSOs to whom the prescribed carriage charges are being paid?

3. Whether the broadcasters having admittedly been supplying signals to the MSOs/LCOs with full knowledge that the same are being transmitted to petitioners without taking any action against them were entitled to take any independent action against petitioners?

4. Whether keeping in view the statutory regime, the broadcasters should have informed the subscribers as to who were their authorised LCOs/MSOs in their respective areas?

5. Whether the restaurants, which are neither registered under the Entertainment Tax laws nor were charging their customers separately for view of the cable televisions in their premises, are liable to pay anything higher than the other protected category of customers?

Appreciation of Evidence Brought On Record

15. The respondents in support of their case examined witnesses.

Mr. Joel Nash was examined on behalf of ESPN and Mr Amar Trivedi was examined on behalf of 'MSM Discovery'.

We may notice the relevant statements from the cross-examination of Mr Joel Nash in extenso as his evidence in this regard is crucial :-

> *"Both Hathway and In Cable were appointed as MSOs for the first time in or around the year 1998.*
>
> *An annual agreement is signed which is renewed every year.*

Sometimes we sign a contract and sometimes we sign MOUs.

I do not know and need to check if a service contract was signed as per clause 9 of Ex. R-1.

Since 1998 there has always been a clause in our agreement with Hathway and In Cable excluding hotels and commercial and other establishment.

Broadly a commercial establishment referred to in our agreement is anybody who is not a domestic user but exploits the signals commercially.

Q: In your view, would hospitals, clubs, airports and restaurants constitute commercial establishment?

A: I need to check.

Q: When did you for the first time become aware that Hathway and In cable were supplying signals/feed to hotels/commercial establishments?

A: In the year 2003.

Q: Did you treat this as a breach of contract and did you send any notice of breach or notice of termination to Hathway or Incable?

A: Yes.

Q: Are you suggesting that you terminated the contract of Hathway and Incable in 2003 or thereafter when you found out that they are supplying feed to hotels and commercial establishment?

A: We did not terminate them and made separate agreements with them with a clause that hotels and commercial establishments would not be served in the same contract and they would have to pay separately.

Q: After that did Hathway and Incable continue to supply to hotels and commercial establishment despite such an agreement?

A: Yes, they have continued to and in certain cases they have paid for it."

"Q: When did you become aware that Hathway and Incable were supplying feed to petitioner's no. 1 to 6?

A: Mid of 2010.

Q: Have you taken any action against Hathway and Incable for supplying signals to petitioner's no. 1 to 6 after you become aware of the same in the mid of 2010?

A: Yes, we have written letters to the same effect.

Q: What action did they take in response to your notice? Is it correct that they continued to supply the feed?

A: there was no action taken.

Q: Have you initiated any steps to terminate Ex. R-1 to R-6 after the two MSOs refused to take any action?

A: No.

I agree that petitioner no. 2 and petitioner no. 5 were respectively church Gate and Fort area are in CAS area and Ex. R-2 and R-5 do not relate to them since these are for non CAS areas.

I say that there are no cable operators in the areas where petitioner's no. 1 to 6 are located were authorized to supply signal to them.

VOL. We have authorized Hathway and Incable to authorize restaurants and hotels to view the channels in the areas where petitioner's no. 1 to 6 are located.

Q: Please tell us the basis for your statement in your affidavit that petitioner's No. 1 to 6 are subject to entertainment tax?

A: This is our feeling.

Q: Can you tell us the rate a two star hotel is required to pay you for getting signals for ESPN, Star Sports and Star Cricket in Non CAS areas?

A: Cable home rate. Its around Rs. 72/- for all the three channels.

Q: what is cable home rate and do you publish it?

A: IT is available on the website.

Q: Can you tell us the rate a five star hotel is required to pay you for getting signals for ESPN, Star Sports and Star Cricket in Non CAS areas?

A:Rs. 250/- uniformly.

Q: Can you answer the same question for two star and five star in CAS areas?

A: It is the same.

Q: If a two star hotel wishes to take the ESPN channel from a local cable operator, what is he required to do?

A: They would pay the LCO the service charges for providing the signals and pay to us for the subscription charges separately.

Q: For the subscription fees, do you enter into a separate agreement?

A: Yes."

"Q: Can you give us the names of all the commercial establishments who are not hotels or restaurants against whom you have taken action for taking feed without paying ESPN?

A: Off and on I do not remember but I assure that information will be provided.

Q: I suggest to you that ESPN has not taken action against any commercial establishment apart from hotels and restaurants?

A: I disagree.

Q: Is it correct that you do not charge subscription charges from domestic/residential viewers but you charge them from all commercial subscribers?

A: The statement itself is wrong. We charge both commercial subscribers as well as domestic subscribers.

Q: Are you suggesting that domestic/residential viewers pay service charge to the cable operator and subscription fee separately to ESPN by your last answer?

A: As far as the home subscriber is concerned, he pays inclusive to the operator.

Q: Can you explain why you do not charge a similar inclusive rate from commercial subscribers for both service charges and subscription fees?

A: As mentioned earlier, a commercial establishment exploits the services provided for profits unlike residential home and therefore there is a difference.

Q: Is it correct that you make no distinction as far as charges are concerned between hotels which are three star and above and those which are two star and below?

A: We go as per TRAI guidelines.

Q: So do you make a distinction or not between these two categories?

A: We do not make any distinction, we go by guidelines.

Q: Do you charge the same amount from these two categories of commercial subscribers? Please give the answer in rupees or in figures?

A: As per TRAI guidelines given to us we are charging the two star and below the cable home rate and a five star property we charge Rs. 250/-."

Mr. Trivedi, in his cross examination stated :-

"I do not remember when Hathway and Incable were originally appointed by us.

Incable and Hathway are MSOs who operate across Mumbai, within certain limitations.

They have been our MSOs for number of years and every year we sign a new contract with them.

It is correct to say that we have had agreements with Hathway. These agreements are for analog and not for commercial subscribers.

There is no reason why we have not filed any agreement with Hathway. However, we can provide the same.

(Ld. Counsel for the petitioner calls upon the witness to produce any agreement with Hathway.)

The witness states that he can produce the standard terms of agreement, short of commercial terms.

Hathway is also our MSO today."

"Please see Clause 3.1 of the agreement on page 5 of 12 where it states "Except as otherwise provided in this agreement….". I suggest to you that there is no absolute prohibition in this agreement against supplying signals to commercial establishments.

A. There is a prohibition. Affiliate cannot deliver signals to commercial establishments."

"Around mid of December 2010, we became aware that Hathway and Incable wee supplying feed to commercial establishments.

Q: Please see para 4 of your affidavit. Your notice dated 20.4.2009 did it relate to Hathway and Incable in any manner?

A: It was related to Hathway and Incable.

Q: Is it correct that prior to 20.4.2009, you were aware that Hathway and Incable were supplying signals to commercial establishments?

A: It is correct.

Q: Did you take any steps to terminate the agreements with Hathway and Incable if they were supplying feed to commercial establishments, after you found out about the same prior to 20.4.2009?

A: No, we did not take any steps.

Q: Is it correct that despite Incable supplying feed to commercial establishments which you say was contrary to your agreement, you signed a fresh agreement in the year 2010?

A: Yes, we have signed.

Vol. We are in negotiations with the MSO for getting into the

commercial agreement. This is an analog agreement and we are into negotiation for a commercial agreement.

Q: Please tell me the charges for CAS and non CAS areas for supplying your channels for say a Five Star and a One Star hotel?

A: It is available on TRAI website."

"Q: Do you charge anything for signing such a commercial agreement and can you produce a sample agreement?

A: Yes, we charge and I can produce a sample agreement without any commercials.

Q: Can you tell us how much do you charge for signing a commercial agreement?

A: We charge as per TRAI regulations.

Q: Between the cable operator and you, do you charge an aggregate figure as per TRAI Regulation or the sum of Local Cable Operator and your charges exceed the TRAI Regulation?

A: I am not aware as to how much LCO is charging and I deal only with MSOs.

Q: IS it correct that you have engaged NOVEX as a collection agent?

A: No, he is not an agent but a distributor.

Q: Is it correct that you pay carriage charges to Hathway and Incable for carrying your channels solely as part of Basic Services?

(Ld. Counsel for respondent no. 2 i.e. MSM Discovery objects being irrelevant.)

A: I am not aware of it.

Q: Can you give us any reason why you have not taken steps

to terminate the agreements with Hathway and Incable, if you believe that they are in breach of contract for supplying signals to commercial subscribers without your consent?

A: We are in negotiations with Hathway and Incable.

Vol. Whatever agreements we are signing with them, they do not relate to the present petitions.

Q: Do you make a distinction between hotels which are Three Star and above and below Three Star, while signing commercial agreements with such hotels, if so, can you tell us the distinction?

A: The distinctions are available on TRAI Website.

Q: I suggest to you that Hathway and Incable are entitled to supply feed to commercial subscribers?

A: I disagree.

Vol. We are in a process of negotiations with Hathway and Incable for commercial agreements for the specific list provided by them and approved by us."

Mr. Joel Nash, therefore, admitted that despite knowledge that 'Hathway' and 'In Cable' which have a Pan India operation that they, in relation to some circles at least, have been retransmitting signals to commercial consumers without any authority in this behalf but no action has been taken against them, although it was at one point in time, the same was contemplated.

16. The contracts with the said MSOs have been renewed without any demur, whatsoever. They have been continuing to do so since 2003.

Although the respondent's witnesses undertook to file relevant documents, they did not do so.

17. From their evidence it is clear that at least 'ESPN' has authorised 'Hathway' and 'In cable' to supply signals of its channels to Restaurants and Hotels in the areas where Petitioners are located.

In answer to a query as to on what basis the said witness had stated that Petitioner No.4 was subject to entertainment tax, Mr. Nash stated :-

"This is our feeling"

There is an admission on the part of the said witness that so far as petitioners are concerned, the cable home rate would be Rs. 72/- for all channels; whereas the rate for the five star hotels would be Rs. 250/- uniformly.

It is really surprising that despite his knowledge with regard to the 'Tariff Orders', he contended that petitioners are required to pay the service charges which, in turn, would be paid to the Broadcasters.

He has not filed any document to show that any action had been taken against the MSOs for supplying feed without paying to ESPN by the commercial establishments.

He, at a later stage of his evidence accepted that the home subscribers do not have to pay any service charges.

Mr Tiwari also accepted that the agreement with the MSOs had been entered into/renewed without any demur for analog subscribers although according to him they were not authorized to do so for commercial subscribers.

He, despite his assurance before this Tribunal, has not filed any agreement with 'Hathway'. Even the standard terms of agreement has not been filed.

He also accepted that no step has been taken against the MSOs for supplying feed to commercial establishments. Despite his knowledge, he also accepted that fresh agreements are also being entered into with the said MSOs.

According to him, negotiations had been going on for entering into commercial agreements.

He, however, evaded answers to many questions with regard to the rate and tariffs stating that they are on the website. He was unable to answer the question, when he was called upon, as to what are the figures of fixed charges so far as the 'ordinary consumers' and 'commercial consumers' are concerned.

He, did not answer a question as to the basis and condition of commercial agreements, which according to him, would be applicable to the Airports, Clubs, Malls, Hospitals etc., where signals of their channels are being transmitted.

He did not, despite an assurance, produce a sample copy of the agreement without any commercials.

When asked as to whether any step had been taken to terminate the agreement with 'Hathway' and 'In cable', he merely stated that they were having negotiations with 'Hathway' and 'In Cable'.

From the evidence of the witness of the respondent, it is therefore, clear that the petitioners were being asked to pay additional charges to which they were not liable to pay.

The Tariff Orders

18. The TRAI, while issuing an ad hoc tariff order as far back as on 01.10.2004, sought to make a distinction between an 'ordinary cable subscriber' and 'commercial cable subscriber'. Prior to making of the said order, the broadcasters were free to levy any charge subject to negotiations between the parties so far as the cable subscribers are concerned.

The TRAI, however, by reason of the said 'Tariff Orders' took an affirmative action by prescribing rates for the broadcasting and cable services and, thus, bringing them within the regulatory regime.

19. The 'Tariff Orders', as the names suggest, provide for control and/or Regulation over the tariff packages for Non-CAS and CAS areas respectively.

20. We may, however, notice the Tariff Order relating to Non-CAS areas. There is, however, one marked difference between the two orders viz. that preceding the 'interpretation section' insofar as in the Tariff Order applicable to the CAS areas is concerned, it provides, *'In this order unless the context otherwise requires'* which words do not appear in the 'Tariff Order' for the Non-CAS areas.

The Tariff Order was made on or about 1st October 2004, that is almost immediately after the 'Broadcasting and Cable Services' were notified by the Central Government as 'Telecommunication Services' within the meaning of the proviso appended to the Section 2(k) of the Telecom Regulatory Authority of India Act, 1997 ('the Act').

Whereas the first order applies throughout the territory of India except States, Cities, Towns and areas notified from time to time under section 4A (1) of the Cable Television Networks (Regulation) Act, 1995, the second order applies to CAS Areas which have been declared as such by the Central Government in exercise of the said provisions.

History of the Tariff Order

21. We may, at the outset, notice the 2004 order, the relevant provisions whereof are as under :-

> *"In exercise of the powers conferred by paras (ii), (iii) and (iv) of clause (b) of sub-section (1) and sub-section (2) of section 11 of the Telecom Regulatory Authority of India Act, 1997, read with*

the Notification No. 39 {S.O. No. 44 (E) and 45 (E) dated 09-01-2004} issued by the Central Government, the answering respondent made on 1.10.2004 a tariff order namely the Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order 2004 (6 of 2004) (hereinafter referred to as the 'principal tariff order')

Clause 3 of the said principal tariff order provided as follows:-

> *"…… 3.Tariff:*
>
> *The charges , excluding taxes, payable by*
>
> *(a) Cable subscribers to cable operator;*
>
> *(b) Cable operators to multi system operators/ broadcasters (including their authorised distribution agencies); and*
>
> *(c) Multi system operators to broadcasters (including their authorised distribution agencies) prevalent as on 26th December 2003 shall be the ceiling with respect to both free-to-air and pay channels.*
>
> *Provided that if any new pay channel(s) that is/are introduced after 26-12-2003 or any channel(s) that was/were free to air channel on 26-12-2003 is/are converted to pay channel(s) subsequently, then the ceiling referred to as above can be exceeded, but only if the new channel(s) are provided on a stand alone basis, either individually or as part of new, separate bouquet(s) and the new channel(s) is/are not included in the bouquet being provided on 26.12.2003 by a particular broadcaster. The extent to which the ceilings referred to above can be exceeded would be limited to the rates for the new channels. For the new pay channel(s) as well as the channel(s) that were free to air as on 26.12.2003 and have subsequently converted to pay channel(s) the rates must be similar to the rates of similar channels as on 26.12.2003:*
>
> *Provided further that in case a multi system operator or a cable operator reduces the number of pay channels that were being shown on 26.12.2003, the ceiling charge shall be reduced taking into account the rates of similar channels as on as on 26.12.2003…..".*

"On 7th March, 2006, an amendment was made to the said principal tariff order namely the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Fourth Amendment) Order 2006, (2 of 2006).

It reads as under :-

"…… 2 (i) In the Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order, 2004 (6 of 2004), under clause 2 after the existing sub-clause (d) and the entry relating thereto, the following sub clauses and the entry relating thereto shall be inserted as sub-clauses (dd) and (ddd), respectively, namely:-

"(dd) 'Ordinary cable subscriber' means any person who receives broadcasting service from a cable operator and uses the same for his/her domestic purposes.

(ddd) 'Commercial cable subscriber' means any person, other than a multi system operator or a cable operator, who receives broadcasting service at a place indicated by him to a broadcaster, multi system operator or cable operator, as the case may be, and uses such signals for the benefit of his clients, customers, members or any other class or group of persons having access to such place.

Explanatory note

The distinction between an ordinary cable subscriber and a commercial cable subscriber is in terms of the difference in the use to which such signals are put. The former would use it for his/her own use or the use of his/her family, guests etc. while the latter would over commercial and other establishments like hotels, restaurants, clubs, guest houses etc. which use the signals for the benefit of their

customers, clients, members or other permitted visitors to the establishment. "

(ii) In the Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order, 2004 (6 of 2004), under clause 2 the following shall be substituted for the existing clause (f)

"(f) 'Charges' means

(i) for all others except commercial cable subscribers, the rates (excluding taxes) payable by one party to the other by virtue of the written/oral agreement prevalent on 26th December 2003. The principle applicable in the written/oral agreement prevalent on 26th December 2003, should be applied for determining the scope of the term "rates"

(ii) for commercial cable subscribers, the rates (excluding taxes) payable by one party to the other by virtue of the written/oral agreement prevalent on 1st March 2006. The principle applicable in the written/oral agreement prevalent on 1st March 2006, should be applied for determining the scope of the term "rates"

"Clause 3 of the Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order 2004, (6 of 2004), the existing sub- clause (a) and the entries relating thereto shall be substituted with the following: -

"(a) Ordinary cable subscribers to cable operator."

In the Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order 2004, (6 of 2004), after the existing clause 3 and the entries relating thereto, the following clause and the entries relating thereto shall be inserted as clause 3A: -

"3A: the charges, excluding taxes, payable by commercial cable subscribers to cable operators, Multi system Operators or Broadcasters as the case may be, prevalent as on 1st March 2006 shall be the ceiling with respect to both free to air and pay channels.

Provided that if any new pay channel(s) that is/are introduced after 1-3-2006 or any channel(s) that was/were free to air channel on 1-3-2006 is/are converted to pay channel(s) subsequently, then the ceiling referred to as above can be exceeded, but only if the new channel(s) are provided on a stand alone basis, either individually or as part of new, separate bouquet(s) and the new channel(s) is/are not included in the bouquet being provided on 1-3-2006 by a particular broadcaster. The extent to which the ceilings referred to above can be exceeded would be limited to the rates for the new channels. For the new pay channel(s) as well as the channel(s) that were free to air as on 1-3-2006 and have subsequently converted to pay channel(s) the rates must be similar to the rates of similar channels as on 1-3-2006. Provided further that in case a broadcaster or multi system operator or a cable operator reduces the number of pay channels that were being shown on 1-3-2006, the ceiling charge shall be reduced taking into account the rates of similar channels as on as on 1-3-2006."

