TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

DATED 15TH DECEMBER 2008

Petition No.183(C) of 2008

M/s Total Telefilms Pvt. Ltd … Petitioner
Vs.
M/s Prasar Bharati & Anr ... Respondent

Petition No.195(C) of 2008

Zee Turner ltd., New Delhi … Petitioner

Vs.
M/s Prasar Bharati ... Respondent

Petition No.216(C) of 2008

Enter 10 Television Pvt. Ltd … Petitioner

Vs.
M/s Prasar Bharati ...Respondent

BEFORE:

HON'BLE MR. JUSTICE ARUN KUMAR CHAIRPERSON
HON'BLE DR. J. S. SARMA MEMBER
HON'BLE MR. G. D. GAIHA MEMBER

P. No. 183(c) of 2008

For Petitioner: Mr. P.S.Narshimha, Senior Advocate, with
Mr. Sunder Khatri, Advocate

For 1st Respondent (Prasar Bharati) Mr. Vijay Hansaria, Senior Advocate with
Mr. Rajiv Talwar,
Mr. Dinkar Kalra,
Ms. Sneha Kalita, Advocates

For 2nd Respondent Mr. Vikas Mehta, Advocate
Mr. Narhari Singh, Advocate.

P.No. 195 (C) of 2008
&
P. no. 216 (C) of 2008

For Petitioner: Mr. Maninder Singh,
Mr. Yoginder Handoo

Mr. Kunal Sood,
Mr. Mansimran Singh, Advocates

For Respondent: Mr. Sanjeev Puri, Senior Advocate with
Mr. Rajiv Talwar,
Mr. Dinkar Kalra, Advocates

ORDER

In Petitions no.s 195(C) and 216(C) of 2008, the Petitioners have challenged the action of the Respondent Prasar Bharati, in removing their channels from its Direct to Home (DTH) platform. According to the Petitioners, they had deposited or agreed to deposit the revised carriage fee as demanded by the Respondent and, therefore, contend that their channels should have been allowed to be continued to be relayed. Discontinuance thereof by the Respondent is stated to be illegal and for that reason, the Petitioners pray that the Respondent be directed to restore broadcast of their channels on the Respondent's DTH platform. In Petition no. 183(C) of 2008, the Petitioner questions the concept of carriage fee and prays that a letter from the Respondent demanding a higher carriage fee be quashed. The subject matter of the petitions being similar, although varying in facts, it was decided, in consultation with the counsels for different parties, to take these up and dispose them of as a batch.

2. Briefly, Total Telefilms Pvt. Ltd filed a petition no. 183 (C)/2008in August 2008 challenging the carriage fees of Rs. 60 lakh charged by Prasar Bharati as legally not valid. Its contention is that it paid the carriage fee of Rs.25 lakh in the year 2007 under protest although there was no provision in law to charge such carriage fees. According to it, the Telecom Regulatory Authority of India (*hereinafter referred to as TRAI*) had, in December 2007, informed that there is no prescribed carriage fee. When the Petitioner approached the Respondent for renewal of the Agreement in 2008, a carriage fee of Rs. 60 lakh was demanded. The Petitioner's prayer is to declare the act of the Respondent as illegal and void, *ab initio* and quash the letter dated 1.8.2008 from the Respondent, seeking an enhanced carriage fees of Rs. 60 lakh, as null and void, besides directing the Respondent not to disconnect the signals of the Petitioner from its DTH platform. When the matter came up initially on 28th August 2008, this Tribunal had, as an interim Order, permitted the Petitioner to deposit the sum of Rs. 25 lakh with the Respondent towards carriage fees on a provisional basis for the year 2008-09 and on this amount being deposited, the Respondent was to continue to carry the channel of the Petitioner.

3. In September 2008, M/s Zee Turner Ltd. filed a petition no. 195(C) /2008against the act of the Respondent for having discontinued carriage of signals of Zee's channels from its DTH platform with effect from 7.9.2008 without giving the mandatory notice under the TRAI Regulations. Its contention was that in the year 2007, it had paid a carriage fee of Rs. 25 lakh (excluding taxes). Although the Agreement for the year 2007-08 contained a clause that it could be extended, and although the Petitioner conveyed its willingness to extend

the Agreement by one year for the carriage of its three channels -- Zee Smile, Zee Jagran, and ETC Music -- the Respondent proceeded to disconnect two of the three channels, namely Zee Smile and Zee Jagran, with effect from 7.9.2008. Terming this act as illegal, the Petitioner pleaded that the Respondent be directed to execute Agreements for these three channels with the Petitioner on terms and conditions which are non-arbitrary, non-discriminatory, just and reasonable; to restore its two channels and to prohibit the Respondent from discontinuing the signals of its third channel -- ETC Music. Vide an Order dated 10.9.2008, this Tribunal noted the willingness of the Petitioners to deposit a sum of Rs. 60 lakh for each of its three channels with the Respondent subject to the final orders and directed the Respondent to restore the signals of the Petitioner's two channels and not to disconnect the third channel.

4. On 30.9.2008, Enter 10 Television Pvt. Ltd. filed a petition no. 216 (C)/2008 aggrieved by the act of the Respondent in discontinuing carriage of signals of its channel from its DTH platform with effect from 7.9.2008, allegedly without giving the mandatory notice under the TRAI Regulations. Its case is that the Agreement entered into between the two parties in the year 2007 stipulated that it may be extended and that on 1.8.2008 the Respondent offered to renew the Agreement at the new carriage fee of Rs. 60 lakh. Despite the Petitioner being ready to deposit the same on 3.9.2008, the Respondent's officials allegedly informed the Petitioner that the full payment could be received only along with the new signed Agreement. But without waiting for the same, the Respondent arbitrarily disconnected the signals of the Petitioner's channel on 7.9.2008 without any mandatory notice. The Petitioner's claim is that despite several visits to the Respondent's office, there was no response from the Respondent. The Petitioner's prayer to this Tribunal was to direct the Respondent to restore the signals of the Petitioner's channel.

5. On 12.9.2008, Prasar Bharati filed a writ petition no. 6721/2008 in the Delhi High Court against the Order passed by this Tribunal on grounds of lack of jurisdiction; that they were not heard when the Orders were passed and that the said order affects the discharge of its statutory duties. The learned single judge of the Delhi High Court, in his Order dated 12.9.2008, disposed of the writ petition with a direction to Prasar Bharati to approach the TDSAT for vacation or variation of the orders and/or such other reliefs that it may be entitled to. The direction was issued without prejudice to the rights and contentions of the parties and with liberty to the Petitioner therein to raise all grounds raised in the writ petition, before this Tribunal. Thereupon, Prasar Bharati filed a Letters Patent Appeal -- LPA (C) no.562/2008 before the division bench of the Delhi High Court. In its order dated 23.9.2008 the division bench of the Delhi High Court directed the parties to appear before the TDSAT which was required to first decide the question of this jurisdiction vis-à-vis the appellant (Prasar Bharati) and the maintainability of the petitions of the Petitioners herein as the preliminary issue. Prasar Bharati thereupon filed a SLP before the Supreme Court where the matter is still pending. On 07.11.2008, the Apex Court ordered as follows: "List on 17.11.2008. We are told that the matter is posted before the TDSAT on 11.11.2008. TDSAT to pass appropriate orders. Status quo shall be maintained till 17.11.2008." On 25.11.2008, the Hon'ble Supreme Court ordered as follows: "List on 15.12.2008. Status quo to continue till the TDSAT takes a final decision in the matter. We hope that TDSAT will take a final decision before the next date of hearing."

6. The case of the 1st Respondent herein, Prasar Bharati, is that the TDSAT has no jurisdiction to hear these appeals and even if it did, it did not have the authority/jurisdiction to issue interim injunctions and ex parte orders. It is also contended that there is no obligation on Prasar Bharati's part to issue any notice as the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations 2006 are bad in law and against the provisions of the TRAI Act. The case of the 1st Respondent is also that the petitions do not stand on merits.

7. The questions that require determination, therefore, are as follows:

1. Whether this Tribunal has jurisdiction to hear the petitions filed herein?
2. Whether this Tribunal has the authority to issue interim injunctions and ex parte orders?
3. Whether the Regulations issued by TRAI are bad in law?
4. Whether the petitioners herein are entitled to any relief based on the facts of the cases?

We have heard, at length, the learned counsels for the Respondents as well as the Petitioners on all the issues.