"On 24th March, 2006 made an amendment to the principal tariff order namely the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Fifth Amendment) Order 2006, (4 of 2006). The said amendment provides as follows:-

"After the existing 2nd proviso below clause 3A and the entries relating thereto, the following explanation and the entries relating thereto shall be added:

Explanation 1: For the purpose of clause 3A above the question whether commercial cable subscriber will pay the cable operator/MSO/the broadcaster will be determined by the terms of agreement(s) between broadcasters, MSO(s), Cable Operator(s) or between Broadcaster(s) and the Commercial Cable Subscriber(s) or between MSO / Cable Operator who have been authorized to provide signals to the Commercial Cable subscriber(s), on the one hand, and Commercial Cable Subscriber(s), on the other, as the case may be."

It is stated by TRAI that the need to make the above said provision in the said amendment tariff order dated 24.3.2006 arose from the fact that it was brought to the notice of the answering respondent, by a group of broadcasters, that certain commercial establishments were exploiting the provisions of clause 3A as inserted by the amendment tariff order dated 7.3.2006 to receive and exhibit cable TV services without a valid license and in an unauthorized manner. The spirit and intention of amendment tariff order dated 7.3.2006 was to cover those commercial cable subscribers who were/are provided television signals by those who were/are authorized to provide signals by virtue of agreements. The intention of the said amendment tariff order dated 7.3.2006 was not to promote illegal provision of broadcasting services. To bring clarity to interpretation of provisions of the said amendment

tariff order dated 7.3.2006, an explanation below the 2nd Proviso, of the said tariff order was issued."

"The Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Seventh Amendment) Order 2006 dated 21st November, 2006 made the following amendments to the principal tariff order:-

"….. 2. In the Principal Order, the existing sub-clause (f) of Clause 2 and the entries relating thereto shall be deleted and substituted by the following sub-clause (f) and entries relating thereto;

"(f) 'Charges' means and includes

(i) for all ordinary cable subscribers and commercial cable subscribers except those specified in (ii) below, the rates (excluding taxes) payable by one party to the other by virtue of the written/oral agreement prevalent on 26th December, 2003. The principle applicable in the written/oral agreement prevalent on 26th December 2003, should be applied for determining the scope of the term "rates".

(ii) for hotels with a rating of three star and above, heritage hotels (as described in the guidelines for classification of hotels issued by Department of Tourism, Government of India) and any other hotel, motel, inn, and such other commercial establishment, providing board and lodging and having 50 or more rooms, the charges specified in (i) above shall not be applicable and for these subscribers the charges would be as mutually determined by the parties.

Explanation: It is clarified that in respect of programmes of a broadcaster, shown on the occasion of a special event for

common viewing, at any place registered under the Entertainment Tax Law and to which access is allowed on payment basis for a minimum of 50 persons by the commercial cable subscribers, the tariff shall be as mutually determined between the parties."

3. In the Principal Order, the existing sub-clause (a) of clause 3 and the entries relating thereto shall be substituted with the following sub-clause (a) and entries relating thereto;

"(a) Ordinary cable subscribers and commercial cable subscribers (except hotels with a rating of three star and above, heritage hotels (as described in the guidelines for classification of hotels issued by Department of Tourism, Government of India) and any other hotel, motel, inn, and such other commercial establishment, providing board and lodging and have 50 or more rooms) to cable operators, multi system operators or broadcasters as the case may be"

4. In the Principal Order, after the existing clause 3(c) and entries relating thereto, the following explanations and entries relating thereto, namely

Explanation –1 and Explanation –2 shall be inserted:

"Explanation 1: for the purpose of clause 3(a) above the question whether the commercial cable subscriber will pay the cable operator/multi system operator/the broadcaster will be determined by the terms of agreement(s) between the concerned parties, namely

i) broadcaster(s)

ii) MSO(s) and cable operator(s) who have been authorized to provide signals to the commercial cable subscribers on

the one hand, and the commercial cable subscribers on the other.

Explanation 2 : for the purposes of clause 3(b) and (c) above the charges will be modified to take into account the payments to commercial cable subscribers where appropriate "

5. In the Principal Order, after the existing second proviso below clause 3(c) the following proviso shall be inserted

"Provided further that in the case of a commercial cable subscriber, the charges in respect of whom by virtue of clause 2(f)(ii) read with clause 3(a), is determinable as per mutual agreement between the parties, having facilities to get broadcasting services directly from the broadcaster, the later shall at the option of the commercial cable subscriber be obliged to provide channels on ala carte basis. For such consumers whenever bouquets are offered, these shall be subject to the following conditions:

I. The maximum retail price of any individual channel shall not exceed three times the average channel price of the bouquet of which it is a part;

Explanation: if the maximum retail price of a bouquet is Rs."X" per month and the number of channels is "Y" then the average channel price of the bouquet is Rs. X divided by Y II. The sum of the individual maximum retail prices of the channels shall not be more than 150% of the maximum retail price of the bouquet."

6. In the Principal Order, the existing clause 3A and entries relating thereto shall be deleted….".

22. By means of the said 'Tariff Orders', the Regulator defined separately the subscribers as 'ordinary cable subscribers' and 'commercial cable subscribers' although the parent Act, namely '1995 Act' or the 'Telecom Regulatory Authority of India Act, 1997' ('the Act') do not make any distinction between a 'commercial cable subscriber' and an 'ordinary cable subscriber'.

Interpretation of statutes - Some broad legal principles

23. It is a well settled principle of law that a statute must be read as a whole. It, in the event found to be ambiguous, is required to be given purposive interpretation. The interpretation of a statute should be with a view to find out the intent and object of the maker thereof.

Indisputably, while making the Tariff Orders, the TRAI intended to protect the consumers as a whole. It, although, made a distinction between a 'domestic cable subscriber' and 'commercial cable subscriber', while laying down the provisions of the charges therein, some commercial subscribers have been put at par with the ordinary cable subscribers.

Those, who are taken out of the statutory protection, are specified in 2 (f) (ii) thereof.

Explanation and Provisions

24. 'Explanation' appended thereto merely specifies as to who, apart from those who are in the excepted category, will fall within the purview thereof.

It is now a well-settled principle of law that 'Explanations' and 'Provisos' have more than one function.

In *S. Sundaram Pillai v. V.R. Pattabiraman* reported in (1985) 1 SCC 591 the Apex Court stated as under :-

> *"48. Bindra in Interpretation of Statutes (5th Edn.) at p. 67 states thus:*
>
> *"An Explanation does not enlarge the scope of the original section that it is supposed to explain. It is axiomatic that an Explanation only explains and does not expand or add to the scope of the original section... The purpose of an Explanation is, however, not to limit the scope of the main provision.... The construction of the Explanation must depend upon its terms, and no theory of its purpose can be entertained unless it is to be inferred from the language used. An 'Explanation' must be interpreted according to its own tenor."*
>
> *49. The principles laid down by the aforesaid authors are fully supported by various authorities of this Court. To quote only a few, in Burmah Shell Oil Storage and Distributing Co. of India Ltd. v. CTO a Constitution Bench decision, Hidayatullah, J. speaking for the Court, observed thus:*
>
> *"Now, the Explanation must be interpreted according to its own tenor, and it is meant to explain clause (1)(fl) of the Article and not vice versa. It is an error to explain the Explanation with the aid of the Article, because this reverses their roles."*
>
> *50. In Bihta Cooperative Development Cane Marketing Union Ltd. v. Bank of Bihar*[15] *this Court observed thus:*

> *"The Explanation must be read so as to harmonise with and clear up any ambiguity in the main section. It should not be so construed as to widen the ambit of the section."*
>
> *51. In Hiralal Rattanlal case this Court observed thus: [SCC para 25, p. 225: SCC (Tax) p. 316]*
>
> *"On the basis of the language of the Explanation this Court held that it did not widen the scope of clause (c). But from what has been said in the case, it is clear that if on a true reading of an Explanation it appears that it has widened the scope of the main section, effect be given to legislative intent notwithstanding the fact that the Legislature named that provision as an Explanation."*

Ordinarily, an 'Explanation' is appended to a Section to explain the meaning contained therein. It becomes a part and parcel thereof.

In the event, however, it is ambiguous, construction thereof will be preferred which would fit in with the avowed purpose. An 'Explanation' is also added to include something within or to exclude something from the ambit of the main enactment or the connotation of some word occurring in it.

(See *CED v. Kantilal Trikamlal* , (1976) 4 SCC 643 : AIR 1976 SC 1935)

It is not in controversy that an 'Explanation' should be read in the main section for the purpose of harmonising it and clearing up any ambiguity. The main provision should not, however, be widened thereby.

We may, however, notice that in some of the decisions of the Apex Court, it has been stated that the meaning to be given to an 'Explanation' would really depend upon its terms and not on any theory of its purpose.

(See *Keshavji Ravji & Co. v. CIT* , (1990) 2 SCC 231 : AIR 1991 SC 1806 and

Aphali Pharmaceuticals Ltd. v. State of Maharashtra , (1989) 4 SCC 378 : AIR 1989 SC 2227)

The TRAI in its Explanatory Memorandum explained the reasons therefor.

Construction/Applicability of Clause 2 (i) (f) of the Order

25. Charges were sought to be levied by reason of the said Clause. The object of the Regulator, indisputably, was to protect the customers. That protection might have been taken away in respect of a category of subscriber which again was within the authority of the Regulator but the exception should not be carried too far. The Tariff Orders, thus, contain an exception in regard to the 'Hotels' with a rating of three stars and above. Another exception is contained in the 'Explanation' although it is stated to be a clarificatory in nature only.

They are, therefore required to be given a purposive meaning.

For the purpose of attracting the 'Explanation' appended to Clause 2(f) of the conditions precedent laid down therein should be fulfilled.

They are :-

(i) there has to be an occasion for a special event for common viewing;

(ii) such a special event must be at a place which is registered under the Entertainment Tax laws;

(iii) in the said place, access is allowed on payment basis;

(iv) such access can be given to a minimum of 50 persons;

(v) the place must belong to a commercial cable subscriber.

Only in the event the aforementioned conditions are fulfilled, the tariff as prescribed would be as may mutually be determined by the parties.

We have noticed heretobefore that according to petitioner they do not come within the purview of the said 'Explanation'.

Admittedly they take supply of signals from the MSOs who have entered into agreements with the broadcasters and, thus, are otherwise authorized to retransmit their signals. They have also a 'licence' to distribute the Copyright of the broadcasters.

26. The question, which arises for our consideration, is as to whether petitioners, who having regard to the definition of "charges" as contained in Clause 2 (f) of the Tariff Order as introduced by an amendment dated 21st November 2006 would come within the purview of the excepted category?

Thus, whether the respondents, who are 'Broadcasters' within the meaning of the provisions of Clause 2 (aaa) of the Tariff Order as also who are engaged in providing broadcasting services within the meaning of Clause 2 (b) thereof, are bound to treat petitioners as a sub class of the class of commercial cable operators?

By reason of the provisions of the said order, the protection granted to the subscribers were sought to be withdrawn so far as the Hotels rated as three star and above, Heritage hotels and the ones having the Boarding and Lodging facilities for 50 or more rooms are concerned.

Protection by way of tariff, however, evidently continued in respect of the commercial cable operators, which do not fall within the 'exception' as contained in 2 (f) (ii) of the said order.

Explanation appended to clause 2 (f) of the Tariff Order seeks to provide for a clarification so far as programs of a 'broadcast' screened on the occasion of a special event for common viewing is concerned.

Such common viewing should take place at any place registered under the 'Entertainment Tax laws' and to which access is allowed on payment basis and if the minimum number of viewers is 50 or more, the protection under the Tariff Order was also sought to be taken away.

The Regulator, however, did not contemplate a situation where the broadcasters would be supplying signals directly to the owners of the

restaurants for those special events in cases where agreements have been entered into by them with the Multi Service Operator/Local Cable Operator for a fixed period.

The Tariff Orders also did not clarify as to what would be effect of the supply of signals when such special events are screened as no consequence therefor was provided.

Additional Charge - Issue

27. The contention of the respondent that additional amounts can be charged from protected commercial consumers over and above what is permissible under the TRAI Regulations cannot be accepted as petitioners would come within the purview of the said orders framed by the TRAI. If that be so, the respondents cannot charge any other or further amount. The Regulations framed by the TRAI must be held to be protecting the subscribers.

In the light of the Tariff Orders and particularly the 'Charging Section', the claim of the respondents demonstrates *malafide* on their part.

We intend to deal with the *'malafide'* aspect of the matter in some details separately.

Shri Trivedi in his evidence stated that commercial arrangements were being worked out with the MSOs barring the petitioners.

28. Why a commercial agreement is likely to be signed with 'Hathway' and 'In cable' barring petitioners is not understood. If any agreement is being signed with the said MSOs, they cannot be barred to supply signals to petitioners.

29. Mr Mishra, however, would urge that the said word has been loosely used. We do not think so.

However, we need not consider this aspect of the matter in depth.

30. Mr. Ganpathy would contend that the commercial cable consumers having been placed in a separate category in terms of the provisions of Sections 30, 37, 39A and in particular Ss. 37 (3)(iv) of the Copyright Act, respondent No.2 cannot be held to have acted *malafide* in initiating criminal proceedings against petitioners.

The learned counsel would contend that the 'commercial cable subscribers' cannot be permitted to exploit the situation. They cannot act in a manner which would affect the revenue of the Broadcasters.

31. The impugned notice was issued by respondent No.3 because of the alleged necessity on the part of the broadcaster-ESPN on the anvil of the exhibition of the World Cup.

Indisputably, the broadcasters have entered into agreements with large MSOs.

Either the said MSOs were authorised to supply signals also to the 'commercial cable consumers' or they were not. The MSOs being not parties to these proceedings and having not questioned the said provisions in the contract, if any, this Tribunal is not required to go into the question as to whether the same was permissible in law.

32. There cannot, however, be any doubt or dispute that in the event it is held that the MSOs have committed breach of contract, the broadcasters will have two remedies.

1. Condone the breach and continue the contract or claim damages therefor;
2. Terminate the agreement and/or claim damages.

The provisions of the 1995 Act and the Tariff Orders as also the Regulations framed by the TRAI do not prohibit any consumer from receiving the supply of signals from LCOs/MSOs.

In fact, as indicated heretobefore, the TRAI has fixed rates for the pay channels in terms whereof, the broadcasters MSOs and LCOs are required to divide the revenue earned from the subscribers.

The broadcasters in their cases must be held to have elected to condone the lapses, if any, on the part of the MSOs by not terminating their contract. They have even been renewing the contracts without any demur.

The conduct of the broadcasters in making attempt to extract some additional amounts from the petitioners if they satisfy the conditions precedent therefor, must be deprecated.

No additional amount, in our opinion, could be charged from the protected category of commercial consumers.

33. There appears to be some dispute with regard to the seating capacities in the restaurants belonging to petitioner Nos. 1, 2 and 3 but we need not go into the said question as admittedly as the same is more than 50.

It is not disputed that so far as the 'Hotels' are concerned, they do not fall within the category of three stars or above or Heritage hotels or hotels having 50 rooms and above, except some controversy in one case which may be considered a little later.

34. Broadcasters, however, contend that the said MSOs were not specifically authorised to retransmit the signals of their channels to the 'commercial cable subscribers'. The commercial subscribers, indisputably, have been taking supply of the signals for viewing of television channels of their guests from the said MSOs. For the said purpose, indisputably all

subscribers including the 'commercial cable subscribers' would be bound by the terms of the agreements they enter into with the LCOs, MSOs, DTH operators, HITS operators or IPTV operators.

It is also not in dispute that the TRAI by its orders postulate different percentages from the revenue earned from the cable subscribers i.e. 45% thereof would go to the broadcasters, 30% to the MSOs and 25% to the LCOs.

35. In some cases involving those 'commercial cable subscribers' who do come within the purview of the 'exempted category', it is accepted at the Bar that the broadcasters might have entered into a direct agreement with them.

36. A public notice was issued, the text of which have been noticed by us heretobefore. Novex, which is said to be a distributor of respondent No.2, had issued letters to the hoteliers only informing them that they, with their local cable operators who were not authorised to transmit the signals of the channels in the premises have conspired having been continuously receiving and transmitting the signals without obtaining any licence.

37. The Tariff Orders or the Regulations do not provide for any license. Licence is contemplated only under the Copyright Act, 1952.

The said Orders/Regulations do not provide for payment of any sum in excess of the rate prescribed by the TRAI directly to the broadcasters although signals were being obtained from the LCOs/MSOs.

The Tariff Orders clearly provide that the charges for the ordinary cable subscribers and the protected category of the 'commercial cable subscribers' would be the same.

If that be so, actions could have been taken against the MSOs by the broadcasters and not against the petitioners.

38. One of petitioners in its reply to the said notice without prejudice to its right to defend any prosecution under the Copyright Act and subject to respondent No.3's establishing its exclusive right contended that the broadcasters may take up the issue of blocking the channels as mentioned in the letter under reference and ensure that local cable operators do not provide any feed in respect thereof. They did not do so.

39. The respondent No.3, in its letter dated 21.09.2009, placed the entire burden upon petitioners stating that it was for them to show that they had been taking supply of signals from the authorised cable operators. We fail to understand this logic.

This was stated despite respondent No.2's knowledge that petitioners had been taking supply from the MSOs with whom they had entered into agreements.

We really, therefore, fail to understand as on what basis the papers were handed over to the Police (Social Service Branch), Crime Branch, CID.

Strangely enough, the respondent No.3 has asked petitioners, in turn to ask the local cable operators/MSOs as to why they had not replied to its communication dated 16.02.2009 as if it was their duty as regards thereto also.

40. It now stands admitted that no action far less any criminal action was initiated against the concerned MSOs or LCOs.

Actions, including criminal actions were only initiated against petitioners.

It is not a case where the petitioners have been taking supply of signals from persons with whom respondents had not entered into any agreement at all.

It is, therefore, difficult to comprehend as to why, without taking any action against the MSOs concerned, petitioners were targeted.