8. Opening the arguments on the issue of jurisdiction, the learned senior Counsel for the 1st Respondent in petition no. 183/2008, Mr. Vijay Hansaria, pointed out that the TDSAT has been conferred jurisdiction under section 14 (a) (ii) of the TRAI Act to adjudicate any dispute, inter alia, between two or more "service providers", and that the term 'service provider', as defined under section 2 (j) of the TRAI Act means the Government as a service provider and includes a licencee. His contention is that whenever, in a definition clause, legislature uses both the expressions –'means' and 'includes' -- whether together or separately, such definition is exhaustive and not illustrative. He cited certain Supreme Court decisions in this regard. Mr. Hansaria's further contention is that a 'licensee' as defined under section 2 (e) of the Telecom Regulatory Authority of India Act, 1997(as amended in 200) (*hereinafter referred to as* ***TRAI Act***) means a person licensed under section 4 (1) of the Indian Telegraph Act, whereas Prasar Bharati, being a statutory Body, is not required to obtain a licence under the Indian Telegraph Act. According to him, a harmonious reading of the different sections of the TRAI Act as well as the provisions of The Prasar Bharati (Broadcasting Corporation of India) Act, 1990, (*hereinafter referred to as the* ***Prasar Bharati Act***) reveals that Prasar Bharati does not require a licence under the Indian Telegraph Act and hence is not a service provider. His case is that, consequently, the disputes between the Petitioners and Prasar Bharati are not disputes between the service providers nor do they fall under any of the other provisions of section 14 of the TRAI Act, and as such the TDSAT does not have jurisdiction to settle these disputes. The learned counsel also pointed out that the definition of licensee under section 2 (1) (e) of the TRAI Act means any person licensed for providing "specified telecommunication services" and argued that the TRAI Act, as originally enacted, did not apply to broadcasting service.

9. Reiterating that Prasar Bharati is not licensed under section 4 of the Indian Telegraph Act, the learned senior Counsel referred to the guidelines on DTH operations issued by the Government of India on 15.3.2001 and contended that these guidelines, which included the procedure for obtaining a licence and the licence proforma, do not apply to Prasar Bharati since the Prasar Bharati Act itself allows the Respondent to undertake Broadcasting services. According to him, only those persons who have applied for and were granted licence as per the guidelines dated 15.3.2001 would be *licensees* for the purpose of DTH operation.

10. According to the Mr. Hansaria, Prasar Bharati is a statutory corporation established under the Prasar Bharati Act. Section 2 (c) of this Act defines 'broadcasting' to mean dissemination of communication by transmission of electromagnetic waves through space or cable. The learned counsel states that Prasar Bharati is not required to obtain a licence under the Indian Telegraph Act since it is statutorily mandated and entitled to use electromagnetic waves by way of a separate statute. The learned counsel also referred to section 12 of the Prasar Bharati Act, which refers to the functions and powers of Prasar Bharati and contends that since section 12 (1) enjoins upon Prasar Bharati to "conduct public broadcasting services", it would automatically mean that Prasar Bharati has all the powers to act in pursuance of this, including using of any means/technology and that no administrative license of the Central Government is needed for the purpose of undertaking broadcasting service. According to Mr. Hansaria, the preamble to the Prasar Bharati Act and also heading of section 12 of this Act make it clear that Prasar Bharati does not require a license under the Indian Telegraph Act. The learned counsel also referred to the letter issued by the Ministry of Information & Broadcasting dated 19.11.2003 and stated that the permission given therein to Prasar Bharati to use the Ku band for Doordarshan's DTH operations, should not be construed as a licence from the licensor but that it is only an approval by the administrative ministry.

11. For a better understanding of the case, we reproduce here under the letter dated 19.11.2003 from the Ministry of Information and Broadcasting addressed to Prasar Bharati; we shall be discussing this letter subsequently.

GOVERNMENT OF INDIA
Ministry of Information and Broadcasting
'A' Wing Shastri Bhawan, New Delhi-110001

Date 19.11.2003

To
Shri K.S. Sarma
Chief Executive officer,
Prasar Bharati,
(Broadcasting Corporation of India)
PTI building, New Delhi.

Subject: Expansion of TV coverage through Ku- band, (Satellite Distribution Technology)

Sir,

I'm directed to refer to DG: DDn's letter No. 9 (8)/2002/EVI/TV/dated 8.7.2003 on the above noted subject and to convey the approval of the Competent Authority to the following:

i. Permission for Prasar Bharati to use satellite distribution technology in the Ku-band frequency for Doordarshan's bouquet of 20 channels and 10 channels of private broadcasters, in free-to-air mode. Prasar Bharati will make every efforts to recover carriage fee from private broadcasters, whose channels will be carried in the bouquet.

ii. Sanction of capital expenditure of Rs.53.80 crores, revenue non-recurring expenditure of Rs.2.25 crores and recurring expenditure of Rs.108.30 crores, for the implementation of the pilot project as per objectives mentioned in the Annexure.

iii. The implementation of the project mentioned above will be confined to Himachal Pradesh, Chhattisgarh, Karnataka, Madhya Pradesh, Rajasthan, Uttaranchal, NE Region and Gujarat i.e. where the percentage of coverage is below national average.

iv. The location of Cable Head end and Set Top Boxes will be decided by Prasar Bharati. 10,000 Set Top Boxes and Dish antenna (excluding receiver) shall be provided free of cost by Prasar Bharati to public institutions like Anganwadis, Schools, Public Health Centres, Panchayats, Youth Clubs, Co-operative societies etc. Maintenance of these assets would be the exclusive responsibility of the institution/organization concerned. The institutions/organizations would arrange for the TV set through their own resources.

v. Wherever it is not possible to distribute Set Top Boxes and dish antennas, Cable head ends may be set up by Doordarshan, for distribution of bouquet of channels. The cable Head Ends may be established in public institutions like Anganwadis, Schools, Public Health Centres, Panchayats, Youth Clubs, Co-operative societies etc. The Cable Head End operator shall not be a Govt. employee and will be appointed by the concerned institution and the cost thereof @Rs. 1500/-per month will be recovered through such operator. There will be no salary liability on the part of Govt. or Prasar Bharati. Cable Head Ends will be set up by Prasar Bharati. The maximum number of Cable Head Ends should not be more than 200 and will be set up in uncovered villages/areas where population concentration is around 50 TV households or so. The Cable network in Cable Head End shall be maintained by Doordarshan through outsourcing it to the entrepreneur.

vi. The design and specification of the Set Top Boxes and antenna kit should be such as could later on be capable of being brought by any person, off the shelf from the market.

vii. The scheme should be sustainable and demonstrable, without entailing recurring liability for the Government.

viii. No extra staff should be recruited for implementing the scheme, except staff required for the Earth Station.

ix. Staff requirements shall be projected separately and approval of the Government sought in all cases.

Yours faithfully
Sd/-
(B.S. RAWAT)
Under Secretary to the Govt. of India

Copy to:

Engineer-in-Chief, Doordarshan, Mandi House, New Delhi

11. The learned senior counsel for the Respondent in Petition no. 195(C)/2008, Mr. Sanjeev Puri, broadly adopted the arguments of the learned counsel Mr. Hansaria. According to him, Section 2 (c) of the Prasar Bharati Act includes the DTH services. Referring to the Regulations issued by TRAI, the learned counsel stated that a subordinate legislation must not only conform to the parent Act but also the provisions of other Acts.

12. Mr. Vikas Mehta, learned counsel for the 2nd Respondent in Petition no.183(C)/2008, the Telecom Regulatory Authority of India (TRAI), disagreed with the contentions of the learned senior counsels Mr. Hansaria and Mr. Puri on the issue of jurisdiction. His averment is that Prasar Bharati is a Service Provider and as such is subject to the provisions of the TRAI Act, and that the Petitions in question are to be adjudicated by the TDSAT.

13. Arguing on behalf of the Petitioner in Petition no. 183/2008, the learned senior counsel, Mr. Narasimha refuted the objection of the Counsel for Prasar Bharati on the issue of jurisdiction. He stated that in an issue relating to jurisdiction, the nature of the relevant Act needs to be understood. According to him, Parliament, at times, creates Corporations, to perform certain routine public functions, through specific statutes; such statutes are not substantive statutes since they only incorporate Bodies. On the other hand, Parliament enacts other substantive statutes, such as the law relating to cooperatives, Electricity etc. The former types of statutes do not violate the substantive statutes. Mentioning that the Prasar Bharati Act is a non-substantive statute, he pointed out that it has no mechanism for adjudication of disputes or licensing issues. According to him, Prasar Bharati is covered by the Indian Telegraph Act, following which it conducts its operations. Mr. Narasimha pointed out that the preamble to the Prasar Bharati Act showed that it was only intended to create this Body. Referring to the Explanation to section 12 (1) of the Prasar Bharati Act, he pointed out that this Explanation clearly sets at rest all doubts and mentioned that it was deliberately included as an 'explanation' and not as a 'proviso'. He also pointed out that the preambles to the TRAI Act and the Prasar Bharati Act are totally different and it is clear that the Prasar Bharati Act deals only with the function of creating the Broadcasting Corporation. Referring to the Statement of objects and reasons for the TRAI Act, the counsel stated that the Statement indicates that Government intended to bring under one Act the entire matter relating to telecommunications. If they wanted to restrict, section 11 of the TRAI Act would not have been introduced. The learned counsel also contended that it is not relevant whether Prasar Bharati has obtained a license or not. The question is whether or not it is **required** to take a licence. According to him, section 2 (j) of the TRAI Act shows that it can include Government, which means that if Prasar Bharati was not created, the Department would have been a service provider. Section 2 (k) of the TRAI Act shows that the scope of the term 'telecommunication service' covers service of any description since it has been defined very widely. Stating that provisions of the statute had to be broadly interpreted, the Counsel argued that Prasar Bharati is a service provider and is a licensee.