41. In the legal notice issued by respondent No.3, again petitioners were asked to obtain a license.

It was asked to contact 'Novex' for obtaining licence to receive and display the said channels. Undertakings were also sought for so that petitioners would not receive and display the aforesaid channels without a valid license and payment of tariff, the terms of which were to be mutually arrived at.

42. If, we are correct in our opinion that for the purpose of attracting the 'Explanation' appended to Clause 2(f) to the Tariff Order, the conditions precedent mentioned therein were required to be fulfilled and if by reason of the materials brought on record and in particular the admission made by the witnesses examined on behalf of respondent it is clear that they were not entitled to any other or further charges apart from the rates prescribed by the Regulator, the logical corollary would be that respondents concerned have acted illegally.

43. It is difficult to perceive why there being other 'commercial cable subscribers' like airports, malls, clubs, hospitals etc., respondent No.2's agent, respondent No.3 had taken recourse to actions against petitioner only and that too even initiating criminal proceeding.

44. Rule of law, by which we are governed, does not contemplate a strong arm tactics. If 'Novex' was a distributor, it could realise the amounts specified in the respective agreements with the MSOs from them. If, under law petitioners were placed at par with the ordinary cable subscribers, there was absolutely no reason why they are asked to take a separate license and pay a fee higher than the one prescribed under the statute.

45. Shri Joel Nash in his evidence stated that the broadcasters were entitled to commercial charges. Such commercial charges are not contemplated under the provisions of the Copyright Act.

In their reply, they have categorically stated so in the following terms:-

> *"As such the Petitioner No.2 being a commercial user is liable to pay the commercial charges for utilizing the services of the answering Respondent."*

46. What would be the commercial charges for the 'commercial cable subscribers'?

Would it be Rs.250/- or Rs.72/-?

It must be Rs.72/- as has been accepted by him in his cross examination.

Although, in his cross examination he contended that the commercial establishments exploit the services for profits unlike residential homes and,

therefore, there exists a difference but in answer to the next question as to whether any distinction is made as far as charges are concerned between Hotels which are three star and above and those which are two star and below he categorically admitted that they go by the TRAI guidelines which demonstrates that his previous answer was wrong. Even he had not been able to lay any basis for his earlier statement.

It is also of some interest to notice that in answer to a question as to whether the charges between a restaurant and domestic residential consumers are the same or different, he stated that they are different which for a restaurant is Rs.25,000/- per annum and for residences it is Rs.72/- per month. He has not placed any material to substantiate his contention, nor can there be any, in view of the 'Tariff Orders'. In fact, his contention is contrary to and/or inconsistent with the Tariff Orders.

Nowhere in his evidence he stated about the license fee under the Copyright Act became payable. The demands made by respondent, therefore, must be held to be wholly illegal and without jurisdiction.

Notice by Respondent No.3 - Validity of

47. So far as the notice issued by respondent No.3 is concerned Ms. Ogra would contend that by reason of the said notice dated 28 August 2009, petitioners were called upon to stop receiving and transmitting signals of the channels of respondent through unauthorised local cable operators without

having obtained the necessary license from them forthwith and furnish the details of the local cable operators immediately on receipt of the said letter.

It is really unfortunate that the Copyright issue in this case has been invoked without any basis.

We have noticed heretobefore that one of petitioners, namely 'Hotel Airlines International' in its reply categorically stated that they have not violated the provisions of the Copyright Act nor have they committed theft of any signals as cable feed is provided to them by their local cable operator on payment of monthly subscription charges.

48. The respondent No.3 claimed itself to be the distributor of the broadcaster. It, therefore, was supposed to know with whom the broadcasters had entered into contracts having the requisite authority to supply signals. It was also supposed to know the areas of operation of the respective MSOs and the fact as to whether MSOs are authorised to retransmit signals to the commercial cable operators both under the Regulating Laws and/or Copyright Act or not. They were supposed to find out the names of the commercial cable subscribers to whom the MSOs were supplying signals of the broadcasters and their authority to do so.

It is absurd to suggest that respondent No.3 , being the agent of respondent No.2 was not aware of the names of the MSOs or local cable operators with whom such agreements have been entered into by

respondent No.2. In any view of the matter, it was obligatory on their part to ascertain the same for respondent No.2.

49. We may take judicial notice of the fact that LCOs/MSOs make allegations that the broadcasters do not supply copies of the agreement. It is, therefore, difficult for us to perceive that the MSOs/cable operators would supply copies of the agreement to the cable subscribers.

50. The question, which has been raised and required to be determined, is as to whether they are bound to take supply of signals from those who have been authorised for the aforementioned purpose?

51. On what basis, therefore, petitioners were called upon to supply the names of the cable operators, is difficult to visualize.

We, therefore, are of the opinion that the action of respondent No.3 was wholly *malafide* being not for authorised purposes but only to extract money from petitioners to which they were not entitled to.

Copyright Act Issue

52. Submissions of Mr. Ganpathy and Ms. Ogra that petitioners have violated the provisions of Copyright Act in terms whereof a license was required to be taken cannot be accepted for more than one reason.

53. Respondent Nos. 2 and 3 have not been asking for license fee stricto sensu in terms of the provisions of the Copyright Act.

Even for the said purpose, respondents were to establish that petitioners have been exhibiting their broadcasting products for consideration.

54. Mr. Ganpathy, as noticed heretobefore, has drawn our attention to the provisions of Sections 2 (ff), 30, 37(i), 37 (iii), 37 (iv), 39 (a), 51 of the Copyright Act.

We, however, are of the opinion that it may not be necessary for us to delve deep into the question of interpretation of the said provisions in this petition, having regard to the factual matrix involved herein.

55. The petitioners have contended that they have not been commercially exploiting the material over which copyright is being claimed by respondents by communicating the same to the public.

The respondents have not been able to show that there has been any commercial exploitation by petitioner in terms of the provisions of the Copyright Act.

If there has been no commercial exploitation, the question of invoking the provisions thereof does not arise.

It now stands almost conceded that the allegations of commercial exploitation by petitioners have not been established in as much as no direct or indirect evidence has been brought on record to show that petitioners have been charging any money for allowing the viewers to see the World Cup Cricket matches.

The respondent No.2, in each of these cases being broadcasters is governed by the provisions of the 1995 Act and the 1994 Rules. They would also be governed by the provisions of the Act.

56. The respondents No.2, indisputably, had entered into contracts with the MSOs who have every right to retransmit the channel. In some of the agreements, it is possible that a clause exists that the Multiservice Operators or Cable Service Operators are not permitted to retransmit signals to the commercial subscribers or cable subscribers. But in such cases, actions were required to be taken against the concerned MSOs and not against the subscribers.

Necessity to notify authorized MSOs/LCOs

57. Supply of signals by a broadcaster/content aggregators are governed by the Parliamentary Acts and the Rules and Regulations framed by the authorities specified thereunder.

Respondent No.1, in exercise of the power conferred upon it under Section 11(i)(b) of the 1997 Act, made Regulations known as the 'Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004'. In terms of the said Regulations, the broadcasters are statutorily obligated to provide signals of its channels to the MSOs/LCOs in terms of Clause 3.2. The 2004 Regulations also postulate that with a view to protect the interest of the general public, the broadcasters/MSOs must not only issue notices to the respective MSOs/LCOS, as the case may be, as contemplated under Regulation 4.1 but also issue a public notice in terms of Regulation 4.3.

58. It is well settled that if any public notice is issued, the viewers can make an alternative arrangement for the purpose of continuing to receive the signals of channels. It is also beyond any doubt that they can approach this Tribunal or take any other action.

The players, thus, being governed by the Regulations must abide by the provisions thereof.

If only some of the MSOs are authorised to supply signals to the commercial cable viewers, it is difficult to understand as to why respondent

No.2 are not placing their names in the public domain. It is furthermore difficult to understand as to why despite demand, the MSOs with whom separate arrangements are being entered into are not being identified so as to enable petitioners to take supply of signals from the authorised cable operators/MSOs. It is also not understood as to on what basis taking benefit of a special event, respondents have been asking for commercial charges from petitioners to which they were not otherwise entitled to.

59. It may be placed on record that Mr. Srinivasan contended that petitioners would be ready and willing to take supply of signals from those who are notified as the authorised MSOs to supply the signals to commercial subscribers like petitioners.

60. Apart from the fact that in some of the areas, as would be noticed hereinafter that MSOs are authorised for supplying signals even to the commercial cable subscribers, the broadcasters themselves were required to notify the names of those who were authorised therefor.

61. We, in this connection, may notice that after the 2006 Amendment was made by the TRAI, the broadcasters themselves approached it for protecting their interests so far as the commercial cable subscribers are concerned vis-a-vis the MSOs who would be authorised therefor.

The representation made by the broadcasters was as under :-

"2. As a part of initial step towards detailed examination a process of seeking inputs from groups representing hotels and broadcasters was initiated. During this process the group of broadcasters made a representation in which it was pointed out inter alia as under :-

> *" .....The Order (Tariff Amendment Order dated 7.3.2006) has in effect nullified / reversed the order (TDSAT order) dated 17.1.2006. (emphasis in italics added). TDSAT recognized that the services to the hotels should be only through authorized means. A vast majority of the Hotels and Commercial establishments who obtain service through cable operators without requisite authorization from the broadcasters. In our view, the current arrangements through which Hotels and Commercial Establishments obtain supply is tantamount to piracy of signals. There is a clear danger that Hotels /commercial Establishments shall misuse the TRAI Tariff Order to legitimize the present unauthorized arrangements. A hotel or a commercial establishment needs to obtain a license from the respective broadcaster to receive and exhibit the service. However, clause 4 3(A) is being exploited by the Hotels to continuously receive service and exhibit the services without a valid license and in an unauthorized manner...."*

The said representations are contained in the Explanatory Memorandum annexed to the notification dated 24th March 2006 and marked as Annexure A.

Keeping in view the spirit and intention behind the provisions of extending the protection to a group of commercial cable consumers as also the judgement of this Tribunal dated 17.01.2006, an explanation has been appended to the existing second proviso to the newly added clause which reads as under :-

> *"Explanation1: For the purpose of clause 3A above the question whether commercial cable subscriber will pay the cable operator/MSO/the broadcaster will be determined by the terms of agreement(s) between broadcasters, MSO(s), Cable Operator(s) or between Broadcaster(s) and the Commercial Cable Subscriber(s) or between MSO / Cable Operator who have been authorized to provide signals to the Commercial Cable subscriber(s), on the one hand, and Commercial Cable Subscriber(s), on the other, as the case may be"*

62. The respondent No.3 admittedly does not possess any headend for the purpose of supplying signals to the commercial cable subscribers. If that be so, it is not an authorised agent/authorised MSO/LCO of respondent No.2 broadcasters within the meaning of the provisions of the said order, although would come within the purview of the term 'distributing agency'.

63. By reason of the 'Explanation' appended to clause 3(a) of the Tariff Order, a duty has been cast upon the broadcasters to notify the names of

authorised MSO/LCO for the said purpose. Such a notification, admittedly, has not been issued.

It is difficult to appreciate a situation, where the broadcasters would not authorise any MSO/LCO, on the one hand, and would insist on the other, that they may enter into separate agreements with the broadcasters and/or its distributor as they form a separate class.

The MSOs appointed by the broadcasters are distributors of TV channels within the meaning of Clause 2 (j) of the Regulations.

The broadcasters, in their representations before the TRAI had contended that those distributors of TV channels would be committing piracy if they are not authorised for the purpose of supply of signals to the commercial cable operators.

The broadcasters had two options.

1. Condone the lapses and terminate the agreement
2. Or terminate the agreement on the ground of piracy

It has another remedy of claiming damages.

They, in any event, could not have charged a higher amount. The respondents were aware that their operations were regulated and, thus, their rights, duties and obligations emanate only therefrom.

They had not questioned the validity or otherwise of the 2004 Regulations or the Tariff Orders.

The rights and obligations of the broadcasters vis-a-vis the MSOs are governed by the special statutes.

Jurisdiction Issue

64. Ms. Ogra would urge that so far as the violation of provisions of the Copyright Act is concerned, the Madras High Court in *M/S. Jak Communications Pvt. Ltd v. M/S. Sun TV Network Limited and Ors.* reported in [2010] 2 L.W. 936 has clearly held that 'Civil Court' has the requisite jurisdiction in relation thereto and not this Tribunal.

We need not go into the said question in details as it appears that in a Special Leave Petition filed by the Appellant therein, M/S. Jak Communications Pvt. Ltd against the said order being, SLP (C) No. 2407-2408 of 2010, the Supreme Court of India by an order dated 20/09/2010 disposed of the said appeal stating :-

> *"At the outset we may note that the dispute before the TDSAT no more survives. As far as the point of law involved in this case is concerned, the matter is still at the preliminary stage. In the circumstances, the Civil Court will proceed to decide the pending civil suit. All contentions on merits as also on law are kept open."*

65. So far as the jurisdiction of this Tribunal is concerned, no issue has been raised by respondent. Respondent No.2 has submitted itself to the jurisdiction of this Tribunal. If no issue has been framed, the question of challenging the jurisdiction of this Tribunal does not arise unless we inherently lack in it. More so, it is now well settled that when the question of implementation/interpretation of the Act vis-a-vis other provisions of the

other Acts arises for consideration, this Tribunal alone would have jurisdiction.

It was so held in *Sea T.V. Network Ltd. v. Star India Pvt. Ltd.* printed in 2005 Cable Petitions 90. A Bench presided over by Santosh Hegde, J. stated the law thus :-

> *"For deciding this question, we will have to first examine the provisions of the MRTP Act and TRAI Act bearing in mind the objectives of the two enactments.*
>
> *The preamble to the MRTP Act shows that it is an Act to provide that the operation of economic system does not result in the concentration of economic power to the common detriment and for the control of monopolies, prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto. Thus, it is seen that the MRTP Act is enacted to control economic system, to prevent concentration of economic power and to control monopolistic and restrictive trade practices. Thus, these restrictive trade practices are general in all sectors and not specific to any particular trade or commerce.*
>
> *Whereas the preamble to the TRAI Act shows, among others, this Act is enacted to adjudicate disputes, dispose of appeals and to protect the interests of service provides and to promote and ensure orderly growth in three specified sectors only. They are the telecom, broadcasting and cable sectors. From this preamble it is seen that the TRAI Act is a special enactment wherein a provision is made specifically for settlement of disputes between the categories of persons mentioned in Section 14(a)(i), (ii) and (iii) that too only in the limited sector. Therefore, while MRTP Act in regard to monopoly and restrictive trade practices generally applies in all sectors. TRAI Act is a special Act covering*

the areas of disputes in the three sectors, referred to hereinabove, that too between the parties mentioned in the TRAI Act.

Under Section 36 of the TRAI Act, Telecom Regulatory Authority of India is empowered to make regulations consistent with the said Act and rules made thereunder. Under Section 37 of the TRAI Act, the Regulations made by the TRAI have to be placed before the Parliament to seek its approval. Thus, there can be no dispute that the Regulations framed by the TRAI have the force of law having been made through the process of subordinate legislation provided they are consistent with the Act and Rules.

The relationship of the parties and their commercial interest in the three sectors to which TRAI Act applies, is thus statutorily controlled and any dispute arising in such relationship will be a dispute which will have to be adjudicated under Section 14 of the TRAI Act by this Tribunal so long as it is a dispute between a licensor and a licensee, between two or more service providers, between a service provider and a group of consumers."

66. The Supreme Court of India also opined that this Tribunal has wide jurisdiction in Union of India v. Tata Teleservices (Maharashtra) Ltd. reported in (2007) 7 SCC 517 in the following terms :-

"16. The Act is seen to be a self-contained code intended to deal with all disputes arising out of telecommunication services provided in this country in the light of the National Telecom Policy, 1994. This is emphasised by the Objects and Reasons also."

"17. Normally, when a specialised tribunal is constituted for dealing with disputes coming under it of a particular nature taking in serious technical aspects, the attempt must be to construe the jurisdiction conferred on it in a manner as not to frustrate the object sought to be achieved by the Act. In this

context, the ousting of the jurisdiction of the civil court contained in Section 15 and Section 27 of the Act has also to be kept in mind. The subject to be dealt with under the Act has considerable technical overtones which normally a civil court, at least as of now, is ill equipped to handle and this aspect cannot be ignored while defining the jurisdiction of TDSAT."

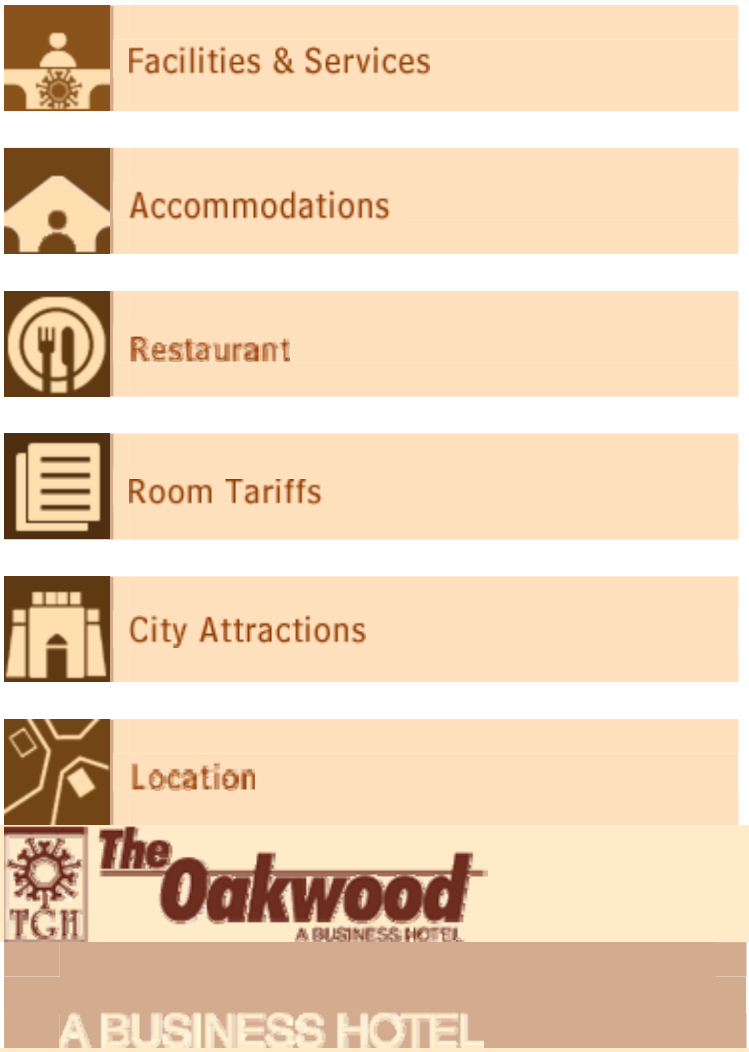
It noticed:

"24. In Cellular Operators' Assn. of India v. Union of India [(2003) 3 SCC 186] this Court had occasion to consider the spread of Sections 14 and 14-A of the Act. This Court held that the scope of Sections 14 and 14-A are very wide and is not confined by restrictions generally imposed by judge-made law on the Tribunal exercising an appellate jurisdiction. Of course, Their Lordships were considering in particular, the case of appellate jurisdiction. But this Court further said that the Tribunal has the power to adjudicate on any dispute but while answering the dispute, due weight had to be given to the recommendations of the authority under the Act which consists of experts. This decision, though it did not directly deal with the power of TDSAT as the original authority but was dealing with the power of TDSAT as an appellate authority and the power of this Court in appeal, clearly gives an indication that there is no need to whittle down the scope of Sections 14 and 14-A of the Act."