14. The learned counsel for the Petitioner in petition no.s 195(C)/2008 and 216(C)/2008, Mr. Maninder Singh, argued that DTH service is a '*Telegraph*' as defined under the Indian Telegraph Act, 1885 and that Prasar

Bharati can establish, maintain and operate a Telegraph only through a license under section 4 of the Telegraph Act. His contention however is that since the term 'license' is not defined in the Indian Telegraph Act and since the said Act also does not prescribe any statutory format, this term has to be interpreted widely to include any permission/sanction/approval/authorisation in any form. He cited in this context the judgement of the Himachal Pradesh High Court in the case of **United India Assurance vs. Tilak Ram (AIR 1986 HP 27),** reiterated by the Delhi High Court in the case of **Modi Rubbers Ltd vs. union of India [2002 (150) ELT 52]** and reaffirmed by the Hon'ble Supreme Court in the case of **National Insurance Co Ltd vs. Swaran Singh & Ors [(2004) 3 SCC 297]**. The learned counsel also argued that section 12 of the Prasar Bharati Act does not override the provisions of section 4 of the Indian Telegraph Act even without Explanation to section 12 (1) and that the said Explanation is only by way of abundant caution. Differing from the argument of the learned counsel Mr. Hansaria, Mr. Singh pointed out that the letter dated 19.11.2003 of the Ministry of Information & Broadcasting is nothing but a licence, interpreted in the larger context. It is, according to him, clearly a case of a permission granted by the Union Government to Prasar Bharati for operating its DTH services. Besides, the counsel argued that the very fact that Prasar Bharati approached the wireless planning and coordination wing in the Department of Telecommunications for a licence clearly demonstrated that they are required to have a licence which is given under the Indian Telegraph Act.

15. The learned counsel further argued that the very preamble to the Agreement between Prasar Bharati and the Petitioner dated 31.8.2007 clearly states that Prasar Bharati is running a DTH service by the name of 'DD direct+' and that it is therefore a service provider.

16. We now proceed to examine in detail the contentions of the learned counsels. The case of the learned senior Counsel for Prasar Bharati has two dimensions. The first set of arguments relates to the provisions of the TRAI Act while the other set of arguments relates to the application of the provisions of the Prasar Bharati Act as well as the guidelines and authorisation issued by the Ministry of Information and Broadcasting. Insofar as the TRAI Act provisions are concerned, Section 14 of the TRAI Act reads as follows:

*"14. **Establishment of Appellate Tribunal**. -- The central government shall, by notification, establish an Appellate Tribunal to be known as the Telecom disputes settlement and appellate Tribunal to-*

(a) adjudicates any dispute-

I. between a licensor and a licensee;
II. between two or more service providers;
III. between a service provider and a group of consumers;

provided that nothing in this clause shall apply in respect of matters relating to-

(A) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the monopolies and restrictive trade practices commission established under subsection (1) of section 5 of the monopolies and restrictive trade practices Act, 1969 (54 of 1969);
(B) but the complaint of an individual consumer maintainable before a consumer disputes redressal for or a consumer disputes redressal commission or the nation consumer redressal

commission established under section 9 of the consumer protection Act, 1986 (68 of 1986);

(C) dispute between Telegraph authority and any other person referred to in subsection (1) of section 7B of the Indian Telegraph Act 1885 (13 of 1885);

(b) hear and dispose of appeal against any direction, deficient or order of the authority under this Act.

It has to be examined whether the subject matter of the petitions is in the nature of disputes between service providers.

17. For the sake of convenience, Section 2 of the TRAI Act, 1997, providing the definitions of the terms – licensee, licensor, service provider, telecommunication service -, is reproduced as under:

2. Definitions. -- (1) In this Act, unless the context otherwise requires, --

(a).....

(e) 'licensee' means any person licensed under subsection (1) of section 4 of Indian Telegraph Act, 1885 (13 of 1885) for providing specified public telecommunication services;

(ea) ' licensor' means the Central Government or the telegraph authority who grants a license under section 4 of the Indian Telegraph Act, 1885 (13 of 1885);

(f).....

(j) 'service provider' means the government as a service provider and includes a licensee;

(k) 'telecommunication service' means the service of any description (including electronic mail, voice mail, data services, audiotex services, videotex services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electromagnetic mean but shall not include broadcasting services;

provided that the central government may notify other service to be telecommunication service including broadcasting services.

(2) words and expressions used and not defined in this Act but defined in the Indian Telegraph Act 1885 (13 of 1885) or the Indian Wireless Telegraphy Act 1933 (17 of 1933) shall have the meanings respectively assigned to them in those Acts.

(3).....

18. The learned counsel, Mr. Hansaria, refers to sub-section 2 (j), defining the term 'service provider'. His contention is that the use of the words 'means' and 'includes' in this sub-section shows that the legislative intent is to make the definition exhaustive and not illustrative. In this context, he referred to the **case of M/s Mahalakshmi Oil Mills vs. state of Andhra Pradesh [(1989) 1 SCC 164]; the case of P. Kasilingam and Others vs. P.S.G. College of Technology and Others [1995 Supp (2) SCC 348]; and the case of Bharat Coop Bank (Mumbai) Ltd. Vs. Coop Bank Employees Union [(2007) 4 SCC 685],** which dealt with the meaning of the usage of the words means' and 'includes'. In the *Mahalakshmi oil Mills case*, the Supreme Court had held as follows: "we are inclined to accept the contention urged on behalf of the state that the definition under consideration which consists of two separate parts which specified what the expression *means* and also what it *includes* is obviously meant to be exhaustive." The Apex Court quoted the observation of Lord Watson in Dilworth v. Commissioner of stamps -- "it may be equivalent to "*mean and include*", and in that case it may afford exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions." However, in the *Kasilingam case*, dealing with the expression of the term '*college'*, the Apex Court observed as follows: "a particular expression is often defined by the legislature by using the

word *means* or the word *includes*. Sometimes, the words '*means and includes*' are used. The use of the word *means* indicates that "definition is a hard and fast definition, and no other meaning can be assigned to the expression than is put down in definition" (see: Gough v. Gough; Punjab land development and reclamation Corporation Ltd v. Presiding officer, Labour Court). The word *includes* when used, enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include. The words "*means and includes*", on the other hand, indicate "an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words are expressions" (see: Dilworth v. Commissioner of stamps (Lord Watson); Mahalakshmi oil Mills v. State of A.P.). The use of the words "*means and includes"* in rule 2 (b) would, therefore, suggest that the definition of college is intended to be exhaustive and not extensive and would cover only the educational institutions falling in the categories specified in rule 2 (b) and other educational institutions are not comprehended." In the *Bharat Coop Bank case*, the Hon'ble Supreme Court dealt with the section 2 (bb) of the ID Act and held that "therefore, the use of the word '*means'* followed by the word '*includes'* in section 2 (bb) of the ID Act is clearly indicative of the legislative intent to make the definition exhaustive and would cover only those banking companies which fall within the purview of the definition and no other." The contention of the learned counsel is that, in the light of the above interpretations of the Honourable Supreme Court, Prasar Bharati should not be considered as a service provider.

19. We have carefully considered the contentions of the learned counsel and have carefully gone through the judgements. Justice GP Singh in his work –' Principles of Statutory Interpretation', explains these terms as follows: "when a word is defined to *'mean'* such and such, the definition is prima facie restrictive and exhaustive; whereas, where the word defined is declared to '*include'* such and such, the definition is prime facie extensive..... Further, a definition may be in the form of '*means and includes'*, where again the definition is exhaustive." He goes on to quote Justice Gajendragadkar who observed that "It is obvious that the words used in an inclusive definition denote extension and cannot be treated as restricted in any sense. Where we are dealing with an inclusive definition, it would be inappropriate to put a restrictive interpretation upon terms of wider denotation." **[State of Bombay v. Hospital Mazdoor Sabha (AIR 1960 SC 610)].**

20. Justice GP Singh goes on to note that "when a word has been defined in the interpretation clause, *prima facie* that definition governs whenever that word is used in the body of the statute. [Vanguard Fire and General Insurance Co Ltd., Madras v. Fraser and Ross, AIR 1960 SC 971].... all definitions given in interpretation clause are therefore normally enacted subject to the qualification – 'unless there is anything repugnant in the subject or context' or ' unless the context otherwise requires'. ... repugnancy of a definition arises only when the definition does not agree with the subject of context; any action not in conformity with the definition will not obviously makes it repugnant to subject or context of the provision containing the term defined under which such action is purported to have been taken **[State Bank of India v. Yogendra Kumar Srivastava, (1987) 3 SCC 10]**. When the application of the definition to a term in a provision containing that term makes it unworkable and otiose, it

can be said that the definition is not applicable to the provision because of contrary context [**Special Officer and Competent Authority, Urban land ceilings Hyderabad v. P.S. Rao, AIR2000 SC 843].**