We, therefore, hold that we have jurisdiction to determine the issues before the parties hereto.

RE: <u>Misrepresentation of Petitioner No.4</u>

67. We must, however, before parting notice that Mr. Ganpathy has rightly drawn our attention to a copy of the website in respect of Petitioner No.4, which is to the following effect :-



68. Mr. Jayesh Shah, the witness for petitioner No.4 in his evidence admitted that the said advertisement has been issued by it stating :-

> *"I deny the suggestion that the petitioner No.6 is a four star hotel. (Witness is shown page 290 of the paper book, Annexure-R8).*
>
> *It is correct that what is shown to me at page 290 is a print out of our website. The name of our cable operator is Hathway. Upon*

receiving the notice from Novex, we made inquiries from our cable operator and were informed by them that they were authorized to provide our establishment with ESPN channels. Our hotel has 45 rooms. Our hotel did not have 84 rooms at any time."

Thus, on the one hand, in its website said petitioner has been showing its hotel to be a four-star one, it has denied that it is so.

69. We would request the Ministry of Tourism to take appropriate step in this behalf so that Respondent No.4 is either treated as a four-star hotel or it stops issuing such misleading advertisements in its website.

Conclusions

70. For the reasons aforementioned, we hold :-

1. These petitions are maintainable.

2. The Associations have locus standi to be parties so far as the legal question involved in these petitions are concerned. However, the Associations cannot represent its members in the matters which would require determination of factual dispute between the parties.

3. The respondent No.3 is not an authorised distributor within the meaning of the provisions of the Tariff Orders.

4. The respondent(s) No.2, for the purpose of enforcement of its rights vis-à-vis the MSOs/LCOs, must act in accordance with law. The broadcasters and/or respondent No.3 could not have taken any action against petitioners as it has been found as of fact that they

do not come within the purview of the 'Explanation' appended to Clause 2 (f) of the Tariff Orders and they belong to the protected group.

5. For the alleged acts of piracy on the part of the MSOs/LCOS of respondent No.2, the broadcasters are not entitled to any commercial charges and the subscribers cannot be proceeded against for payment of any charges which would be more than the rates prescribed under the 'Tariff Orders'.

6. The petitioners are also not bound to obtain any separate licence from the broadcasters in terms of the provisions of the Regulatory laws.

7. The broadcasters are hereby directed to notify their authorised distributors of TV channels within four weeks from date. On such notification, petitioners would take supply of signals only from the authorised distributors of TV channels of the broadcasters.

8. The notices issued by respondent No.3 to petitioners being *mala fide* are liable to be set aside.

9. It is clarified that this Tribunal has not expressed any opinion with regard to the violation of Copyright Act, if any. But, it is held that petitioners have not violated the provisions of any of the laws forming the regulatory regime. In fact, they are entitled to protection in terms of the Tariff Orders.

10. The broadcasters may proceed against petitioners only when it is found that they come within the purview of the 'Explanation' appended to Clause 2 (f) of the Tariff Order and not otherwise.

71. These petitions are allowed with the aforementioned observations and directions.

72. In the facts and circumstances of this case, respondents No.2 and 3 must pay and bear the costs of petitioners in both the petitions separately in equal proportions.

73. Advocate's Fee assessed at Rs.50,000/- in each of the petitions.

..... J
(S.B. Sinha)
Chairperson

.....
(G. D. Gaiha)
Member

.....
(P.K. Rastogi)
Member

//Shree/rkc//

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 4th September, 2013

Petition No. 396(C) of 2012

Ras Resorts, Silvassa & Ors … Petitioners
Versus
Media Pro Enterprise India Pvt. Ltd. & Ors. …Respondents

With

Petition No. 560(C) of 2012

Surya Palace Hotel …Petitioner
Vs.
Media Pro Enterprise India Pvt. Ltd. …Respondent

Petition No. 527(C) of 2012

Hotel Woodland & Ors. …Petitioners
Vs.
Media Pro Enterprise India Pvt. Ltd. & Ors. …Respondents

Petition No.738(C) of 2012

Hotel and Restaurant Association (Western India) …Petitioner
Vs.
Media Pro Enterprise India Pvt. Ltd. & Ors. …Respondents

BEFORE:

HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON
HON'BLE MR. KULDIP SINGH, MEMBER

For Petitioners (in all the Petitions) : Mr.Ramji Srinivasan,Sr.Advocate

Mr.Sameer Parekh,Advocate
Mr.Kumar Shashank,Advocate
Ms.Rukmini Bobde,Advocate
Ms.Nandita Bajpai, Advocate

For Respondents
In Pet No. 396 (C) of 2012 :
(Nos. 1 & 3) Mr. Tejveer Singh Bhatia, Advocate
Mr.Upender Thakur,Advocate
for Mrs.Prathiba M. Singh,Advocate

(No.2) : Mr.Nitin Sharma,Advocate

(No.4) : Mr.Sharath Sampath,Advocate
Mr.Manikya Khanna, Advocate

(No.7) : Mr. Atul Sharma, Advocate

(No.8) : Mr.Abhishek Malhotra, Advocate
Mr.Angad Singh Dugal,Advocate

(No.9) : Mr.N. Ganpathy, Advocate

(No.12) : Mr. Harsh Kaushik,
(No.14) Advocate
Mr.Navin Chawla,Advocate
Mr.Abhishek Kumar Jha,Advocate

Pet No. 527 (C) of 2012
(No. 2) : Mr.Nitin Sharma,Advocate

(No.6)		Mr.Atul Sharma,Advocate
(No.8)	:	Mr.Kamal Shankar, Advocate
(No. 7)	:	Mr.Abhishek Malhotra, Advocate
(No.11)		Mr.Angad Singh Dugal, Advocate
(No.13)	:	Mr.Harsh Kaushik,Advocate Mr.Nitin Sharma, Advocate Mr.Navin Chawla,Advocate Mr.Abhishek Kumar Jha,Advocate
Pet No. 560 (C) of 2012		
(No. 2)		Mr.Nitin Sharma,Advocate
(No. 6) (No.8)	:	Mr. Harsh Kaushik, Advocate Mr.Navin Chawla,Advocate Mr.Abhishek Kumar Jha,Advocate
Pet No. 738 (C) of 2012		
(No.2) (No.5)	:	Mr.Nitin Sharma,Advocate Mr.Angad Singh Dugal,Advocate
(No.6)	:	Mr.N. Ganpathy, Advocate
(No.9)	:	Mr.Harsh Kaushik,Advocate
(No.11)	:	Mr.Navin Chawla, Advocate Mr.Abhishek Kumar Jha,Advocate

O R D E R

After the matter was heard for some time, counsel representing the

broadcasters namely, i) Mr.N. Ganpathy appearing for ESPN Software India Pvt. (Respondent No.9); (ii) Mr.Tejveer Singh Bhatia appearing for Media Pro Enterprise India Pvt. Ltd. and Zee Entertainment Enterprises Ltd. (Respondent No.1& 3 respectively); (iii) Mr.Abhishek Malhotra appearing for Discovery Pvt. Ltd. (Respondent No.8); and (iv) Mr.Nitin Sharma appearing for Star India Pvt. Ltd. (Respondent No.2) state that as long as the DTH operators and the Multi System Operators make payments to the broadcasters at the rates, for excluded commercial consumers as shown on the broadcasters' websites and submitted to the TRAI or at any lower rates as mutually agreed between the broadcasters and the DTH operators or the Multi System Operators as the case may be, the DTH operators and the Multi System Operators will be free to negotiate the rates at which they would supply the channels to the petitioners'.

This, to a large extent, redresses the petitioners' grievance. It needs, however, to be clarified here that the petitioners shall not be compelled to take the full bouquets of any broadcaster/DTH Operator/Multi System Operator and it will be open to the petitioners to take only the channels of their choice and to pay for it at rates mutually agreed between the petitioners and the distributors as provided in the regulations relating to *a-la-carte* channels.

In case the petitioner(s) make a request to any broadcaster to furnish to them the names of the DTH Operators/Multi System Operators/Local Cable Operators directly authorized by the broadcaster for any particular area or territory, the broadcaster should give the necessary information to the

petitioner(s) without objection.

These petitions stand disposed of with the aforesaid observations and directions.

…….
(Aftab Alam)
Chairperson

……..
(Kuldip Singh)
Member

dbc

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IN THE HIGH COURT OF DELHI AT NEW DELHI

FAO(OS) 211/2010

MSM SATELLITE SINGAPORE PTE LTD. ..... Appellant
Through: Mr.Praveen Anand, Advocate with
Mr.Dhruv Anand, Advocate

versus

STAR CABLE NETWORK and ORS. ..... Respondents

Through: Nemo.

CORAM:
HON?BLE MR.JUSTICE PRADEEP NANDRAJOG
HON?BLE MR.JUSTICE RAJIV SAHAI ENDLAW

O R D E R
01.04.2010

CM No.5737/2010 in FAO (OS) 211/2010

Allowed subject to just exceptions.

CM No.5736/2010
Allowed subject to just exceptions. However, certified copy of the impugned order shall be filed as and when made available by the Registry.
FAO(OS) No.211/2010 and CM No.5735/2010
1. MSM Discovery Pvt. Ltd. is the distribution arm of Multi Screen Media Pvt. Ltd., a wholly owned subsidiary company of the appellant and has the sole and exclusive distribution rights pertaining to ?Sony Set Max? channel in India.
2. The appellant has acquired entertainment software and distributes and broadcasts signals of various entertainment channels such as ?SONY ENTERTAINMENT (MAX and SAB)?. The appellant has an agreement with BCCI as per which exclusive broadcast rights for matches of ?IPL Cricket Tournament in India? which commenced on 12th March 2010 vest with the appellant.
3. The grievance of the appellant is that respondents No.1 to 10 and 20 to 41, having obtained no authorization from the appellant as required by the Cable Television Networks (Regulation) Act 1995 and the Cable Television Network Rules framed thereunder are indulging in the unauthorized activity of downloading signals of the appellant and thereafter distributing the same through their network channel to various individuals. Qua respondents No.11 to 19, the grievance is of downloading the signals or otherwise obtaining the same illegally are telecasting the IPL matches to attract customers to their establishment. It is alleged that all the respondents require a license along with a decoder to capture the signal of the appellant which is encrypted and thereafter after decrypting the same, to transmit/broadcast the same under the

authorization as per the license granted.

4. It is the positive assertion of the appellant that none of the respondents has any license under the appellant authorizing the respondent to download and thereafter transmit the signals or broadcast the program in which the appellant has the exclusive right.

5. We note that as per the appellant the IPL matches are being transmitted on the ?Sony Set Max? channel.

6. The grievance in the plaint was that the unauthorized activities of the defendants requires to be injuncted by means of a permanent injunction and in the interregnum, by way of interim relief, it was prayed that an ex-parte ad-interim injunction be issued to injunct the defendants from downloading the signals of ?Sony Set Max? channel and thereafter distribute the same to the individual houses or broadcast the same.

7. Vide impugned order dated 26.3.2010, declining the ex-parte ad-interim relief prayed for, the learned Single Judge has directed that a Commission be executed with the mandate that the local commissioners appointed would visit the premises of the defendants and report whether the defendants are telecasting the program of ?Sony Set Max? channel. The defendants have been directed to maintain accounts in respect of the telecast of the channel.

8. Mr.Praveen Anand, learned counsel for the appellant urges that the illegal activities being carried on by the respondents are under the cover of darkness of secrecy and where would be the purity in the accounts required to be maintained by the respondents? Learned counsel urges that it would be impossible for the appellant to find out as to how many houses have subscribed with the respondents and how many connections have been provided for, in each house. Learned counsel urges that the very life of the Copyright Broadcasting Reproduction Rights is limited in duration and unless the problem is not dealt with, with matching commensurate exercise of judicial power, the problem of piracy cannot be brought down or curtailed. Learned counsel highlights that very soon the Common Wealth Games are likely to be held and a message needs to be sent out that those who desire a share in the pie must contribute in the creation of the pie.

9. Having considered the submissions afore-noted, suffice would it be to state that if the respondents or any one of them does not have the license under the appellant to download and thereafter distribute Sony Set Max channel, any such activity would be an act of piracy. Similarly an act of downloading the signal of Sony Set Max channel and broadcasting the same without a license would be of the same taint.

10. Considering the life span of the right in favour of the appellant to broadcast live the IPL cricket matches and conscious of the fact that large number of viewers would be affected by any order which may be passed by us, but noting the fact that if any respondent has no license under the appellant to download and thereafter distribute or broadcast the signals/program of Sony Set Max channel, it hardly matters, where would the balance of convenience lie, for the reason where the prima facie case made out is so strong that it reaches proof of 100% success, injunction must follow.

11. Learned counsel for the appellant submits at this stage, on being asked by us, that in terms of the orders passed by the learned Single Judge the commissions have yet to be executed. Learned counsel further urges that past

experience shows that unless the learned Commissioner is a person with some authority it becomes difficult to execute the Commission, which more often than not requires assistance from the local administration.

12. Considering that the learned Single Judge has issued notice in the application seeking interim injunction, meaning thereby, that the learned Single Judge is still seized of the issue, we are of the opinion that the appeal can be disposed of issuing appropriate directions and clarifying that opposition if any, by the respondents can be before the learned Single Judge by means of either an application or by means of a reply to the application filed by the appellant for interim relief.

13. It is hereby directed that subject to any orders which may be passed by the learned Single Judge after hearing the parties, the said respondents shall be restrained from downloading any signals of Sony Set Max channel and/or from distributing the same through cable network to any individual or from broadcasting the same in their establishments without obtaining the license/authorization from the appellant. The appellant also seeks John Doe/Ashok Kumar order; it is stated that during the enforcement of this order and/or execution of the Commission the appellant may learn of others committing similar acts of piracy; it is further stated that the respondents may also make the injunction order issued by this Court infructuous by commencing/carrying on the business which they are injuncted from carrying, in the names of others. We are satisfied with the said argument. Accordingly, any other person/organization/body who is indulging in the act of piracy of the signal of the appellant and/or in which the appellant has the exclusive right is also prohibited/injuncted from distributing or broadcasting the said signal/programme of the appellant qua the IPL Cricket Tournament.

14. It is directed that respondents No.11 to 19 shall stand restrained, unless they obtain from the appellant affiliation subscription agreement authorizing said respondents to download the signals and show the program on the Sony Set Max Channel.

15. We further direct that a Commission be executed with mandate of the Commissioner to visit the premises of the respondents and on proof that any respondent is downloading the signal of Sony Set Max channel without any proper authorization, to seize the devices which receive and transmit the Sony Set Max Channel. The Commissioners are also authorized to visit the premises of any other person found to be indulging in such piracy and on proof that such person is downloading the signal of Sony Set Max channel or broadcasting the same without authorization of the appellant, to seize the devices used for the same.

16. We direct that the Commission would be executed during the hours IPL Matches are being telecast live and would note the telephone calls, if any, received by individuals making a grievance at the telephone installed at the premises of the respondents, pertaining to signals not being received by the caller.

17. We hereby appoint Mr.Parveen Uppal, Assistant Registrar (Mob.No.9717394810) as the Commissioner to visit the premises of respondent Nos.1, 6, 32, 33, 34, 35 and 36, all of which are at Alwar.

18. We hereby appoint Mr.Lorren Bamniyal, Joint Registrar (Mob.No.9910390952) as the Commissioner to visit the premises of respondent Nos.27, 28, 29, 30 and 31 in Jodhpur.

19. We hereby appoint Mr.Govind Ram Grover, Deputy Registrar (Mob.No.9717991822)

as the Commissioner to visit the premises of respondent Nos.7, 8, 9 and 10 at Chittorgarh, Rajasthan.

20. We hereby appoint Mr.V.Vishwanathan, Joint Registrar (Mob.No.9910390947) as the Commissioner to visit the premises of respondents No.2, 3, 4 and 5 at Ganganagar, Rajasthan.

21. We hereby appoint Ms.Meenakshi, Private Secretary (Mob.No.9717394843) as the Commissioner to visit the premises of respondents No.11, 12, 13, 14 and 15 at New Delhi.

22. We hereby appoint Mr.Pradeep Patwal, Senior Personal Assistant, (Mob.No.9810961661) as the Commissioner to visit the premises of respondents No. 16, 17, 18, 19, 20 and 21 at New Delhi.

23. We hereby appoint Mr.Anil Koushal, Joint Registrar (Mob.No.9910390949) as the Commissioner to visit the premises of respondents No.23, 37 and 41 in Gurgaon and Ghaziabad respectively.

24. We hereby appoint Mr.Vishnu Kumar Mittal, Joint Registrar (Mob.No.9910390942) as the Commissioner to visit the premises of respondents No.38 and 39 at Kangra and Manali.

25. We hereby appoint Mr.Janardan Tripathi, Assistant Registrar (Mob.No.9717394839) as the Commissioner to visit the premises of respondents No.22 and 26 at Lucknow.

26. We hereby appoint Mr.Rakesh Kumar, Private Secretary (Mob.No.9717991831) as the Commissioner to visit the premises of respondents No.24, 25 and 40 at Meerut, Aligarh and Roorkee respectively.

27. We fix the fee of the learned Local Commissioners in sum of Rs.75,000/- (Rupees Seventy Five Thousand) each besides out of pocket expenses.

28. The learned Local Commissioners are directed to file their reports in the Suit before the learned Single Judge being CS(OS) No.560/2010. The report shall be filed immediately after the Commissions are executed.

29. The SHO of the local Police Station as also the District Magistrate of the concerned district in jurisdiction whereof the respondents reside are directed to render full assistance to the learned Local Commissioners for the Commissions to be executed.

30. Copy of this order be supplied dasti to learned counsel for the appellant.

(PRADEEP NANDRAJOG)
JUDGE

(RAJIV SAHAI ENDLAW)
JUDGE
April 01, 2010
Dk

Annexure-F-1B

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IN THE HIGH COURT OF DELHI AT NEW DELHI

CS(OS) 560/2010

MSM SATELLITE (SINGAPORE) PET LTD .....
Plaintiff
Through: Mr. Pravin Anand, Adv.

versus

GUJARAT TELELINK PVT LTD and ORS ..... Defendant
Through

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

O R D E R
16.12.2010

Mr. Anand says that he has instructions to withdraw the suit.

The captioned suit is dismissed as withdrawn.

All interim orders shall stand vacated.

RAJIV SHAKDHER,J
DECEMBER 16, 2010
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27

IN THE HIGH COURT OF DELHI AT NEW DELHI

CS(OS) 384/2011

ESPN SOFTWARE INDIA PRIVATE LTD ..... Plaintiff
Through Mr. C.A. Sundaram, Sr. Adv. with Ms. Nanju Ganpathy and Mr. Kartik Yadav, Advs.

versus

M/S TUDU ENTERPRISE and OTHERS ..... Defendant
Through Ms. Pratibha M. Singh, Mr. Vadivelu Deenadayalan, Adv. for D-91

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL

O R D E R
18.02.2011

IA No. 2562/2011
1. Exemption allowed subject to just exceptions.
CS(OS) 384/2011
2. Learned senior counsel appearing for the plaintiff makes a prayer for seeking deletion of defendant no. 91 from the array of parties.
It is so directed.
3. Subject to the plaintiffs taking steps within one week, issue summons in the suit to the defendants by ordinary process, registered cover and through approved courier, returnable on 19th May, 2011 before the Joint Registrar.
4. The summons to the defendants shall indicate that a written

- 2 -
statement to the plaint shall be positively filed within four weeks of the receipt of the summons. Liberty is given to the plaintiff to file replication and rejoinder within two weeks of the receipt of the advance copy of the written statement and reply.

In case the written statement is not filed within the time stipulated above, the same shall be taken on record only subject to payment of costs of Rs.30,000/- and if filed within a period of four weeks thereafter.
5. The parties shall file all original documents in support of their respective claims alongwith their respective pleadings. In case parties are placing reliance on a document which is not in their power and possession, its details and source shall be mentioned in the list of reliance which shall be also filed within the pleadings.
6. Admission/denial of documents shall be filed on affidavit by the parties within two weeks of the completion of the pleadings. The affidavit shall include the list of the documents of the other party. The deponent shall indicate its position with regard to the documents against the particulars of each document.

7. Learned counsel for the plaintiff submits that his client would be willing to explore the possibility of settlement by mediation.
8. The summons shall indicate that it is open to the parties to
- 3 -
access the facility of negotiating a settlement with the other side before the Delhi High Court Mediation and Conciliation Centre in the court complex. In case the defendants are so desirous of pursuing negotiations, it shall be open to them to do so. Such participation in the mediation shall be without prejudice to their rights and contentions in the suit.
9. In such eventuality, the defendant shall inform the plaintiff as well as his counsel of the same by a written notice. Such written notices shall be treated as consent of the parties to the mediation process. The plaintiff and/or defendants may then approach the Delhi High Court Mediation and Conciliation Centre for facilitating mediation in the matter and proceeding in accordance with the rules of the Centre.
10. The parties shall place the copy of this order as well as the written notice before the Delhi High Court Mediation and Conciliation Centre.
11. During the course of mediation, it shall be open to the mediator to join any other person(s) considered necessary for effective mediation and dispute resolution.
12. The Registry shall enclose the information brochure published by Samadhan ? the Delhi High Court Mediation and Conciliation Centre with the summons.
- 4 -
13. The parties shall appear before the Joint Registrar for marking of exhibits on 19th May, 2011.
14. The matter shall be fixed before the court for reporting outcome of the mediation/framing of issues on 12th August, 2011.
15. The schedule fixed by this order shall not be interdicted by the pendency of the matter in mediation.
IA No. 2561/2011

16. Issue notice, returnable on 12th August, 2011.

17. The case of the plaintiff is that it has the exclusive rights for India and other territories for telecast of the ICC Cricket World Cup 2011, cricket matches being played in India, SriLanka and Bangladesh. The Plaintiff obtained these exclusive rights from the International Cricket Council (ICC).
18. The Plaintiff is claiming to be the sole and exclusive distributor of three pay channels, namely, ESPN, STAR Sports and STAR cricket Channels in India (?the Channel(s)?) having obtained the exclusive right from ESPN STAR Sports (?ESS?) the defendant no.174 herein, who in turn obtained the same from ESPN (Mauritius) Limited (EML). EML has obtained from ICC Development (International) Limited (ICC) the exclusive right to televise in India till the year 2015 all

ICC events including the said ICC Cricket World Cup 2011, being fifty overs International cricket matches, being played in India, Sri Lanka and
- 5 -
Bangladesh from February 19, 2011 to April 2, 2011. The plaintiff also has the exclusive right to televise in India various other international live sporting

events including the French Open, Wimbeldon, Confederation Cup, FI, Moto GP, various Golfing events, the Olympics events.

19. It is urged that the feed/signal is transmitted/telecast by a satellite through the Singapore facilities of ESS ? defendant no. 174 through leased satellite space to the various homes through different modes of transmission such as DTH, IPTV, CAS and Non-CAS cable in India and other contracted territories. It is in respect of this composite package/programme that the Plaintiff claims broadcast reproduction right from ESS .

20. The event organizer(s) merely provide access to the venue and facilitate the broadcast by ESS by providing requisite space to them for installing their cameras, lighting, parking their OB Van and other equipment and commentary box etc. and add their own graphics and commentary to the live feed which is ultimately televised in the territories in respect of which ESS has obtained rights to televise. The plaintiff claims broadcast reproduction rights in respect of the ESS channels so produced and licensed to the Plaintiff for distribution in India.

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21. In compliance with the downlinking guidelines issued by the Ministry of Information and Broadcasting on November 11, 2005 the plaintiff has obtained the downlinking permission for ESPN, STAR Sports STAR Cricket Channels by the date prescribed under the said guidelines.

22. No other person, entity and/or Cable Operators can broadcast/telecast in India, the said events therefore without a license from the plaintiff.

23. It is stated that the said ICC Cricket World Cup 2011 matches are to be televised on STAR Cricket, ESPN and STAR Sports. Approximately 6500 Cable Operators/Multi System Operators across India are claimed to have entered into contracts with the plaintiff for the right to access the channels of the plaintiff. Pursuant to these contracts, the Local Cable Operators (LCO?s) and Multi Systems Operators (MSO?s) are granted a license to transmit the channels of the plaintiff depending upon their respective subscriber base.

24. The defendants are Multi Systems Operator (MSO) and /or Local Cable Operators (LCOs) having their respective Head end(s)/cable network(s) in the cities as set out in the cause title. These defendants have been unauthorisedly and without entering into contracts either with the distributor of the plaintiff or with the plaintiff itself are

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transmitting over their respective cable networks the channels of the plaintiff and showing the events to their subscribers on payment and thereby, violating the plaintiff?s broadcast reproducting right granted under the Copyright Act, 1957.

The practice matches for the ICC World Cup 2011 were held between 13th to 16th February, 2011. As per reports received by the official(s) of the plaintiff from the plaintiffs? field staff/representatives/ distributors all over India. During these matches there was rampant piracy indulged in by the defendants named in the suit in different locations/ parts of the country and several unknown persons.

The plaintiff received faxes and other communications dated 14th, 15th and 16th February, 2011 from the field staff from different parts of the country addressed to their respective regional and corporate office of the plaintiff in this regard. The actions of the defendants in distributing the plaintiff?s signals to other cable operators and cable homes without any license in this

regard from the plaintiff are unlawful and violative of the plaintiff?s broadcast reproduction right.

25. Learned senior counsel for the plaintiff has contended that despite best efforts, it has not been able to obtain full particulars of the persons who have been detailed at serial nos. 145 to 173 who have

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been collectively mentioned as ?Mr. Raj Sharma?. It is submitted that these are unknown entities who being unlicensed are likely to unauthorisedly transmit the plaintiff?s television channel via their network without a licence and a prayer is made to invoke the inherrent powers of this court under Section 151 of the CPC to evolve a fair and reasonable procedure to address the peculiar facts and circumstances over the violations pleaded by the defendant.

26. In this regard, reliance is placed on the internationally adopted ?John Doe? practice as well as this country?s obligation under the TRIPPS agreement to effectively enforce IPR rights of parties including those as in the present one.

27. In support of this submission, my attention has been drawn to a judgment dated 14th June, 2002 passed in CS(OS) No. 1072/2002 Taj Television Ltd. and Ors. vs. Rajan Mandal and Ors. wherein the court on similar facts, this court had held as follows :-

?xxxxx

Mr. Anand submitted that conduct of various unscrupulous cable channel companies/distributors such as the defendants is well known. The aspect of channel is being illegally aired on the local cable networks has almost taken on a regular feature. He prayed that in the facts and circumstances apart from giving necessary directions be also given for defendant Nos. 7 to 20, in other words, the court may pass ?John Doe? orders.

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Mr. Anand placed reliance on Trade Marks Law of Canada in which it is mentioned that John Doe? orders enabling the order to be served upon persons whose identity is unknown to the plaintiff at the time the action was commenced, but whose activity falls within the scope of the action. This form of naming a party is considered a mere ?misnomer?, and as long as the ?litigating finger? is pointed at such person then the misnomer is not fatal. This proposition has been taken from Jackson v/s Bubels (1972) 28 DLT. (3d) 500 (B.C.C.A.) and Dukoff vs. Teronto General Hospital (1986),54,O.R.(2d) 50(H.C.).

Mr. Anand submitted that ?John Doe? orders are passed by American, English, Canadian and Australian Courts frequently. He further submitted that this court also possesses enormous inherent powers to formulate the orders which are necessary to meet the peculiar facts and peculiar situations., In the first U.S. Federal ?John Doe? order, Shaw vs Various John Does, No 80 Civ,722 (S.D.N.Y.Fe,6,1980) the court held that a court of equity was always free to fashion a decree in keeping with the needs of the litigants. Similarly, in Billy Joel vs. Various John Does, 1980 U.S. Dist LEXIS 12841 the Court held:

? Were the Injunction to be denied, Plaintiffs would be without any legal means to prevent what is clearly a blatant infringement of their valid property

rights. While the proposed remedy s. Novel, that in itself should not weigh against its adoption by this court. A court of equity is free to fashion whatever remedies will adequately protect the rights for the parties before it.?

Mr. Anand placed reliance on the judgment of the Supreme Court in Manohar Lal Chopra vs. Rai Bahadur Rao Raja Seth Hiralal, AIR 1962 SC 527. The Court held that the inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to

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those powers and therefore, it must be held that the court is free to exercise them for the purposes mentioned in Section 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the legislature.

Mr. Anand placed reliance on EMI Records Ltd . v. Kudhail and others (1985) FSR 36, (1983) Com LR 280.

Mr. Anand , Learned counsel for the plaintiffs, has made references to a large number of Canadian, Australian, English and American cases but I would not like to burden this order with all the judgments on which reliance has been placed at this stage. Since ?John Doe? orders are passed in the court of Canada, America, England, Australia and in some other countries. The judicial systems of all these countries have basic similarity with our judicial system. Therefore, looking to the extra ordinary facts and circumstances of the case, in the interest of justice the courts in India would also be justified in passing ?john Doe? orders.

It is noteworthy that after such finding keeping in view the peculiar facts of the CS(OS) No. 1072/2002, a John Doe order was not passed.

28. My attention has also been drawn to an order dated 24th November, 2006 in CS(OS) No. 2189/2006 wherein the court has granted an injunction order in terms of the above observations. This court as such has the jurisdiction to pass an order in the nature of a John Doe order injunction unknown persons in circumstances as have been pleaded by the plaintiff in the present case.

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29. The plaintiff has approached this court to seek protection of its valuable rights against such unwarranted, unauthorized and illegal actions of the defendants nos. 1 to 90, 92 to 144 as well as the Mr. Raj Sharmas' arrayed as defendant nos. 145 to 173 which tend to violate and dilute the exclusive broadcast reproduction rights vested with the Plaintiff in respect of such events for the territories including India which also impact financially the operations of the plaintiff herein.

30. The plaintiff has asserted violation of its rights and violations of the Copyright Act, 1957, the Cable Network (Regulation) Act, 1995 before this court. It is urged that unauthorized cable transmission of the plaintiff?s channel shall result in irreparable loss and damage to the plaintiff including subscription loss as well as advertisement revenues in addition, it would encourage other cable operators who have currently procured licenses from the plaintiff and possessed valid licenses to also transmit unauthorized signals

without making necessary payments. It would appear that public interest would also suffered on account of poor programme quality. There is prima facie substance in the plaintiff?s contention that the same would impact the plaintiffs reputation as well. In support of the grievance that the damage would be irreparable, it is pointed out that the cable industry has an unstructured compensation and it would be impossible to

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assess the damages which may result on account of unauthorized telecast/broadcast/distribution.

31. The material placed before this court would show that the plaintiff?s channels are paid channels not meant to be viewed by persons who are not subscribers through authorized cable operators. Only authorized licenses can use/distribute the encrypted channels. The licensed cable operators use a decoder or a decryption device which have unique numbers given by the plaintiff to its licensed cable operators. Unauthorised cable operators indulge in

illegal capturing of sports signals of the plaintiff which are the illegally transmitted. The modus operandi adopted by dishonest cable operators including the defendants is detailed in para 17 and 19 of the plaint. Such illegally and unauthorisedly captured signals are then distributed to through their respective network surreptitiously to cable homes attached to them.

32. There is therefore substance that unlicensed broadcast of the reproduction rights vested in the plaintiff by operating signals, transmit to India in the foregoing manner is illegal, unfair and deserves to be prohibited.

33. The plaintiff has specifically averred that the defendants in the suit have not signed any licensed agreement and/or direct that the

- 13 -

plaintiff?s distributors and as such are not authorized to distribute the channels over their cable operators. As such transmission of these channels is violative of section 37(3) of the Copyright Act.

34. The events of ICC Cricket World Cup 2011 to be held in India, SriLanka and Bangladesh will last only till April 2. 2011 and it is contended that unless injunction as prayed for is granted by this court, the events would be over and the business of the plaintiff herein would have been severely impacted.

35. Having perused the plaint, application and documents, I am satisfied that the plaintiff has made out a prima facie case for grant of ad interim orders. Grave and irreparable loss and damage would enure to the plaintiff in case interim protection is not granted. Balance of convenience and interest of justice are in favour of the plaintiff and against the defendants.

36. It is accordingly directed as follows :-

(i) that the defendants/their agents, representatives, franchisees, sub-operators, head ends and/or anyone claiming under them are hereby restrained from distributing, telecasting and broadcasting/rebroadcasting or in any other manner communicating to the viewing pubic/subscribers either by means of wireless diffusion or by wire or in any other manner the ICC Cricket World Cup, 2011 being

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telecast on the STAR Cricket, ESPN and Star Sports channels and/or in any other manner infringing the copyright/re-broadcast right of the plaintiff by downloading any other channels not registered under the downlinking guidelines till further orders.

(ii) It is further directed that till the present order is vacated or modified, the direction shall operate against the defendants, their agents, representatives, franchises, sub-operators or any person claiming under them an injunction.

(iii) Further injunction in terms of serial no. (i) above is passed against un-named and undisclosed persons who may be likewise committing breach of the rights of the plaintiff by resorting to illegal tapping of DTH connections by linking the same to the distribution networks.

(iv). The SHO/Superintendent of the concerned police station(s) are directed to render assistance to the plaintiff should any be required for purposes of enforcement of the present order as it the obligation of the police authorities and the state to enforce judicial orders passed.

(v) The plaintiff shall comply with the provisions of the proviso to rule 3 of order 39 of the CPC within a period of one week from today.

- 1 5 -

IA no.2563/2011 (U/O.26 Rules (and 12 CPC)

37. Issue notice, returnable on 12th August, 2011.

Copy of this order be given to counsel for the plaintiff dasti under signatures of the Court Master.

GITA MITTAL,J

FEBRUARY 18, 2011

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IN THE HIGH COURT OF DELHI AT NEW DELHI

CS(OS) 384/2011

ESPN SOFTWARE INDIA PRIVATE LTD ..... Plaintiff

Through: Mr. Kartik Yadav, Advocate.

versus

M/S TUDU ENTERPRISE and OTHERS ..... Defendants

Through: None.

CORAM:

HON?BLE MS. JUSTICE REVA KHETRAPAL

O R D E R

12.12.2011

The counsel for the plaintiff seeks leave to withdraw the suit.

The suit is accordingly dismissed as withdrawn leaving the parties to bear their own costs.

REVA KHETRAPAL, J.

DECEMBER 12, 2011

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I-17

IN THE HIGH COURT OF DELHI AT NEW DELHI

CS(OS) 2877/2012

ESPN SOFTWARE INDIA PVT LTD ..... Plaintiff

Through: Mr Rajiv Nayar, Sr. Adv with

Mr Kartik Yadav, Adv.

versus

SKY WORLD COMMUNICATION and ORS ..... Defendants

Through: None.

CORAM:

HON'BLE MR. JUSTICE V.K. JAIN

O R D E R

19.09.2012

IA No. 17427/2012 (Exemption)

Allowed, subject to just exceptions.