21. Keeping in view the decisions of the Apex Court, as well as the observations given above, it does not appear to us that there is much ambiguity about the import of the use of terms '*means'* and '*includes'* in section 2 (j) of the TRAI Act. Evidently, these terms were used by the Parliament with deliberation. The very fact that the word '*government'* existing in the TRAI Act 1997 was substituted by the words '*government as a service provider'*, clearly indicate that the term '*service provider'* is defined to mean not only government as a service provider but also the licencee. This amendment was brought about in the year 2000 by which time the Prasar Bharati Act was already in force. If the intention of the Parliament was to exclude Prasar Bharati or any other such institution it would have been expressly stated. The fact that government itself was not excluded makes it difficult to believe that Parliament intended to exclude Prasar Bharati. A perusal of the preamble to the Prasar Bharati Act also does not reveal any intention of the parliament to exclude it from the operation of the provisions of any other statute, including those of the TRAI Act. Besides, like in several other Acts, the definition clause of the TRAI Act also starts with the expression 'unless the context otherwise requires'. After the amendment in the year 2000, the context has definitely changed in the sense that broadcasting service was notified as a telecommunications service, in keeping with the provisions of the TRAI Act. It is therefore necessary to read the definition of the term *service provider* in the context of the notification issued in January 2004.

22. Be that as it may, section 2 (j) of the TRAI Act clearly includes a licensee under the definition of the term 'service provider'. As seen above, the term 'licensee' is defined as "any person licensed under subsection (1) of section 4 of Indian Telegraph Act, 1885 (13 of 1885) for providing specified public telecommunication services;" The contention of the learned counsel for Prasar Bharati is that his client is not a licensee since the TRAI Act, as originally enacted, did not apply to broadcasting service, and that it was only in January 2004 that broadcasting service has been brought under telecommunication service. We are unable to agree with this contention of the learned counsel. *Firstly*, Section 2 (c) of the Prasar Bharati Act defines the term 'Broadcasting' to mean "the dissemination of any form of communication like signs, signals, writing, pictures, images and sounds of all kinds by transmission of electromagnetic waves through space or through cables intended to be received by the general public either directly or indirectly through the medium of relay stations and all its grammatical variations and cognate expressions shall be construed accordingly;" simultaneously, section 3(1AA) of The Indian Telegraph Act, 1885 defines the term "telegraph" to mean "any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, image and sounds or intelligence of any nature by wire, visual or other electro-magnetic emissions, radio waves or Hertzian waves, galvanic, electric or magnetic means." This clearly indicates that Broadcasting is a Telegraph requiring a license under the Indian Telegraph Act. *Secondly*, the definition of the term 'telecommunications service' in the TRAI Act is comprehensive and in addition, there is a clear proviso that the central government may notify other service including broadcasting services to be telecommunication service. In other words, even in the year 2000, Parliament foresaw a situation where broadcasting service would be notified as telecommunications service.

Besides, the definition clause starts with the words "unless the context otherwise requires", which means that in the absence of a clear indication to the contrary, those terms as defined shall govern what is proposed, authorised or done under or by reference to the enactment. We therefore reject this contention of the learned counsel for Prasar Bharati.

23. The next contention of the learned counsel is that Prasar Bharati does not require a licence under section 4 of the Indian Telegraph Act since, according to him, the guidelines dated 15.3.2001 issued by the Ministry of Information & Broadcasting do not apply to Prasar Bharati. According to him, only those persons who have applied for and are granted licence as per the guidelines of 15.3.2001 would be 'licensees' for the purpose of DTH operation. But a reading of the guidelines shows that there is nothing therein which provides for an exemption to Prasar Bharati.

24. Mr. Hansaria then relies on the preamble to the Prasar Bharati Act and section12 thereof. The preamble to the Prasar Bharati Act reads as follows: "An Act to provide for the establishment of Broadcasting Corporation for India, to be known as Prasar Bharati, to define its composition, functions and powers and to provide for matters connected therewith or incidental thereto." Therefore, the preamble only indicates that the Act is to set up Prasar Bharati. The contention of the counsel is also that section 12 of the Prasar Bharati Act imposes a statutory duty as well as power to conduct public broadcasting services. The counsel also referred to the Heading of Section 12 –Functions and Powers of Corporation- and in this context, referred to the decision of the Hon'ble Supreme Court in **Bhinka vs. Charan Singh [AIR 1959 SC 960]**, where it was held that heading prefixed to sections or set of sections is to be regarded as preamble to those sections and is an aid to interpret the section. Accordingly, he contends that power to make broadcasting by Prasar Bharati by use of wireless signals flows from section 12 of Prasar Bharati Act and no license of the Central government is needed by Prasar Bharati to use wireless signals for the purpose of undertaking broadcasting service.

25. Section 12 of the Act reads as follows:

> ***"12. Functions and powers of Corporation.*** *(1) Subject to the provisions of this Act, it shall be the primary duty of the corporation to organise and conduct public broadcasting services to inform, educate and entertain the public and to ensure a balanced development of broadcasting on radio and television.*
> ***Explanation--*** *For the removal of doubts, it is hereby declared that the provisions of this section shall be in addition to, and not in derogation of, the provisions of the India Telegraph Act, 1885 (13 of 1985).*
>
> *(2)The Corporation shall, in the discharge of its functions, be guided by the following objectives, namely:*
> *(a) to (p) .....*
> *(3) In particular, and without prejudice to the generality of the foregoing provisions, the Corporation may take such steps as it thinks fit-*
> *(a) To ensure that broadcasting is conducted as a public service to provide and produce programmes;*
> *(b) To establish a system for the gathering of news for radio and television;*
> *(c) To negotiate for purchase of, or otherwise acquire, programmes and rights or privileges in respect of sports and other events, films, serials, occasions, meeting, functions or incidents of public interest, for*

broadcasting and to establish procedures for the allocation of such programmes, right or privileges to the services;
(d) To establish and maintain a library or libraries of radio, television and other materials;
(e) To conduct or commission, from time to time, programmes, audience research, market or technical service, which may be released too such person and in such manner and subject to such terms and conditions as the Corporation may think fit;
(f) to provide such other services as may be specified by Regulations.

(4) Nothing is sub-sections (2) and (3) shall prevent the Corporation from managing on behalf of the Central Government and in accordance with such terms and conditions as may be specified by the specified by that government the broadcasting of external services and monitoring of broadcasts made by arrangements outside India on the basis of arrangements made for reimbursement of expenses by the Central Government.
(5) For the purposes of ensuring that adequate time is made available for the promotion of the objectives set out in this section, the Central Government shall have the power to determine the maximum limit of broadcast time in respect of the advertisement.
(6) The corporation shall be subject to no civil liability on the ground merely that it failed to comply with any of the provisions of this section.
(7) The Corporation shall have power to determine and levy fees and other service charges for or in respect of the advertisements and such programmes as may be specified by regulation:
***Provided** that the fees and other service charges levied and collected under this sub-section shall not exceed such limits as may be determined by the Central Government, from time to time."*

26. As can be seen, section 12 of the Prasar Bharati Act is comprehensive in that it deals with both functions and powers of the Corporation. The functions of the Corporation of set out in subsections (1) and (2) while the powers are set out in subsections (3), (4) and (7) of section 12. Besides section 12 (1) sets out the primary duty of the Corporation and this duty ordained on the Corporation cannot be treated as a power. We have examined the contention of the learned counsel that headings prefixed to sections or set of sections is to be regarded as preamble to those sections and is an aid to interpret the section in the light of the judgement of the Hon'ble Supreme Court in Bhinka vs. Charan Singh case, cites supra. In its judgement, the Apex Court quoted Maxwell on Interpretation of Statutes, 10th Edn. as follows:
"The headings prefixed to sections of sets of sections in some modern statutes are regarded as preamble to those sections. They cannot control the plain words of the statute but they may explain ambiguous words."

27. The significance of headings has been comprehensively dealt with by Justice GP Singh in his 'Principles of Statutory Interpretation' 8th Edn, wherein he has stated that conflicting opinions have been expressed on the question as to what weight should be attached to the headings and cited the case of **Frick India Ltd v. Union of India [AIR1990 SC 689, p. 693]**. In this case, the Supreme Court expressed itself as follows: "It is well settled that the headings prefixed to sections or entries (of the tariff schedule) cannot control the plain words of the provision; they cannot also be referred to for the purpose of construing the provision when the words used in the provision are clear and unambiguous; nor can they be used for cutting down the plain meaning of the words in the provision. Only in the case of ambiguity or doubt the headings or sub-heading may be referred to as an aid in construing the provision but even in such a case it could not be used for cutting down the wide application of the clear words used in the provision."

28. It is thus clear both from the case law cited by the learned counsel as well as the observations of the Apex Court in the Frick India case, that the headings cannot control the plain words of the statute. The heading of section 12 only uses the words '*Functions and powers of Corporation'*. As indicated above, subsection (1) of section 12 deals only with the functions whereas the powers of the Corporation (Prasar Bharati) are given in other subsections. There is nothing ambiguous in the language of Section 12 of the Prasar Bharati Act, for us to take the help of the heading; and the heading cannot be used to cut down or alter the meaning of the plain words used in this Section. Besides, the Explanation to section 12 (1) states, in unambiguous terms, that the provisions of this Section shall be *in addition to* and not *in derogation of* the provisions of the Indian Telegraph Act. This is an ample indication that the Corporation is bound by the requirements of the Indian Telegraph Act. There cannot, in this situation, be any doubt as to the intent of the legislature, and so the question of using the heading to clarify the intent does not arise. In our view, the learned counsel Mr. Narasimha has rightly pointed out the significance of the Explanation. Unlike a '*proviso'* whose normal function is to except something out of the enactment or to qualify something enacted therein, an '*explanation'* is, at times, appended to a section to explain the meaning of the words contained in the section. It becomes a part and parcel of the enactment, as held by the Hon'ble Supreme Court in **Bengal immunity Co Ltd v. State of Bihar [AIR 1955 SC 661]**. It is thus clear that there is no provision in the Prasar Bharati Act which expressly or impliedly exempts Prasar Bharati from the obligation of obtaining a licence under the Indian Telegraph Act for its DTH operations.

29. Let us look at it another way. The guidelines dated 15.3.2001 issued by the Ministry of Information and Broadcasting for operating DTH services stipulate as follows: "After signing of such licensing Agreement with the Ministry of Information and Broadcasting, the applicant will have to apply to the Wireless Planning and Coordination (WPC) wing of the Ministry of Communications for seeking wireless operational licence for establishment, maintenance and operation of DTH platform." Admittedly Prasar Bharati, through Doordarshan applied, in June 2004, to the Department of Telecommunications for the grant of a licence. The Wireless Planning and Coordination wing of the Department of telecommunications had, vide letter dated 19th October 2004, conveyed its in principle decision to grant the licence and had clearly indicated therein that the operation should not be commenced before grant of the operating licence, which is admittedly under section 4 of the Indian Telegraph Act. This itself indicates that Prasar Bharati is required to obtain a licence and has also acted in pursuance of this requirement. And they have obtained the in principle allocation of the frequency from the WPC wing of the Department of Telecommunications. The question whether an in principle decision would be akin to a licence has been settled by the Hon'ble Supreme Court in the case of **Union of India v. Tata Teleservices (Maharashtra) Ltd. [(2007)7 SCC 517]**, where it held as follows:

> *"19. The thrust of the argument on behalf of the Respondent before us was, in a case where, a licence had not Actually been issued to a party by the Central Government, the dispute could not be said to be one between a licensor and a licensee, contemplated by Section 14(a)(i) or (ii) of the Act. It is submitted that only on the Actual grant of a licence, a person would become a licensee under the Central Government and only a dispute arising after the grant of a licence would come within the purview of the Act. The wording of the definition of licensee is emphasised in support. Considering the purpose for which the Act is brought into force and the TDSAT is created, we*

think that there is no warrant for accepting such a narrow approach or to adopt such a narrow construction. It will be appropriate to understand the scope of Section 14(a)(i) of the Act and for that matter Section 14(a)(ii) of the Act also, as including those to whom licenses were intended to be issued and as taking in also disputes that commence on the tender or offer of a person being accepted. In other words, a dispute commencing with the acceptance of a tender leading to the possible issue of a licence and disputes arising out of the grant of licence even after the period has expired would all come within the purview of Section 14(a) of the Act. To put it differently, Section 14 takes within its sweep disputes following the issue of a Letter of Intent pre grant of Actual licence as also disputes arising out of a licence granted between a quondam licensee and the licensor."

Following this judgement, it is clear that having obtained an in principle allocation of Frequency (akin to a letter of intent), the Respondent, Prasar Bharati is, by this measure alone, a licensee u/s 4 of the Indian telegraph Act and hence a 'service provider' under the TRAI Act.

30. The guidelines dated 15.3.2001 are guidelines for obtaining licence for providing DTH broadcasting service in India. They set out, inter alia, "the procedure for obtaining the licence to set up and operate DTH service". The question arises whether Prasar Bharati had signed a licensing Agreement with the Ministry of information and broadcasting. The contention of the Counsel for Prasar Bharati is that it is not required to obtain a licence as it is already empowered by the Prasar Bharati Act. For reasons indicate above, we have already rejected this contention. The question arises whether Prasar Bharati was acting in violation of the guidelines, if they indeed did not obtain the licence. It can safely be assumed that being a responsible Corporation in the public sector, it would not have acted in violation of the guidelines. The learned counsel for the Petitioner Mr. Maninder Singh argued that the permission granted to Prasar Bharati vide para (i) of the letter dated 19.11.2003 of the Ministry of Information and Broadcasting, extracted in Para 11 above, is to be treated as a licence. His contention is that the fact of the term licence not being defined under the Indian Telegraph Act clearly shows that the licence could have been given in several ways and not as per any specified format. In **United India insurance Co Ltd v. Tilak Ram and ors [AIR 1986 HP 27]**, the High Court of Himachal Pradesh held that "the word 'licence' having not been defined it must be understood in its ordinary grammatical meaning. According to the Webster's third new international dictionary, 1966, vol.II, at page 1304, the word 'licence', inter alia, means: (1) permission to Act, (2) a right or permission granted in accordance with law by a competent authority to engage in some business or occupation, to do some Act, or to engage in some transaction which but for such licence would be unlawful, (3) formal permission from local authorities and (4) a document embodying such permission or evidence in the licence granted. In words and phrases, permanent edition, Vol.32, at pages 233 and 234, the word licence is stated to signify the following: "The term 'licence' in its general and popular sense, as used with reference to occupations and privileges, means a right or permission granted by some competent authority to carry on business ought to do an Act which without such licence would be illegal..... licence means and is synonymous with permission or authority...." In the case of **Modi Rubbers Ltd. Vs. union of India [2002 (150) ELT 52 (Del)],** the Delhi High Court held that "there does not exist any distinction between 'licence' and 'permission', and that "the expressions 'licence' and 'permission' are synonymous and are interchangeable". Counsel for Respondent, Mr. Hansaria, contended that the Himachal Pradesh High Court judgement was overruled by the Supreme Court in **New India Assurance Co. Ltd. v. Mandar Madhav Tambe [1996(2) SCC 328]**, but it is seen that this ruling of the Supreme Court was itself overturned in the case of **National Insurance Co. Ltd v. Swaran Singh [(2004) 3 SCC 297**] where the court held that *Mandar Madhav*

Tambe case has no application to the facts of the case under consideration since that decision was rendered in the peculiar fact situation obtaining therein and that it does not create any binding precedent.

31. Para (i) of the letter dated 19.11.2003 from the Ministry of Information and Broadcasting to Prasar Bharati, extracted at Para 11 above reads as follows: *I'm directed to refer to DG: DDn's letter No. 9 (8)/2002/EVI/TV/dated 8.7.2003 on the above noted subject and to convey the approval of the Competent Authority to the following:*

i. Permission for Prasar Bharati to use satellite distribution technology in the Ku-band frequency for Doordarshan's bouquet of 20 channels and 10 channels of private broadcasters, in free-to-air mode. Prasar Bharati will make every efforts to recover carriage fee from private broadcasters, whose channels will be carried in the bouquet.

ii. .....

This is the only authorisation for Prasar Bharati to conduct its DTH operations. As indicated, DTH is a Telegraph and every Telegraph activity requires licence under section 4 of the Indian Telegraph Act. We have also concluded that there is nothing in the Prasar Bharati Act which automatically grants a licence to Prasar Bharati to undertake its DTH operations nor is there any provision to exempt it from the operation of the provisions of the Indian Telegraph Act. On the other hand, the explanation to section 12(1) makes it explicit that Prasar Bharati is bound by the provisions of the Indian Telegraph Act. It can therefore be surmised that Prasar Bharati was acting under the authority granted to it by the letter dated 19.11.2003 from the Ministry of Information and Broadcasting.

32. We accordingly agree with the contentions of the learned counsel, Mr. Maninder Singh and hold that the letter dated 19.11.2003, issued by the Ministry of Information and Broadcasting, permitting Prasar Bharati to commence its DTH operations using the Ku band, is a licence. It is also significant that none of the parties have indicated, either in the affirmative or negative, that the Ministry of information and broadcasting does not have the authority to issue such a licence under the Indian Telegraph Act. We leave this to be looked into by the Department of Telecommunications, to which a copy of this Order may be sent.

33. Lastly and significantly, the preamble to the agreement between the petitioners and the respondent, dated 31.8.2007 is clearly states that Prasar Bharati is running a DTH service by the name of 'DD direct+'. Clause 2(Ka) of The Telecommunication (Broadcasting and Cable Services) Interconnection (Fourth Amendment) Regulation, 2007 dated 3.9.2007 defines DTH service as follows: "(ka) "direct to home service" means distribution of multichannel TV programmes by using a satellite system by providing TV signals directly to a subscriber's premises without passing through an intermediary such as cable operator or any other distributor of TV channels;" In our view, this sufficiently and independently establishes the fact that Prasar Bharati is a service provider.