The application stands disposed of.

IA No. 17429/2012 (under Section 149 of CPC)

The plaintiff is granted one week time to file the deficient Court Fee.

The application stands disposed of.

IA No. 17428/2012 (O. 26 R. 9 and 12 CPC)

Dismissed as not pressed.

CS(OS) 2877/2012 and IA No. 17426/2012 (O. 39 R. 1and2 CPC)

Be issued summon in the suit and notice of the application to the defendant for 18.10.2012.

The broadcast right of ICC World Cup Twenty 20, 2012 vested in ESPN (Mauritius) Limited (EML) and ESPN STAR obtained those rights from that company in India. The plaintiff has been authorized by ESPN STAR Sports (ESS) to broadcast the aforesaid event in India. The plaintiff thus holds exclusive right to broadcast the aforesaid event in India. Defendants No. 1 to 29 and 31 to 34 are Multi System Operators (MSO)/Local Cable Operators (LCO)/Hotels. Defendant No. 30 is a website of ENOM, Inc., based in USA. The apprehension of the plaintiff is that the defendants may unauthorizedly broadcast the above-referred event, without prior permission from it and without paying any charges to it. The unauthorized broadcast, according to the plaintiff, may take place in various manners indicated in para 17 of the plaint and that includes Decoder Shifting, Delayed Re-broadcast by Tapping, Downlinking Free-to-Air unencrypted Channels, subscribing to a pay channel such as Tata Sky or Dish TV and routing signals through their cable network and hiring set-top boxes to transmit signals in Non-Conditional Access System areas.

The plaintiff is also seeking invocation of John Doe principle which this Court has recognized in a number of cases and is seeking injunction against unnamed defendants on the ground that it is not possible for the plaintiff, at this stage, to identify all possible infringers. The intention behind seeking such order is that if the plaintiff comes across any person other than the defendants 1 to 34 infringing its broadcast rights, the injunction order which this Court may pass in the suit, may be served upon him and in the event of that person disobeying the order, appropriate action may be initiated against him for disobedience of the order of the Court. Taking into consideration all the facts and circumstances, including the fact that ICC World Cup Twenty 20, 2012 has already commenced on 18.09.2012, I am satisfied that the plaintiff has made out a prima facie case for grant of ad-interim injunction and the purpose of filing the suit may be

frustrated if ex parte injunction is not granted. Defendants 1 to 34, their agents, employees and representatives as well as unnamed and undisclosed persons, who might be committing breach of the broadcast right of the plaintiff by unauthorized broadcast of ICC World Cup Twenty 20, 2012, are hereby restrained, till further orders from broadcasting/re-broadcasting/telecasting/communicating to public ICC World Cup Twenty 20, 2012, either by means of wireless diffusion, by wire or by any other manner, without prior permission of the plaintiff. If necessary, the concerned Station House Officer would assist the plaintiff and/or its representatives in enforcement of the order.

This order will operate from the time it is served upon the defendants along with suit summon and notice of the application. The plaintiff is directed to take dasti process and get the defendants served at its own responsibility within one week. The Registry is directed to give dasti process to the plaintiff within three days.

The plaintiff is directed to comply with provisions of Order 39 Rule 3 of CPC within 24 hours.

A copy of this order be given dasti under the signatures of Court Master.

V.K. JAIN, J

SEPTEMBER 19, 2012

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IN THE HIGH COURT OF DELHI AT NEW DELHI

CS(OS) 2877/2012

ESPN SOFTWARE INDIA PVT LTD ..... Plaintiff

Through: Mr.N. Ganpathy, Advocate

versus

SKY WORLD COMMUNICATION and ORS ..... Defendant

Through

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

O R D E R

21.02.2014

Counsel for the plaintiff submits that the suit has become infructuous. Accordingly the suit is dismissed as infructuous.

CCP(O) 112/2012 and I.A. 17426/2012

As the suit stands dismissed as infructuous, the present I.A. 17426/2012 and the CCP(O)No.112/2012 stand dismissed as not pressed.

G.S.SISTANI, J

FEBRUARY 21, 2014

ssn

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IN THE HIGH COURT OF DELHI AT NEW DELHI

CS(OS) 853/2013

MSM SATELLITE (SINGAPORE)

PTE LIMITED and ANR. .....
Plaintiffs

Through: Mr. Darpan Wadhwa, Mr. Amitesh

Chandra Mishra, Mr. Akhil Sachar,

Mr. Azmat H. Amanullah and

Ms. Upasana Mukherjee, Advocates

versus

P.M. NETWORK and ORS. ..... Defendants

CORAM:

HON'BLE MR. JUSTICE P.K. BHASIN

O R D E R

08.05.2013

I.A. No. 7503/2013

Exemption as prayed for in this application is granted for the time being. This application stands disposed of accordingly.

CS(OS) 853/2013

Let the plaint be registered as a suit and summons in the suit be issued to the defendants returnable for 31st July, 2013 before the regular Bench.

Dasti service is also permitted.

I.A. No. 7501/2013 (O.39 R.1and2 CPC)

Learned counsel for the plaintiffs has submitted that the plaintiff no. 1 Company is engaged in the business of production and acquisition of entertainment and sports programmes and the broadcast of channels such as ?Sony Entertainment Television (?SET?), ?SET MAX?, ?SIX?, ?SAB?, ?MIX? and ?PIX? while plaintiff no. 2 Company is its exclusive distributor of the channels in India. In the present suit the plaintiffs are aggrieved by the piracy of the signals of the Channels ?SET MAX? and ?SIX? on which Indian Premier League(IPL) cricket matches are being exclusively broadcast by the plaintiffs in respect of which the plaintiff no.1 has the exclusive television broadcast reproduction rights/copy right in the Indian sub-continent obtained from the Board of Cricket Control in India(BCCI)

It is alleged that the defendants, which are categorized as Multi System Operators/Local Cable Operators, commercial establishments like hotels and restaurants having their networks in various towns and cities across the length and breadth of the country, are infringing upon the exclusive broadcast reproduction rights of the plaintiff no.1 by illegally transmitting the ?SET MAX? and ?SIX? channels showing the ongoing IPL cricket matches without obtaining licenses from plaintiff no.2.

After having heard the learned counsel for the plaintiffs and going through the plaint and the accompanying documents, which include various ex parte ad interim injunction orders by this Court, including one passed by a Division Bench in appeal filed by the plaint under similar circumstances in favour of the plaintiffs in the suits filed during the period of those matches when also piracy of the plaintiffs? exclusive broadcasting rights in respect of earlier IPL cricket matches in India by cable operators etc. was detected, I am of the view that the plaintiffs have been able to make out a case for grant of interim injunction. I am also of the view that if the interim injunction is not granted ex parte the very purpose of granting this relief would be defeated.

So, issue notice of this application also to the defendants for the aforesaid date and it is ordered that till further orders the defendants, as also all other persons who are unknown at present but are found to be similarly infringing the copyright/exclusive broadcasting rights of ongoing IPL matches in India, of the plaintiff no.1, are restrained from broadcasting, communicating, telecasting, streaming on the internet or otherwise in any other manner communicating to the public, including their subscribers, through cable TV network(s) or otherwise the

channels ?SET MAX? and ?SIX? unauthorisedly without obtaining licence from the plaintiff no.2.

Compliance of the provisions of Order XXXIX Rule 3 CPC be done by the plaintiffs within ten days.

I.A. No. 7502/2013 (O.26 R.9 CPC)

Learned counsel for the plaintiffs has submitted that Court Commissioners may be appointed to visit the premises of each one of the defendants, to carry out the directions as have been sought for in this application. This request made on behalf of the plaintiffs also appears to be justified. Accordingly the following Court Commissioners are appointed to visit the premises of the defendants, as assigned to them, to carry out the directions sought for by the plaintiffs in prayer para no. 10(i) and (ii) of this application provided the defendants are found to be having no licences from the plaintiff no.2 for the transmission of ?SET MAX? and ?SIX? channels:

Mr. Ankit Mehta, Advocate (Mob.No.9891154718) is appointed as the Court Commissioner to visit the premises of defendant no. 1 as mentioned in the memo of parties.

Mr. Manish Bansal, Advocate(Mob.No.9810453883) is appointed as the Court Commissioner to visit the premises of defendant no. 2 as mentioned in the memo of parties.

Mr. Rahul Raj Malik, Advocate(Mob.No. 9810705405) is appointed as the Court Commissioner to visit the premises of defendant no.3 as mentioned in the memo of parties.

Ms. Pooja Chaudhary, Advocate (Mob. No. 7838788350) is appointed as the Court Commissioner to visit the premises of defendant no. 4 as mentioned in the memo of parties.

Mr. Manish Sangwan, Advocate (Mob. No. 9810334335) is appointed as the Court Commissioner to visit the premises of defendant no.5 as mentioned in the memo of parties.

Mr. Aseem Swaroop, Advocate (Mob. No. 9971612887) is appointed as the Court Commissioner to visit the premises of defendant no. 6 as mentioned in the memo of parties.

Mr. Ajay Mehrotra, Advocate (Mob. No. 09811353874) is appointed as the Court Commissioner to visit the premises of defendant no. 7 as mentioned in the memo of parties.

Mr. Aayush Agarwala, Advocate (Mob. No. 9999105064) is appointed as

the Court Commissioner to visit the premises of defendant no. 8 as mentioned in the memo of parties.

Mr. Akshay Chandra, Advocate(Mob.No. 9910401230) is appointed as the Court Commissioner to visit the premises of defendant no.9 as mentioned in the memo of parties.

Mr. Rahul Budhiraja, Advocate (Mob.No.9810958000) is appointed as the Court Commissioner to visit the premises of defendant no. 10 as mentioned in the memo of parties.

Mr. Deepak Dahiya, Advocate (Mob. No. 9711170446) is appointed as the Court Commissioner to visit the premises of defendant no. 11 as mentioned in the memo of parties.

Mr. D.K.Saini, Advocate (Mob. No. 9312627187) is appointed as the Court Commissioner to visit the premises of defendant no.12 as mentioned in the memo of parties.

Mr. Brijesh Oberoi, Advocate (Mob.No. 9810281212) is appointed as the Court Commissioner to visit the premises of defendant no. 13 as mentioned in the memo of parties.

Mr. R.S.Rathi, Advocate (Mob.No.9810868733) is appointed as the Court Commissioner to visit the premises of defendant no.14 as mentioned in the memo of parties.

Mr. Nand Kishor Agarwal, Advocate (Mob.No. 9313988355) is appointed as the Court Commissioner to visit the premises of defendant no. 15 as mentioned in the memo of parties.

Mr. Tirath Singh Duggal, Advocate (Mob.No.9810088820 and 9818047820) is appointed as the Court Commissioner to visit the premises of defendant no. 16 as mentioned in the memo of parties.

Mr. Vineet Kumar Tyagi, Advocate (Mob.No. 9899375157 and 9350187171) is appointed as the Court Commissioner to visit the premises of defendant no. 17 as mentioned in the memo of parties.

Mr. Arnav Narain, Advocate (Mob.No.9910461612) is appointed as the Court Commissioner to visit the premises of defendant no. 18 as mentioned in the memo of parties.

Mr. Saurabh Balwani, Advocate (Mob.No.9958199188) is appointed as the Court Commissioner to visit the premises of defendant no. 19 as mentioned in the memo of parties.

Mr. Ashish Kumar Pandey, Advocate (Mob.No. 9873890442) is appointed as the Court Commissioner to visit the premises of defendant no. 20 as mentioned in the memo of parties.

Mr. Jamal Akhtar, Advocate(Mob.No.9911120018) is appointed as the Court Commissioner to visit the premises of defendant no.21 as mentioned in the memo of parties.

Mr. Sidhant Srivastava, Advocate (Mob.No.8588011624) is appointed as the Court Commissioner to visit the premises of defendant no. 22 as mentioned in the memo of parties.

Ms. Aeshna Dahiya, Advocate (Mob. No. 9999714089) is appointed as the Court Commissioner to visit the premises of defendant no. 23 as mentioned in the memo of parties.

Mr. Daya Nand Sharma, Advocate (Mob.No. 9910043160) is appointed as the Court Commissioner to visit the premises of defendant no.24 as mentioned in the memo of parties.

Mr. Gyan Chand, Protocol Assistant in High Court (Mob.No.9910390864) is appointed as the Court Commissioner to visit the premises of defendant no. 25 as mentioned in the memo of parties.

Mr. H.K. Arora, Deputy Registrar in High Court(Mob.No. 9717991820) is appointed as the Court Commissioner to visit the premises of defendant no. 26 as mentioned in the memo of parties.

Ms. Ishita Chakrabarti, Advocate, (Mob.No. 9899067927) is appointed as the Court Commissioner to visit the premises of defendant no.27 as mentioned in the memo of parties.

Mr. Tanveer Zaki, Advocate, (Mob.No. 9711833730) is appointed as the Court Commissioner to visit the premises of defendant no. 28 as mentioned in the memo of parties.

Mr. Saharsh Jauhari, Advocate, (Mob.No. 9811982989) is appointed as the Court Commissioner to visit the premises of defendant no.29 as mentioned in the memo of parties.

Ms. Nusrat Hossain, Advocate, (Mob.No. 9971882656) is appointed as the Court Commissioner to visit the premises of defendant no. 30 as mentioned in the memo of parties.

Mr. Anuj Kapoor, Advocate, (Mob.No. 8130324433) is appointed as the Court Commissioner to visit the premises of defendant no.31 as mentioned in the memo of parties.

Ms. Kriti Sharma, Advocate, (Mob.No. 8447772021) is appointed as the Court Commissioner to visit the premises of defendant no.32 as mentioned in the memo of parties.

Mr. Madhav Mallya., Advocate, (Mob.No. 9167916739) is appointed as the Court Commissioner to visit the premises of defendant no.33 as

mentioned in the memo of parties.

Ms. Medha Sachdev, Advocate(Mob.No.9810770908) is appointed as the Court Commissioner to visit the premises of defendant no. 34 as mentioned in the memo of parties.

Ms. Shreya Som, Advocate(Mob.No. 9871917223) is appointed as the Court Commissioner to visit the premises of defendant no. 35 as mentioned in the memo of parties.

Ms. Liana Barooah, Advocate(Mob.No.9999051658) is appointed as the Court Commissioner to visit the premises of defendant no. 36 as mentioned in the memo of parties.

Mr. Abhishek Gupta, Advocate(Mob.No.9999959779) is appointed as the Court Commissioner to visit the premises of defendant no. 37 as mentioned in the memo of parties.

Tusha Chawla, Advocate (Mob. No. 9871456909) is appointed as the Court Commissioner to visit the premises of defendant no.38 as mentioned in the memo of parties.

Ms. Juhi Chawla, Advocate (Mob. No. 9999014248) is appointed as the Court Commissioner to visit the premises of defendant no. 39 as mentioned in the memo of parties.

Ms. Shaima Khan, Advocate (Mob. No. 9953501232) is appointed as the Court Commissioner to visit the premises of defendant no. 40 as mentioned in the memo of parties.

Ms. Ruby Nahar, Advocate (Mob. No.9654854537) is appointed as the Court Commissioner to visit the premises of defendant no. 41 as mentioned in the memo of parties.

Ms. Sweta Jha, Advocate (Mob. No. 9540772926) is appointed as the Court Commissioner to visit the premises of defendant no. 42 as mentioned in the memo of parties.

Ms. Monisha Batra Ajmani, Advocate (Mob. No. 9999401631) is appointed as the Court Commissioner to visit the premises of defendant no.43 as mentioned in the memo of parties.

Mr. Bosco K.T., Advocate (Mob. No. 8588986965) is appointed as the Court Commissioner to visit the premises of defendant no.44 as mentioned in the memo of parties.

Ms. Rakhi Bora, Advocate (Mob. No. 9873383880) is appointed as the Court Commissioner to visit the premises of defendant no. 45 as mentioned in the memo of parties.

Mr. Hari Kishan, Advocate (Mob. No. 8010441088) is appointed as the

Court Commissioner to visit the premises of defendant no. 46 as mentioned in the memo of parties.

Ms. Tina Gupta, Advocate (Mob. No. 9999443522) is appointed as the Court Commissioner to visit the premises of defendant no. 47 as mentioned in the memo of parties.

Ms. Pranita Shekhar, Advocate (Mob. No. 9958648948) is appointed as the Court Commissioner to visit the premises of defendant no. 48 as mentioned in the memo of parties.

Mr. Kishore Kumar D, Advocate (Mob. No. 9916474794) is appointed as the Court Commissioner to visit the premises of defendant no. 49 as mentioned in the memo of parties.

Ms. Rubal Bansal, Advocate (Mob. No. 9873755301) is appointed as the Court Commissioner to visit the premises of defendant no. 50 as mentioned in the memo of parties.

Ms. Raspreet Kaur, Advocate (Mob. No. 9910873566) is appointed as the Court Commissioner to visit the premises of defendant no. 51 as mentioned in the memo of parties.

Mr. Pradeep Kumar, Sr. Judicial Assistant in High Court (Mob.No. 9811109790) is appointed as the Court Commissioner to visit the premises of defendant no.52 as mentioned in the memo of parties.

Ms. Bhoomika Chaudhary, Advocate (Mob. No. 9860869498) is appointed as the Court Commissioner to visit the premises of defendant no. 53 as mentioned in the memo of parties.

Ms. Ragini Ahuja, Advocate (Mob. No. 9871026252) is appointed as the Court Commissioner to visit the premises of defendant no. 54 as mentioned in the memo of parties.

Mr. Sameer Sharma, Advocate (Mob. No. 9213857759) is appointed as the Court Commissioner to visit the premises of defendant no. 55 as mentioned in the memo of parties.

Mr. Gurmehar Singh, Advocate (Mob.No.9810977667) is appointed as the Court Commissioner to visit the premises of defendant no. 56 as mentioned in the memo of parties.

Ms Natasha Thakur, Advocate (Mob. No.8800654111) is appointed as the Court Commissioner to visit the premises of defendant no.57 as mentioned in the memo of parties.

Ms. Sanjana Malik, Advocate(Mob.No.9810002149) is appointed as the Court Commissioner to visit the premises of defendant no. 58 as mentioned in the memo of parties.