34. In sum, therefore, the contentions of the 1st Respondent, Prasar Bharati, regarding this Tribunal not having the jurisdiction to settle the petitions herein fail. We hold, for the reasons discussed above, that Prasar

Bharati is a licensee u/s 4 of the Indian Telegraph Act and being a licencee, that Prasar Bharati is covered under the definition of 'service provider' in section 2 (j) of the TRAI Act. Consequently, the disputes between the Petitioners, who are admittedly service providers, and Prasar Bharati, which is now held to be a service provider, squarely fall within the ambit of Section 14 (a) of the TRAI Act. Accordingly, we hold that these disputes are to be adjudicated by this Tribunal.

35. Before leaving this issue, mention must be made of a suggestion made by the learned counsel, Mr. Hansaria that Government of India be heard, as a necessary party, for resolution of the issue whether Prasar Bharati is a licensee or not of Government of India. He has suggested this virtually towards the end of the arguments. Impleading Government of India at that stage would have been fraught with considerable delay. And different aspects of the case were already brought out in detail and effectively by the learned counsels. We therefore did not consider it necessary to bring in Government of India as a necessary party. Besides, in the light of our decision that Prasar Bharati is a licensee and as such, a service provider, we do not feel that government of India was a necessary party.

36. We now turn our focus to the next issue i.e., whether this Tribunal has the authority to issue interim injunctions and ex parte orders?

37. The learned counsel for Respondent in Petition no. 195(C) /2008, Mr. Puri, led the arguments in this behalf. His arguments revolved around two aspects –firstly, whether this Tribunal has the powers to grant interim injunctions / ex-parte orders and if so, whether injunction has been rightly granted. The counsel argued that

a) Power to grant injunction is defined u/s 94 of CPC; it is not an inherent power and should specifically be vested in the relevant statute. TRAI Act does not have a specific provision empowering the TDSAT to issue interim injunction.

b) There is a difference between ancillary and incidental proceedings and supplementary proceedings. An injunction is in the nature of supplementary proceedings, and which should be based on specific provisions of the Act. He cited the case of **Vareed Jacob v. Sosamma Geevarghese & Others [(2004) 6 SCC 378]; the case of Morgan Stanley Mutual Fund v. Kartick Das [(1994) 4 SCC 225]; and the case of Rashtriya Ispat Nigam Limited v. Verma Transport Co. [(2006)7 SCC 275]**

c) A dispute would involve an assertion and denial and as such, adjudication of disputes as per Sec 14(a) of the TRAI Act would involve hearing both the parties, as laid down in Sec. 14 (A) (4) of the TRAI Act. The principle of natural justice incorporated in Sec. 16 of the TRAI Act should be adhered to.

d) Sec. 16(2) of the TRAI Act refers to original jurisdiction. Power to grant injunction is not incorporated in Sec. 16(2) and that the powers of the Appellate Tribunal to regulate its own jurisdiction are subject to

Sec. 16(2) of TRAI Act. The legislature having mentioned clearly procedural issues in Sec. 16(2) of the Act would not have omitted the power to grant interim relief which is an important measure.

e) An order of injunction is an extraordinary power since at times it can even give a remedy similar to the final remedy/relief. In such case, particularly in a case such as this, since appeal does not lie to the Supreme Court, being an interlocutory order, the Party will be left without remedy. In such a case, the contract will continue for as long as the case is pending.

38. The counsel for TRAI, Mr. Vikas Mehta, however disagreed with Mr. Puri and averred that the TDSAT has inherent powers to grant interim/ex parte orders.

39. The learned counsel for the Petitioner in Petition no.183(C) of 2008, Mr. Narasimha, refuted the arguments of Mr. Puri and pointed out that the Supreme Court had held in **Union of India and Anr. v. Paras Laminates (P) Ltd. [(1990)4 SCC 453]** that grant of interim injunction is an incidental power to the basic jurisdiction. The learned counsel for the Petitioner in Petition no.195(C) of 2008, Mr. Maninder Singh, argued as follows:

a) Adjudication of a dispute empowers the TDSAT to give any order, whether final or interim.

b) Section 14 (a) (4) of the TRAI Act empowers the Tribunal to pass such orders as it thinks fit, which provision includes interim orders.

c) Parliament has through Sections 14, 15 and 16 fully empowered the TDSAT.

d) Since civil court jurisdiction is barred by section 15, relief can only be given by TDSAT.

e) Sec. 18 of the TRAI Act speaks of appeal to Supreme Court against *any order of the Tribunal, not being an interlocutory order,* meaning thereby that the Tribunal has powers to pass interlocutory orders.

The learned counsel referred to the cases of **Allahabad Bank, Calcutta v. Radha Krishna Maity and ors. [AIR 1999 SC 3426]; Union of India v. Tata Teleservices [(2007) 7 SCC 517]; Cellular Operators Association of India and others v. Union of India and others [(2003) 3 SCC 186].**

40. We have fully considered the submissions of the different counsels and also the judgements cited. The *Vareed Jacob case* dealt with issues related to the civil procedure code, 1908, whereas the TRAI Act clearly stipulates in section 16 that the Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908. We are therefore of the view that this case does not have direct application to the issue under consideration. Likewise, *the Morgan Stanley case* refers to the Consumer Protection Act 1986 and the relevant portions cited by the learned counsel relate to a District Forum. The provisions of the TRAI Act are entirely

different and for this reason, we hold that this case also does not have a direct bearing on the issue under consideration.

41. On the other hand, we notice that the Hon'ble Supreme Court has pronounced judgements in matters relating to Tribunals and more particularly the TDSAT. In the *Paras Laminates case,* cited supra, the Apex Court held as follows: "There is no doubt that the Tribunal functions as a court within the limits of its jurisdiction. It has all the powers conferred expressly by the statute. Furthermore, being a judicial body, it has all those incidental and ancillary powers which are necessary to make fully effective the express grant of statutory powers. Certain powers are recognised as incidental and ancillary, not because they are inherent in the Tribunal, nor because its jurisdiction is plenary, but because it is the legislative intent that the power which is expressly granted in the assigned field of jurisdiction is efficaciously and meaningfully exercised, the powers of the Tribunal are no doubt limited. Its area of jurisdiction is clearly defined, but within the bounds of its jurisdiction, it has all the powers expressly and impliedly granted. The implied grant is, of course, limited by the express grant and, therefore, it can only be such powers as are truly incidental and ancillary for doing all such acts or employing all such means as are reasonably necessary to make the grant effective. As stated in Maxwell on Interpretation of Statutes, (eleventh edition) "where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution."

42. In the *Allahabad bank case,* cited supra, the Apex Court observed thus: "In a recent decision of this Court under this Act in *Industrial Credit and Investment Corporation of India Ltd. Vs. Grapco Industries Ltd. and Ors. (1994(4) SCC 710),* this Court considered the provisions of the Act and the powers of the Tribunal. The question that arose in that case was whether the Tribunal could pass an order granting ex- parte injunction. In that context, reference was made to Section 22 of the Act. This Court observed that the Tribunal's powers were (except as stated in sub-clause (2)), wider than the powers of a Civil Court and the only limitation was that it should observe principles of natural justice. Wadhwa,J. stated as follows: (P.716, para 11)-

"We, however, do not agree with the reasoning adopted by the High Court. When Section 22 of the Act says that the Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, it does not mean that it will not have jurisdiction to exercise powers of a Court as contained in the Code of Civil Procedure. Rather, the Tribunal can travel beyond the Code of Civil Procedure and the only fetter that is put on its powers is to observe the principles of natural justice."

After contrasting the provisions of the Act with the restrictions imposed upon certain other Tribunals under other statutes, this Court observed: (P.717)-

"It will, thus, be seen that while there are no limitations on the powers of the Tribunal under the Act, the Legislature has thought fit to restrict the powers of the authorities under various enactments while exercising certain powers under those enactments... Further, when power is given to the Tribunal to make an interim order

by way of injunction or a stay, it inheres in it the power to grant that order even ex parte, if it is so in the interest of justice...."

Thus, we are of the view that the Tribunal certainly has powers to pass other types of injunction orders or stay orders apart from what is stated in Section 19(6). It may issue notice and after hearing the opposite side, pass orders. Or, it may pass ad interim orders without hearing the opposite side and then give a subsequent hearing to the opposite party and pass final orders."

43. In the *Cellular Operators case* cited supra, the Supreme Court observed: "8. ....Having regard to the very purpose and object for which the appellate Tribunal was constituted and having examined the different provisions containing chapter IV, more particularly, Duke commission dealing with ousting the jurisdiction of the civil court in relation to any matter which the appellate Tribunal is empowered by or under the Act, as contained in section 15, we have no hesitation in coming to the conclusion that the power of the appellate Tribunal is quite wide, as has been indicated in the statute itself.... ..... 11. .... it is the only forum for redressing the grievance of an aggrieved party in as much as the appellate jurisdiction to this Court is only on a substantial question of law and the jurisdiction of a civil court for filing suit is also ousted."

44. In the *Tata Teleservices (Maharashtra) case*, the Apex Court held as follows: "16. The Act (TRAI 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."

45. In the light of these observations of the Hon'ble Supreme Court, there should not be any doubt regarding the power of this Tribunal to issue interim/ex parte orders as deemed fit. It will also render this Tribunal toothless if this power were not to be available; and it would adversely affect the very purpose for which the Tribunal has been created, as reflected in the preamble which inter alia, speaks off protection of the interests of service providers and consumers of the telecom sector and to promote and ensure orderly growth of the telecom sector. For these reasons and keeping in view the judgements of the Supreme Court in various cases, we reject the contention of the Counsel for Respondent that this Tribunal does not have the power to issue interim/ex parte orders.

46. Notwithstanding the power to issue ex parte orders, we would like to address the question raised by the Counsel for Prasar Bharati whether the injunction has been rightly granted. It has been brought to our notice that, as required under the procedure laid down by TDSAT, the counsels for Petitioners have duly furnished a

copy of the petition to Prasar Bharati before the date on which the petitions were considered by this Tribunal. The Cause list of this Tribunal is available daily on this Tribunal's website. In any case, it does not appear to us that this is the material grievance for the Respondent. If it were truly so, Prasar Bharati would have come back to this Tribunal seeking a review of the interim orders. Their case, as evidenced, has primarily been that they are not subject to the jurisdiction of this Tribunal. We find no merit in this objection raised by the Respondent.

47. We now examine the third issue, namely whether the Regulations issued by TRAI are bad in law? According to the Respondent, the Regulations issued by TRAI are contrary to the TRAI Act. He cited the judgement of the Hon'ble Supreme Court in **Kerala Samsthana Chethu Thozhilali Union v. State of Kerala [(2006) 4 SCC 327]**, which held that a subordinate legislation cannot be violative of any plenary legislation made by Parliament. But, during the course of arguments, the learned counsel did not elaborate on this issue. Nor did he indicate as to which of the Regulations he considers violative of the provisions of the TRAI Act. Nevertheless, we have examined the matter and we do not find any support to the contention of the learned counsel. All the Regulations by TRAI are issued invoking specific provisions of the TRAI Act. The validity of Regulation 4, introduced by the Telecommunications (Broadcasting and Cable Services) Interconnection (Third Amendment) Regulation 2006 (10 of 2006) dated 4.9.2006 was tested and found valid by the Delhi High Court in Writ petition (C) 24105/2005. We therefore do not find any merit in the contention raised by the Counsel and do not feel it necessary to further go into this matter.

48. Having disposed of the common issues, we now turn to the merits of each case. We will deal with each case separately since the facts vary even though there appears to be a pattern.

Petition no. 183 (C) of 2008 M/s Total Telefilms Pvt. Ltd v. Prasar Bharati & Anr

49. M/s Total Telefilms Pvt. Ltd entered into an Agreement with Prasar Bharati in September 2007, valid for one year with effect from 7.9.2007, for the latter to carry its channel -- Total TV-- on its DTH platform DD direct +. In consideration of this, the Agreement provides for the Petitioner to pay to the Respondent a carriage fee of Rs. 25 lakh per year besides taxes. It is the contention of the petition at that this carriage fee was paid under protest. By a letter dated 1.8.2008, the Respondent communicated to the Petitioner that the carriage fee would have to be increased from Rs. 25 lakh to Rs. 60 lakh. The Petitioner is protesting against this hike on the grounds that the charging of carriage fee, particularly for a free to air channel such as Total TV is without any legality and also that the decision to charge a high yet carriage fee has not been taken at the appropriate level in Prasar Bharati. According to the Petitioner, another DTH operator -- Sun Direct TV -- is distributing the Petitioners channel without charging carriage fee. The Petitioner's prayer is to declare the act of the Respondent in claiming a higher carriage fee as illegal; to direct TRAI to furnish details regarding carriage fee and its validity; to quash

the letter of Prasar Bharati dated 1.8.2008 and to direct the Respondent not to disconnect the Petitioner's channel from its DTH platform during the pendency of the present petition.

50. In its reply, the 1st Respondent stated that clause 1 of the Agreement entered into in September 2007 provided for extension for such further period and on such terms as may be mutually agreed upon and that the channel provider must convey its intention to seek extension at least 90 days before the expiry of the Agreement. Its contention is that the Petitioner had not exercised this right and since there was neither extension nor renewal nor fresh Agreement, the Agreement has to be considered as having expired by efflux of time. Its further contention is that in order to make its bouquet of channels wholesome, it has to exercise its own discretion having due regard to TAM rating of TV channels, which it did by allocating the slot occupied by the Petitioner's channel to another news channel with a higher TAM rating. The Respondent also sought to justify higher carriage fee on the grounds of its own expenditure, both capital and revenue.

51. The Telecom Regulatory Authority of India, who is the 2nd Respondent herein, stated that the payment of carriage fee is essentially a matter between service providers. It is also contended that the Petitioner had filed a writ petition no. 6281 of 2008 in the Delhi High Court seeking relief against charging of carriage fee by Prasar Bharati and that thereby the Petitioner is indulging in forum shopping. The Respondent mentioned that in the year 2004 as well as 2005, TRAI had considered the issue of carriage fee and felt that detailed regulation of carriage fee may be neither feasible nor desirable and that it should be left to the market forces.

52. During the course of arguments, the learned counsel for the Respondent, Mr. Hansaria, reiterated that the Petitioner is not entitled to any relief since he had indulged in forum shopping. He has drawn our particular attention to the statement of the Petitioners in the affidavit of amended petition filed on 1.9.2008 the Petitioner states that the carriage fee has to be challenged when in fact the writ petition has already been filed in the High Court and also when the grounds for seeking relief are similar in the petitions before the High Court as well as before this Tribunal.

53. We have carefully considered the matter. We find no evidence to support the contention of the Petitioner that it had paid the sum of Rs. 25 lakh in the year 2007 under protest. The petition had not produced any evidence to the effect that they had taken up the matter with Prasar Bharati. Secondly the prayer of the Petitioner is to quash the letter dated 1.8.2008 of Prasar Bharati. Vide this letter, Prasar Bharati to renew the Agreement at the new rates of carriage fee. There is no evidence to indicate that the Petitioner had acted in pursuance of this letter either by way of accepting it or further corresponding with Prasar Bharati. Even the prayer is only to quash this letter. Obviously, the concern of the Petitioner is to carry on the arrangement but without paying the carriage fee. In the light of averment by TRAI, we do not wish to go into the issue of whether or not the carriage fee should be charged particularly since it does not form part of the relief sought by the Petitioner through this

petition. Besides, it is not denied that carriage fee is currently not governed by any statutory order. If other DTH operators are charging less or no carriage fee, it is always open to the Petitioners to make its commercial choice. In view of the fact that the Petitioner is pursuing the issue of Carriage fee in the Delhi High Court, and also since this is not an issue under challenge, we desist from commenting on this issue.

54. Before we conclude, we must express our strong sense of disapproval at the attempt of the Petitioner to seek relief simultaneously in two fora. We are not convinced by the attempt of the counsel for Petitioner to show that the relief sought here and in the Delhi High Court is not exactly the same. It is necessary to bear in mind the judgment of the Hon'ble Supreme Court in **Chetak Construction v. Om Prakash and Ors [(1998) 4 SCC 577]:**

"We certainly cannot approve any attempt on the part of any litigant to go "forum shopping". A litigant cannot be permitted choice of forum and every attempt at forum shopping must be crushed with a heavy hand".

55. We accordingly dismiss this petition. No costs.

Petition no. 195 (C)/2008 Zee Turner ltd., New Delhi v. Prasar Bharati

56. The facts in this case are that the Petitioner, Zee Turner and the Respondent, Prasar Bharati, entered into three separate Agreements on 31.8.2007 for carriage of the Petitioner's three channels -- Zee Smile, Zee Jagran and ETC Music on the Respondent's DTH platform -- DD Direct+. The Petitioner paid the agreed carriage fee of Rs. 25 lakh per year, excluding taxes, for each of the channels. The Agreements contained a clause that they can be extended for such further period and on such terms as may be mutually agreed upon. The Petitioner's case is that it had conveyed its willingness to extend the Agreements on 30.7.2008 and had also indicated its willingness to pay the higher carriage fee of Rs.60 lakh. It is alleged that the Respondent proceeded to disconnect two of the three channels, namely Zee Smile and Zee Jagran on 7.9.2008, in violation of the TRAI Regulations dated 4.9.2006, according to which it was mandatory on the part of the Respondent to issue notices under clauses 4.2 and 4.3 of the said Regulations. It is alleged that despite repeated communications requesting for immediate restoration of the signals of these channels, there was no response from the Respondent. The relief sought by the Petitioner is that this Tribunal should direct the Respondent to restore the two channels on just and reasonable terms; to restrain the Respondent from disconnecting the signals of ETC Music; and to pass such orders as deemed fit.