Ms. Hina Bhargava , Advocate (Mob. No. 9810467055) is appointed as the Court Commissioner to visit the premises of defendant no. 59 as mentioned in the memo of parties.

Mr. Rajinder Singh Karki, Sr. Personal Assistant (Mob. No. 9968143059) is appointed as the Court Commissioner to visit the premises of defendant no. 60 as mentioned in the memo of parties.

Ms. Shakun Anand, Private Secretary in High Court (Mob.No.9717306078) is appointed as the Court Commissioner to visit the premises of defendant no.61 as mentioned in the memo of parties.

Mr. Ravinder Pahuja, Assistant Registrar, (Mob.No. 9717394821) is appointed as the Court Commissioner to visit the premises of defendant no.62 as mentioned in the memo of parties.

Mr. Krishan Gopal Malik, Protocol Officer(Medical), Delhi High Court (Mob.No. 9971988890) is appointed as the Court Commissioner to visit the premises of defendant no.63 as mentioned in the memo of parties.

Mr. Pankaj Goel, Sr. Personal Assistant (Mob. No. 9811866875) is appointed as the Court Commissioner to visit the premises of defendant no. 64 as mentioned in the memo of parties.

Ms. Saumaya Rai, Advocate (Mob. No. 09555637666) is appointed as the Court Commissioner to visit the premises of defendant no.65 as mentioned in the memo of parties.

Mr. Amit Sharma, Advocate(Mob.No.9971501502 and 9891778104) is appointed as the Court Commissioner to visit the premises of defendant no.66 as mentioned in the memo of parties.

Ms. Swati Gupta, Advocate(Mob.No. 9711566266) is appointed as the Court Commissioner to visit the premises of defendant no.67 as mentioned in the memo of parties.

Ms. Aditi Chawla, Advocate (Mob.No.9818083561) is appointed as the Court Commissioner to visit the premises of defendant no.68 as mentioned in the memo of parties.

Mr. Anshumaan Sahni, Advocate (Mob. No. 8826517924) is appointed as the Court Commissioner to visit the premises of defendant no. 69 as mentioned in the memo of parties.

Ms. Rachel Mamatha Mannam, Advocate (Mob. No. 8373928334) is appointed as the Court Commissioner to visit the premises of defendant no. 70 as mentioned in the memo of parties.

Ms. Pallavi Mohpal, Advocate (Mob. No. 0971497956) is appointed as the Court Commissioner to visit the premises of defendant no.71 as

mentioned in the memo of parties.

Ms. Bhoomika Aggarwal, Advocate (Mob. No.9958832377) is appointed as the Court Commissioner to visit the premises of defendant no. 72 as mentioned in the memo of parties.

The Court Commissioners shall during their visits to the premises of the defendants ascertain and confirm as to whether defendants are engaged in unauthorized/unlicensed broadcasting or transmitting of the channels ?SET MAX? and ?SIX?. In case, however, any of the defendants would be willing to obtain the licence at the time of their visits the representatives of the plaintiffs shall give the same on receipt of necessary licence fee from them.

The Court Commissioners shall be entitled to seek the help of the representatives and their technical experts for the proper execution of the duties entrusted to them and shall also be entitled to obtain police assistance from the local police stations and the SHOs of all the concerned police stations shall render all assistance to them if requested by them, for the execution of the directions of this Court.

The fee of each of the Court Commissioners who are to go out of Delhi is fixed at ` 1,00,000/-, exclusive of all other expenses which shall also be borne by the plaintiffs, and those who have to visit the premises of some of the defendants in Delhi shall be paid ` 75,000/- each.

The Court Commissioners shall submit their reports within two weeks of the execution of the Commission.

Copy of this order be given dasti to the counsel for the plaintiffs under the signatures of the Court Master.

P.K. BHASIN, J

MAY 08, 2013/pg

CS(OS) 853/2013 Page 12 of 12

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IN THE HIGH COURT OF DELHI AT NEW DELHI

CS(OS) 853/2013 and IA Nos.7501/2013, 20834/2013, 20835/2013 and 20837/2013.

MSM SATELLITE(SINGAPORE) PTE LTD and ANR ..... Plaintiffs

Through Mr.Amitesh C.Mishra, Advocates.

versus

P. M NETWORK and ORS ..... Defendants

Through Ms.Dharini Ravi, Advocate for D-57.

Ms.Suruchi Mittal, Adv. for D-63.

CORAM:

HON'BLE MR. JUSTICE V.K. SHALI

O R D E R

21.05.2014

1. The IA No.20837/2013 has been filed on behalf of the plaintiffs under Order 23 Rule 1 read with Section 151 CPC seeking withdrawal of the suit. In view of the averments made in the application, the same is allowed and the suit is dismissed as withdrawn.

2. So far as IA Nos.20834/2013 (u/O 1 R 10 r/w Section 151 CPC) and 20835/2013 (u/O 1 R 10 read with Section 151 CPC) are concerned, the same do not warrant any order to be passed in the present suit and the plaintiffs are free to file an independent suit against the parties who they want to implead in the present suit by way of these applications. Accordingly, the application stand disposed of.

3. Interim order dated 08.05.2013 stands vacated.

4. All the other pending applications stand disposed of as having become infructuous.

V.K. SHALI, J

MAY 21, 2014/dm

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IN THE HIGH COURT OF DELHI AT NEW DELHI

CS(OS) 374/2014

STAR SPORTS INDIA PVT LTD ..... Plaintiff

Through : Mr.SaikrishnaRajagopal, Mr.Sidharth Chopra, Mr.Nitin Sharma, Ms.Julien George, Advs.

versus

RAJENDRA KUMAR GAMBHIR and ORS ..... Defendants

Through

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

O R D E R

07.02.2014

I.A. No.2479/2014 (Exemption for filing Originals)

I.A. No.2480/2014 (Exemption for filing clear copies)

Let original documents be filed at the time of admission/denial of documents. Clear copies of the documents be filed within four weeks from today.

Applications stand disposed of accordingly.

I.A. No.2482/2014

As agreed, let Court fee be filed by plaintiff within one week from today

Application stands disposed of

CS (OS) 374/2014

Issue summons in the suit, dasti as well, to the defendants returnable on 15.04.2014.

I.A. No.2478/2014 (Order XXXIX Rule 1 and 2 CPC)

Issue notice of this application to the defendants for the aforesaid date.

In the present suit, the plaintiff is aggrieved as the defendants are infringing the plaintiff?s copyrights and exclusive broadcast reproduction rights in its channels and original programmes.

Learned counsel for the plaintiff submits that the plaintiff Company is engaged in the business of sports broadcasting through its channels STAR SPORTS 1, STAR SPORTS 2, STAR SPORTS 3, STAR SPORTS 4, FOX SPORTS NEWS, STAR SPORTS HD1 and STAR SPORTS HD2. It is further submitted that the plaintiff has the exclusive Broadcast Reproduction Rights in the broadcast of its channels and copyright in respect of the original content such as Star Power, Master Class, Heroes, Switch Hit, Outstanding Ojha, Hockey Hotshots, Superstar, Football Review, etc., communicated through its channel. In case any third party wishes to re-transmit and communicate the signals of the plaintiff?s channels and original programmes, then such third parties can do so only if they are duly authorized in writing vide an agreement by the plaintiff to do so.

It is alleged that the defendants are engaged in the business of hotel/restaurant/bar and hospitality industry and operate various hotels including Hotel Crowne Plaza Today, located at Plot No.1, Community Centre, Okhla Phase-I, New Delhi. It is alleged that the defendants had a service contract dated 1.4.2012 with the plaintiff for re-transmission of the signals of its channels. However, subsequent to the termination of the contract w.e.f. 31.3.2013, the defendants are infringing upon the exclusive

CS (OS) 374/2014 2/5

broadcast reproduction rights of the plaintiffs by illegally re-transmitting the plaintiff?s channel i.e. STAR SPORTS 1, STAR SPORTS 2, STAR SPORTS 3, STAR SPORTS 4, FOX SPORTS NEWS, STAR SPORTS HD1 and STAR SPORTS HD2 to their rooms, bar and lounge and other areas of their Hotel premises.

After having heard the learned counsel for the plaintiff and going through the plaint and the accompanying documents, which include various

ex parte ad interim injunction orders passed by this Court, I am of the view that the plaintiff has been able to make out a case for grant of ex parte ad interim injunction. I am also of the view that if the ex parte interim injunction is not granted the very purpose of granting this relief would be defeated. Accordingly, till the next date of hearing, defendants, their servants, agents, employees, and all others in the capacity of principal or agents acting for and on their behalf, as the case may be, are hereby restrained from broadcasting, re-broadcasting, re-transmitting, telecasting or otherwise in any other manner communicating to the public, including their visitors and hotel guest, the channels STAR SPORTS 1, STAR SPORTS 2, STAR SPORTS 3, STAR SPORTS 4, FOX SPORTS NEWS, STAR SPORTS HD1 and STAR SPORTS HD2 unauthorisedly without obtaining license / subscription from the Plaintiff.

Compliance of the provisions of Order XXXIX Rule 3 CPC be done by the plaintiff within ten days from today.

I.A. No.2481/2014 (Order XXVI Rule 9 and Order XXXIX Rule 7 CPC)

Learned counsel for the plaintiff has submitted that one Court

CS (OS) 374/2014 3/5

Commissioner may be appointed to visit the hotel premises of defendants situated at Hotel Crowne Plaza Today, located at Plot No.1, Community Centre, Okhla Phase-I, New Delhi, to carry out the directions as have been sought for in this application. This request made on behalf of the plaintiff also appears to be justified.

Accordingly, Ms.Denker Mohan, Advocate, (Mobile No.9560044698), is appointed as a Local Commissioner, to visit the premises of the defendants at Hotel Crowne Plaza Today, located at Plot No.1, Community Centre, Okhla Phase-I, New Delhi, or any other premises of the defendant, which may be revealed during the local commission proceedings, to carry out the directions sought for by the Plaintiff in prayer paragraphs no.8 (i) to (x) of this application. The Local Commissioner shall during visit to the premises of defendants ascertain and confirm as to whether they are engaged in unauthorized / unlicensed broadcasting or transmitting of the channels STAR SPORTS 1, STAR SPORTS 2, STAR SPORTS 3, STAR SPORTS 4, FOX SPORTS NEWS, STAR SPORTS HD1 and STAR SPORTS HD2. In case, however, the defendants would be willing to obtain the licence at the time of their visits, the representatives of the plaintiff shall give the same as per law. The Local Commissioner shall be entitled to seek the help of the plaintiff?s representatives and their technical experts for the proper execution of the duties entrusted to them and shall also be entitled to obtain police assistance from the local police stations and the SHOs of all the concerned police stations which shall render all assistance to them if requested by them, for the execution of the directions of this Court.

CS (OS) 374/2014 4/5

The fee of the Local Commissioner, who shall visit the premises of defendants, is fixed at Rs.75,000/-, and for any additional place, she will be paid Rs.30,000/-, exclusive of all other expenses which shall be borne by the plaintiff. The Local Commissioner shall submit report within two weeks of the execution of the Commission.

Copy of this order be given dasti to the Counsel for the Plaintiff.

G.S.SISTANI, J

FEBRUARY 07, 2014

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CS (OS) 374/2014 5/5

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IN THE HIGH COURT OF DELHI AT NEW DELHI

CS(OS) 374/2014

STAR SPORTS INDIA PVT LTD ..... Plaintiff

Through: Mr.Sai Krishna, Advocate

versus

RAJENDRA KUMAR GAMBHIR and ORS ..... Defendant

Through

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

O R D E R

15.04.2014

Counsel for the plaintiff submits that he has instructions to withdraw the present suit. Accordingly, the suit stands dismissed as withdrawn.

I.A. 2478/2014

In view of the order passed in the suit, no further orders are required to be passed in the present application and same stands dismissed.

G.S.SISTANI, J

APRIL 15, 2014

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IN THE HIGH COURT OF DELHI AT NEW DELHI
(Ordinary Original Civil Jurisdiction)

C.S. (O.S.) No. 412 of 2014

Star Sports India Pvt. Ltd ... Plaintiff

Versus

Mr. R.P. Mishra & Ors. ... Defendants

MEMO OF PARTIES

Star Sports India Pvt. Ltd.
(Formerly ESPN Software India Pvt. Ltd.)
Star House, Off Dr. E Moses
Road Mahalaxmi Mumbai 400011 ...
Plaintiff

Versus

1. Mr. R.P. Mishra
A-1A, ABlock, Mahipalpur Extension,
Opp. Aerocity Metro Station,
National Highway-8,
New Delhi - 110037 ... Defendant No.1

2. Hotel Le Seasons
A-1A, ABlock, Mahipalpur Extension,
Opp. Aerocity Metro Station,
National Highway-8,
New Delhi - 110037 ... Defendant No.2

3. SITI Cable Network Ltd.
135, Continental Building,
Dr. Annie Besant Road,
Worli, Mumbai-400018.

Also at
Essel House, B-10,
Lawrence Road,
Industrial Area,
Delhi- 110035 ... Defendant No. 5

(NITIN SHARMA)
Saikrishna & Associates
Advocates for the Plaintiff
A-2E, CMA Tower
Second Floor Sector-24
Noida. 201301

New Delhi
Date: 10th February, 2014

S-36.

IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ CS(OS) 412/2014

STAR SPORTS INDIA PVT LTD ..... Plaintiff
Through : Mr.Saikrishna Rajagopal, Mr.Sidharth Chopra, Mr,Nitin Sharma and Ms.Julien George, Advs.

versus

R.P. MISHRA & ORS ..... Defendants
Through

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI

ORDER

% **12.02.2014**

I.A. No.2752/2014 (Exemption for filing Originals)
I.A. No.2753/2014 (Exemption for filing clear copies)

Let original documents be filed at the time of admission/denial of documents. Clear copies of the documents be filed within four weeks from today. Applications stand disposed of accordingly.

I.A. No.2754/2014

As agreed, let Court fee be filed by plaintiff within one week from today.

Application stands disposed of.

CS (OS) 412/2014

Issue summons in the suit, dasti as well, to the defendants returnable on 2.5.2014.

I.A. No.2750/2014 (Order XXXIX Rule 1 and 2 CPC)

Issue notice of this application to the defendants for the aforesaid date.

In the present suit, the plaintiff is aggrieved as the defendants are infringing the plaintiff's copyrights and exclusive broadcast reproduction rights in its channels and original programmes.

Learned counsel for the plaintiff submits that the plaintiff Company is engaged in the business of sports broadcasting through its channels

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STAR SPORTS 1, STAR SPORTS 2, STAR SPORTS 3, STAR SPORTS 4, FOX SPORTS NEWS, STAR SPORTS HD1 and STAR SPORTS HD2. It is further submitted that the plaintiff has the exclusive Broadcast Reproduction Rights in the broadcast of its channels. In case any third party wishes to re-transmit and communicate the signals of the plaintiff's channels and original programmes, then such third parties can do so only if they are duly authorized in writing vide an agreement by the plaintiff to do so.

It is alleged that defendant no.2 is a hotel located at A-1A, A Block, Mahipalpur Extension, Opp. Aerocity Metro Station, National Highway-8, New Delhi – 110037. It is alleged that the defendant no.1 is the General Manager of defendant no.2. It is further alleged that defendant no.3 is a large Multi Systems Operator (MSO) engaged in the business of retransmitting TV signals/connections to home cable viewers, including the signals of plaintiff's channels, directly and through Local Cable Operators (LCOs) attached to its network. It is further alleged that the defendants are infringing upon the exclusive broadcast reproduction rights of the plaintiff by illegally re-transmitting the plaintiff's channels i.e. STAR SPORTS 1, STAR SPORTS 2, STAR SPORTS 3, STAR SPORTS 4, FOX SPORTS NEWS, STAR SPORTS HD1 and STAR SPORTS HD2 to the rooms, lounge and other areas of the premises of defendant no.2 and that defendant no.3 is providing signals of the plaintiff's channels in an unauthorised and illegal manner to defendants no.1 to 2.

After having heard the learned counsel for the plaintiff and going through the plaint and the accompanying documents, which include various ex parte ad interim injunction orders passed by this Court, I am of the view that the plaintiff has been able to make out a case for grant of ex parte ad interim injunction. I am also of the view that if the *ex parte* ad interim injunction is not granted, the very purpose of granting this relief would be defeated. Accordingly, till the next date of hearing, defendants no.1 and 2, their servants, agents, employees and all others in the capacity of principal or agents acting for and on their behalf, as the case may be, are hereby restrained from broadcasting, re-broadcasting, re-

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transmitting, telecasting or otherwise in any other manner communicating to the public, including their visitors and hotel guests, the channels STAR SPORTS 1, STAR SPORTS 2, STAR SPORTS 3, STAR SPORTS 4, FOX SPORTS NEWS, STAR SPORTS HD1 and STAR SPORTS HD2 unauthorisedly without obtaining license / subscription from the Plaintiff and further defendant no.3, its agents, servants, employees, LCOs, representatives, franchisees, sub-operators, are hereby restrained from transmitting and distributing the aforesaid plaintiff's channels to the hotel of defendants no.1 and 2 and/or any other hotel or commercial establishment.

Compliance of the provisions of Order XXXIX Rule 3 CPC be done by the plaintiff within ten days from today.

I.A. No.2751/2014 (Order XXVI Rules 9 and Order XXXIX Rule 7 CPC)

Learned counsel for the plaintiff has submitted that one Court Commissioner may be appointed to visit the premises of defendant no.2 i.e. Hotel Le Seasons situated at A-1A, A Block, Mahipalpur Extension, Opp. Aerocity Metro Station, National Highway 8, New Delhi - 110037, to carry out the directions as have been sought for in this application. This request made on behalf of the plaintiff also appears to be justified.

Accordingly, Ms.Pavani Puri, Advocate, (Mobile No.9818044332) is appointed as a Local Commissioner, to visit the premises of the defendants at Hotel Le Seasons A-1A, A Block, Mahipalpur Extension, Opp. Aerocity Metro Station, National Highway 8, New Delhi – 110037, or any other premises of the defendant, which may be revealed during the local commission proceedings, to carry out the following directions:

> "(i) To inspect and ascertain if Plaintiff's Channels Star Sports 1, Star Sports 2, Star Sports 3, Star Sports 4, Star Sports HD1, Star Sports HD2 and Fox Sports News are available for viewing by the guests and visitors at the Defendants' premises;
>
> (ii) To search and inspect the rooms/guest rooms (Pursuant to room reservation made by the Plaintiff's representative)/

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lobby/kitchen/restaurant/terrace/bar and/or any other part of the premises in order to ascertain the availability of Plaintiff's Channels;

(iii) To take photographs and video recording of the Plaintiff's Channels which are available for viewing at the Defendants' premises, and to take assistance of the Plaintiff's representatives or the technical experts of the Plaintiff for such purpose;

(iv) Direct the representatives present at the Defendants' premises to disclose the source of the signals through which Plaintiff's Channels are being made available for viewing by the Defendants at their premises and to produce any agreement and/or document with any third party authorizing the Defendants to telecast the Plaintiff's Channels at their premises;

(v) Search, inspect and make an inventory of all the television sets and/or any other electronic media used by the Defendants, at their premises, where the Plaintiff's Channels are available for viewing by guests and visitors;

(vi) Seize / take into custody all Equipment found at such premises through which the Plaintiff's Channels and Original Content, is being broadcasted, telecasted and / or communicated without permission, and thereafter seal the same in suitable packing material/containers;

(vii) Direct the Defendants and / or those in-charge of such premises to:

a. open their current premises, in case the said premises are locked, and/or any rooms/guest rooms/lobby/terrace/kitchen and/or any other part of the premises, in order to enable the Local Commissioner to inspect the premises, and /or;

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b. reveal any other premises from where the infringing activity is taking place.

(viii) Hand over the seized Equipment on 'superdari' to the Defendants or their representatives or those claiming through the Defendants, who may be directed to give an appropriate undertaking that the seized Equipment will be produced before this Hon'ble Court, as and when directed."

The Local Commissioner shall during her visit to the premises of defendants ascertain and confirm as to whether they are engaged in unauthorized / unlicensed broadcasting or transmitting of the channels STAR SPORTS 1, STAR SPORTS 2, STAR SPORTS 3, STAR SPORTS 4, FOX SPORTS NEWS, STAR SPORTS HD1 and STAR SPORTS HD2. In case, however, the defendants would be willing to obtain the licence at the time of the Local Commissioner's visits, the representatives of the plaintiff shall give the same as per law. The Court Commissioner shall be entitled to seek the help of the plaintiff's representatives and their technical experts for the proper execution of the duties entrusted to her and shall also be entitled to obtain police assistance from the local police stations and the SHOs of all the concerned police stations which shall render all assistance to her if requested by her, for the execution of the directions of this Court.

The fee of the Court Commissioner, who shall visit the premises of defendants is fixed at Rs.1.00 lakh, and for any additional place, she will be paid Rs.30,000/- exclusive of all other expenses which shall be borne by the plaintiff. The Court Commissioner shall submit her report within two weeks of the execution of the Commission.

Copy of this order be given dasti to the Counsel for the Plaintiff.

G.S.SISTANI, J

FEBRUARY 12, 2014 msr

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Annexure-F-6B

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IN THE HIGH COURT OF DELHI AT NEW DELHI

CS(OS) 412/2014 and I.A. 2750/2014 and I.A. 2751/2014

STAR SPORTS INDIA PVT LTD ..... Plaintiff

Through: Mr.Sahil Sethi, Advocate

versus

R.P. MISHRA and ORS ..... Defendant

Through: Mr.Ranjay N., Advocate.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

O R D E R

02.05.2014

Counsel for the plaintiff wishes to withdraw the present suit and applications. Accordingly, the suit and the applications stand dismissed as withdrawn.

G.S.SISTANI, J

MAY 02, 2014

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IN THE HIGH COURT OF DELHI AT NEW DELHI
(Ordinary Original Civil Jurisdiction)

C.S. (O.S.) No. 411 of 2014

Star Sports India Pvt. Ltd ... Plaintiff

Versus

Mr. Bikram Singh & Ors. ... Defendants

MEMO OF PARTIES

Star Sports India Pvt. Ltd.
(Formerly ESPN Software India Pvt. Ltd.)
Star House, Off Dr. E Moses
Road Mahalaxmi Mumbai 400011 ... Plaintiff

Versus

1. Mr. Bikram Singh
L-73/L322, Mahipalpur Extension,
National Highway-8,
Near Indira Gandhi International Airport,
New Delhi - 110037 ... Defendant No.1

2. Mr. Sunita Devi Yadav
L-73/L322, Mahipalpur Extension,
National Highway-8,
Near Indira Gandhi International Airport,
New Delhi - 110037 ... Defendant No.2

3. M/s Saptagiri Restaurant Pvt. Ltd.
L-73/L322, Mahipalpur Extension,
National Highway-8,
Near Indira Gandhi International Airport,
New Delhi - 110037 ... Defendant No. 3

4. SITI Cable Network Ltd.
135, Continental Building,
Dr. Annie Besant Road,
Worli, Mumbai-400018.

Also at
Essel House, B-10,
Lawrence Road,
Industrial Area,
Delhi- 110035 ... Defendant No. 4

New Delhi
Date: 10th February, 2014

Saikrishna & Associates
Advocates for the Plaintiff
A-2E, CMH Tower

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

\+ CS(OS) 411/2014

STAR SPORTS INDIA PVT LTD ..... Plaintiff
Through : Mr.Saikrishna Rajagopal, Mr.Sidharth Chopra, Mr,Nitin Sharma and Ms.Julien George, Advs.

versus

BIKRAM SINGH & ORS ..... Defendants
Through

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI

O R D E R
12.02.2014

% **I.A. No.2747/2014 (Exemption for filing Originals)**
I.A. No.2748/2014 (Exemption for filing clear copies)

Let original documents be filed at the time of admission/denial of documents. Clear copies of the documents be filed within four weeks from today. Applications stand disposed of accordingly.

I.A. No.2749/2014

As agreed, let Court fee be filed by plaintiff within one week from today. Application stands disposed of.

CS (OS) 411/2014

Issue summons in the suit, dasti as well, to the defendants returnable on 2.5.2014.

I.A. No.2745/2014 (Order XXXIX Rule 1 and 2 CPC)

Issue notice of this application to the defendants for the aforesaid date.

In the present suit, the plaintiff is aggrieved as the defendants are infringing the plaintiff's copyrights and exclusive broadcast reproduction rights in its channels and original programmes.

Learned counsel for the plaintiff submits that the plaintiff Company is engaged in the business of sports broadcasting through its channels STAR SPORTS 1, STAR SPORTS 2, STAR SPORTS 3, STAR SPORTS 4, FOX

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SPORTS NEWS, STAR SPORTS HD1 and STAR SPORTS HD2. It is further submitted that the plaintiff has the exclusive Broadcast Reproduction Rights in the broadcast of its channels. In case any third party wishes to re-transmit and communicate the signals of the plaintiff's channels and original programmes, then such third parties can do so only if they are duly authorized in writing vide an agreement by the plaintiff to do so.

It is alleged that the defendant no.3 is engaged in the business of hotel/restaurant/bar and hospitality industry in various parts of the country including Delhi. It is alleged that defendant no.3 operates a Hotel Saptagiri Located at L-73/L322, Mahipalpur Extension, National Highway-8, Near Indira Gandhi International Airport, New Delhi – 110037. It is alleged that the defendant no.4 is a large Multi Systems Operator (MSO) engaged in the business of retransmitting TV signals/connections to home cable viewers including the signals of plaintiff's channels, directly and through Local Cable Operators (LCOs) attached to its network. It is further alleged that the defendants are infringing upon the exclusive broadcast reproduction rights of the plaintiffs by illegally re-transmitting the plaintiff's channels i.e. STAR SPORTS 1, STAR SPORTS 2, STAR SPORTS 3, STAR SPORTS 4, FOX SPORTS NEWS, STAR SPORTS HD1 and STAR SPORTS HD2 to the rooms, bar and lounge and other areas of the Hotel premises of defendant no.3 and further that defendant no.4 is providing signals of the plaintiff's channels in an unauthorised and illegal manner to defendants no.1 to 3.

After having heard the learned counsel for the plaintiff and going through the plaint and the accompanying documents, which include various ex parte ad interim injunction orders passed by this Court, I am of the view that the plaintiff has been able to make out a case for grant of ex parte ad interim injunction. I am also of the view that if the *ex parte* ad interim injunction is not granted, the very purpose of granting this relief would be defeated. Accordingly, till the next date of hearing, defendants no.1 to 3, their servants, agents, employees and all others in the capacity

of principal or agents acting for and on their behalf, as the case may be, are hereby restrained from broadcasting, re-broadcasting, re-transmitting, telecasting or otherwise in any other manner communicating to the public, including their visitors and hotel guests, the channels STAR SPORTS 1, STAR SPORTS 2, STAR SPORTS 3, STAR SPORTS 4, FOX SPORTS NEWS, STAR SPORTS HD1 and STAR SPORTS HD2 unauthorisedly without obtaining license / subscription from the Plaintiff and further defendant no.4 its agents, servants, employees, LCOs, representatives, franchisees, sub-operators, are hereby restrained from transmitting and distributing the aforesaid plaintiff's channels to the hotel of defendants no.1 to 3 and/or any other hotel or commercial establishment.

Compliance of the provisions of Order XXXIX Rule 3 CPC be done by the plaintiff within ten days from today.

I.A. No.2746/2014 (O XXVI Rules 9 and O XXXIX Rule 7 CPC)

Learned counsel for the plaintiff has submitted that one Court Commissioner may be appointed to visit the hotel premises of defendants no.1 to 3 situated at Hotel Saptagiri, located at L-73/L322, Mahipalpur Extension, National Highway 8, Near Indira Gandhi International Airport, New Delhi, to carry out the directions as have been sought for in this application. This request made on behalf of the plaintiff also appears to be justified.

Accordingly, Ms.Kanika Chugh, Advocate, (Mobile No.9999831083) is appointed as a Local Commissioner, to visit the premises of the defendants at Hotel Saptagiri, located at L-73/L322, Mahipalpur Extension, National Highway 8, Near Indira Gandhi International Airport, New Delhi, or any other premises of the defendant, which may be revealed during the local commission proceedings, to carry out the following directions:

(i) To inspect and ascertain if Plaintiff's Channels Star Sports 1, Star Sports 2, Star Sports 3, Star Sports 4, Star Sports HD1, Star Sports HD2 and Fox Sports News are available for viewing by the guests and visitors at the

Defendants' premises;

(ii) To search and inspect the rooms/guest rooms (Pursuant to room reservation made by the Plaintiff's representative)/ lobby/kitchen/restaurant/terrace/bar and/or any other part of the premises in order to ascertain the availability of Plaintiff's Channels;

(iii) To take photographs and video recording of the Plaintiff's Channels which are available for viewing at the Defendants' premises, and to take assistance of the Plaintiff's representatives or the technical experts of the Plaintiff for such purpose;

(iv) Direct the representatives present at the Defendants' premises to disclose the source of the signals through which Plaintiff's Channels are being made available for viewing by the Defendants at their premises and to produce any agreement and/or document with any third party authorizing the Defendants to telecast the Plaintiff's Channels at their premises;

(v) Search, inspect and make an inventory of all the television sets and/or any other electronic media used by the Defendants, at their premises, where the Plaintiff's Channels are available for viewing by guests and visitors;

(vi) Seize / take into custody all Equipment found at such premises through which the Plaintiff's Channels and Original Content, is being broadcasted, telecasted and / or communicated without permission, and thereafter seal the same in suitable packing material/containers;

(vii) Direct the Defendants and / or those in-charge of such

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premises to:

a. open their current premises, in case the said premises are locked, and/or any rooms/guest rooms/lobby/terrace/kitchen and/or any other part of the premises, in order to enable the Local Commissioner to inspect the premises, and /or;

b. reveal any other premises from where the infringing activity is taking place.

(viii) Hand over the seized Equipment on 'superdari' to the Defendants or their representatives or those claiming through the Defendants, who may be directed to give an appropriate undertaking that the seized Equipment will be produced before this Hon'ble Court, as and when directed;

The Local Commissioner shall during her visit to the premises of defendants ascertain and confirm as to whether they are engaged in unauthorized / unlicensed broadcasting or transmitting of the channels STAR SPORTS 1, STAR SPORTS 2, STAR SPORTS 3, STAR SPORTS 4, FOX SPORTS NEWS, STAR SPORTS HD1 and STAR SPORTS HD2. In case, however, the defendants would be willing to obtain the licence at the time of the Local Commissioner's visits, the representatives of the plaintiff shall give the same as per law. The Local Commissioner shall be entitled to seek the help of the plaintiff's representatives and their technical experts for the proper execution of the duties entrusted to her and shall also be entitled to obtain police assistance from the local police stations and the SHOs of all the concerned police stations which shall render all assistance to her if requested by her, for the execution of the directions of this Court.

The fee of the Local Commissioner, who shall visit the premises of

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defendants is fixed at Rs.1.00 lakhs, and for any additional place, she will be paid Rs.30,000/- exclusive of all other expenses which shall be borne by the plaintiff. The Court Commissioner shall submit her report within two weeks of the execution of the Commission.

Copy of this order be given dasti to the Counsel for the Plaintiff.

G.S.SISTANI, J

FEBRUARY 12, 2014 msr

Annexure-F-7B

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IN THE HIGH COURT OF DELHI AT NEW DELHI

CS(OS) 411/2014 and I.A. 2745/2014 and I.A. 2746/2014

STAR SPORTS INDIA PVT LTD ..... Plaintiff

Through: Mr.Sahil Sethi, Advocate

versus

BIKRAM SINGH and ORS ..... Defendant

Through: Counsel for the defendant.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

O R D E R

02.05.2014

Counsel for the plaintiff wishes to withdraw the present suit and applications. Accordingly, the suit and the applications stand dismissed as withdrawn.

G.S.SISTANI, J

MAY 02, 2014

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PAYMENTS MADE BY A THREE STAR HOTEL IN CHENNAI

Pay Channels- Subscription Payment Statement from-2005 to 2014

ESPN & Star Sports						
Sl No.	**Contract Period**	**No of Rooms**	**Rate**	**Amount /Year**	**Tax**	**Total Amount**
1						
2	01/12/05 - 30/11/06	30	150	54,000.00	6,059.00	60,059.00
3	01/12/06 - 30/11/07	30	150	54,000.00	3,642.00	57,642.00
4	01/12/07 - 30/11/08	72	160	1,38,240.00	17,086.00	1,55,326.00
5	01/12/08 - 30/11/09	72	160	1,48,240.00	15,269.00	1,63,509.00
6	01/12/09 - 30/11/10	66	250	2,00,000.00	20,600.00	2,20,600.00
7	01/12/10 - 30/11/11	83	250	2,49,000.00	25,647.00	2,74,647.00
8	01/12/11 - 30/11/12	83	250	2,49,000.00	25,647.00	2,74,647.00
9	01/04/13 - 31/03/14	40	340	3,07,200.00	37,969.92	3,45,169.92

Zee Turner						
1	01/12/05 - 30/11/06	30	226.9	81,684.00	9,148.00	90,832.00
2	01/12/06 - 30/11/07	30	226.9	81,684.00	9,966.00	91,650.00
3	01/12/07 - 31/03/08	30	226.9	27,228.00	3,322.00	30,550.00
4	01/04/08 - 31/03/09	30	375	1,35,000.00	16,686.00	1,51,686.00
5	01/04/09 - 31/03/10	30	375	1,35,000.00	13,905.00	1,48,905.00
6	01/04/10 - 31/03/11	30	297	1,06,920.00	11,013.00	1,17,933.00
7	01/04/11 - 31/03/12	30	297	1,06,920.00	11,013.00	1,17,933.00

Zee Merged with Star from 01/04/12.

Sony						
1	01/10/06 - 30/09/07	16	327	62,501.00	7,724.00	70,225.00
2	01/10/07 - 30/09/08	16	327	62,501.00	7,649.00	70,150.00
3	01/10/08 - 30/09/09	16	327	62,501.00	6,438.00	68,939.00
4	01/10/09 - 30/09/10	12	450	64,800.00	6,674.00	71,474.00
5	01/11/10 - 30/10/11	16	536	1,02,912.00	10,600.00	1,13,512.00
6	01/11/11 - 30/10/12	40	450	2,16,000.00	22,248.00	2,38,248.00
7	01/04/13 - 31/03/14	36	600	2,59,200.00	32,037.12	2,91,237.12

Star						
1	01/12/07 - 30/11/08	30	230	82,800.00	10,234.00	93,034.00
2	01/12/08 - 30/11/09	30	230	82,800.00	8,528.00	91,328.00
3	01/12/09 - 30/11/10	21	410	1,03,320.00	10,642.00	1,13,962.00
4	01/12/10 - 30/11/11	35	410	1,72,200.00	17,737.00	1,89,937.00
5	01/12/11 - 31/03/12	30	600	72,000.00	7,416.00	79,416.00
6	01/04/12 - 31/03/13	30	1133	4,07,880.00	50,414.00	4,58,294.00

Tensports /Ten Cricket						
1	01/04/10 - 31/03/11	16	146	28,032.00	2,887.00	30,919.00
2	01/04/11 - 31/03/12	23	225	61,999.81	6,386.00	68,385.81
3	01/04/12 - 31/03/13	25	226	67,800.00	8,380.00	76,180.00

Neo Prime/ Neo Cricket/ Neo Sports						
1	01/04/12 - 31/03/13	25	200	60,000.00	7,416.00	78,000.00

We have paid 7Lakhs as Lumsum for the following channels from 01/04/13-31/03/14

1	Star & Zee	01-04-2013	31-03-2014		1,250.00		12.36%	
2	Times	01-04-2013	31-03-2014		205.00		12.36%	
3	Neo	01-04-2013	31-03-2014		200.00		12.36%	
4	Ten	01-04-2013	31-03-2014	Lum	335.00	7,00,000.00	12.36%	7,86,520.00
5	Jaya TV	01-04-2013	31-03-2014		200.00		12.36%	
6	I CAST	01-04-2013	31-03-2014		400.00		12.36%	
7	1PVA	01-04-2013	31-03-2014		10,000.00		12.36%	