57. In its reply, the Respondent, besides taking objections on the issue of jurisdiction and interim relief which are already dealt with above, stated that the Petitioner did not exercise the option for extension of

Agreement within 90 days before the expiry of the said Agreement as provided therein. As such, in the absence of either extension or a fresh Agreement, the Petitioner does not have any vested right. Its further contention is that it should be free to form a wholesome bouquet of channels which it is doing by replacing channels with low TAM ratings by others with a higher rating. The Respondent's contention is that the Petitioner's group company has its own DTH platform which can be availed of by the Petitioner for dissemination of its channels.

58. During the course of arguments, the learned counsel for Petitioner, Mr. Maninder Singh, marshalled his arguments on the following lines:

a) that the Agreement dated 31.8.2007 contained a clause providing for renewal of the Agreement and that accordingly the Petitioner sent a letter to the Respondent on 30.7.2008 stating that they wish to renew the contract and that they would be willing to pay the carriage fee of Rs. 60 lakh. This letter was replied to by Prasar Bharati on 1.8.2008. As such, there is a concluded contract.

b) After issuing the letter on 1.8.2008 asking the Petitioner to complete the formalities, Prasar Bharati cannot now take recourse to TAM /TRP ratings.

c) It is obligatory on the part of the Respondent to abide by the Regulations which are issued by TRAI, in pursuance of the TRAI Act. It is not open to the Respondent to call into question those Regulations.

d) Admitting that carriage of Petitioner signals on the Respondent's platform is subject to the availability of capacity to the Respondent, it is obligatory on the part of Prasar Bharati which is a public body to conduct its operations in a transparent manner.

59. The learned counsel for Respondent, Mr. Puri refuted the contention that there is a concluded contract when the Petitioner approached the Tribunal. His arguments on this issue ran on the following lines:

a) That there is no contract between the parties at the time of the petition approaching the Tribunal is evidenced by the lack of a pleading to this effect.

b) The letter dated 1.8.2008 of Prasar Bharati is a stand-alone letter and has no relevance to the letter dated 30.7.2008 Petitioner. In fact, this letter was issued to all the channels and not only to the Petitioner

c) For a contract, there must not only be an offer and acceptance but also a communication of offer and communication of acceptance. Since admittedly, the Petitioner was in the know of the so-called acceptance only on 17.9.2008, the contract stood terminated before that, on expiry of the original contract.

d) The fact that the Petitioner itself states that negotiations were taking place on 2.9.2008 and 3.9.2008 shows that there was no concluded contract and that there was no consensus *ad idem*.

e) Since admittedly there was a variation in carriage fee from Rs. 25 lakh to Rs. 60 lakh, a fresh Agreement was essential as per the provisions of the Agreement dated 31.8.2007.

f) As per the Agreement, the Petitioner should have sought extension of the contract 90 days before the determination of the Agreement. There is no such request and as such the Petitioner has lost the right to seek extension.

g) Assuming that the interconnection Regulations apply, clause 8.1 of the Regulations states that negotiations must start two months before expiry. The first letter of the Petitioner is on 30.7.2008 while the date of expiry of the contract was 6.9.2008. There is no other correspondence on file.

60. The Counsel for Respondent states that what the Petitioner is seeking is a direction to execute an Agreement, and the Respondent cannot be directed by the Tribunal to execute a commercial Agreement. He also states that four elements are needed to be satisfied, namely the existence of a prima facie case; an examination whether the Petitioner will be put to irreparable loss in the absence of relief; balance of convenience; and comparative hardship.

61. We have carefully examined the matter. The two central issues in this case are whether there is a contract between the two parties on the date of expiry of the earlier Agreement and whether the Respondent has violated the Interconnection Regulations. In order to determine the first issue, it is necessary to examine the relevant clause in the Agreement dated 31.8.2007 between the two parties. Clause 1 reads as follows:

"TERM

*1. This Agreement shall commence from 1st September, 2007 and shall be valid for a period of one year up till 31st August, 2008. This Agreement may be extended for such further period and on such terms as may be mutually agreed upon. However, fresh Agreement shall have to be executed in case of any variance in terms of this Agreement. '**The channel provider'** must convey his intention for extension at least 90 days before the expiry of this Agreement."*

62. The main point to be noted from the above condition in regard to the "Term" is regarding the extension of this Agreement for a further period and on such terms as may be mutually agreed upon. In our view, the intent to extend the Agreement or at least explore the possibility of an extension is explicit in this clause. In case the terms remain the same there appears to be no necessity for a fresh Agreement. However, a fresh Agreement was required to be executed in case of any variance in terms of the Agreement. The channel provider must convey his intention for extension at least 90 days before the expiry of this Agreement. From that point of view, the Petitioner vide its letter dated 30.7.2008 conveyed its acceptance to the variance of terms in respect of carriage fee and to extend the Agreement dated 31.8.2007 by one year for the above three channels i.e. Zee Smile, Zee Jagaran and ETC Music on DD Direct +. It was also requested by the Petitioner that it is ready to complete the formalities so that the Agreement can be signed. It is true that there is no evidence of any correspondence prior to 30.7.2008. But the very fact that the petition has expressed its willingness to pay Rs. 60 lakh for carriage of the channels indicates that there was a prior discussion. It can reasonably be inferred that negotiations were started earlier and were completed by 30th July 2008. From the letter dated 1.8.2008 from Prasar Bharati to the Petitioner, it is seen that the decision to enhance the carriage fee to Rs. 60 lakh was taken

on 2.6.2008. Obviously, the two parties were in negotiation before the Petitioner wrote a letter on 30.7.2008 stating that it is willing to pay the higher carriage fee. The figure of Rs. 60 lakh could not have been imagined by the Petitioner. Two alternative positions are possible. On the one hand, it can be held that the Agreement itself contained an offer which was accepted by the Petitioner in its letter of 30.7.2008. On the other, it can also be held that the letter dated 30.7.2008 was an offer which is accepted by the Respondent in its letter of 1.8.2008. We are inclined to take the latter view only on the ground that the mere existence of a clause in the Agreement leaving scope for a possible extension need not by itself be taken as an offer.

63. The contention of the counsel for Respondent is that the petitioner ought to have indicated its desire to extend the Agreement at least 90 days before its expiry. If the Respondent wanted to go strictly by the stipulation of 90 days, it should have informed the Petitioner that its letter of 30.7.2008 cannot be acted upon for that reason. Instead, a letter dated 1.8.2008 was issued to the Petitioner. This letter, which is an important document, is extracted below.

PRASAR BHARATI
(BROADCASTING CORPORATION OF INDIA)
DIRECTORATE GENERAL DOORDARSHAN
Copernicus Marg New Delhi-110001

File No:- DTH/RC/69/Renewal *Dated:-1st August 2008*

M/s ZEE TURNER LTD.
5TH FLOOR RADISSON PLAZA
NH-8 NEW DELHI 110037

Subject: -- Renewal of agreement in respect of ZEE JAGRAN on DD's DTH platform

Sir,

It is brought to your kind notice that existing agreement is going to expire on 6.9.2008

It has been decided in DTH core group meeting held on 2.6.2008 to increase the carriage fee from Rs. 25 lakhs to Rs. 60 lakhs and service tax their on@12.36%.

Prasar Bharati DTH agreement in this regard has now a clause that during the currency of agreement, if Prasar Bharati revises the carriage fee, the other party will have to pay that during the remaining period of agreement.

Prasar Bharati reserves the right to renew or not to renew the agreement for a continuation of the channel.

You are therefore requested to renew the agreement at new rates of carriage fee i.e. Rs. 60 lakhs and service tax thereon @12.36% and amounting to Rs. 741600/-.

The agreement should be typed on Rs. 100/-stamp paper in duplicate and signed by authorized signatory (signatory name should be clearly mentioned as place of signature and notarized). The agreement completed with authorisation may be sent to the under-signed.

Thanking you

Sd/-

Dr. S. K Grover
Dy. Director General (I/C)

64. The contention of the counsel for the Respondent is that this is a general letter sent to all channels. But this contention is not supported from a perusal of the letter. The subject title itself relates to renewal of Agreement in respect of Zee Jagran on DD's DTH platform. It also refers to the Agreement which was going to expire on 6.9.2008. And it refers to a meeting held on 2.6.2008 where it was decided to increase the carriage fee to Rs. 60 lakh and specifically asks the Petitioner to renew the Agreement at the new rate of carriage fee. Further, it goes on to state as to how the Agreement should be typed. In the face of such clear stipulations regarding a specific Agreement, including such minute details as stamp paper etc, it is not possible to accept the contention of the learned counsel for Respondent that this letter of 1.8.2008 was a general letter. Obviously, this is a culmination of the negotiations between the two specific parties regarding renewal of their Agreement. It is, in our view, nothing but an acceptance of the proposals made during the course of negotiations and the letter dated 30.7.2008 from the petitioner to the respondent.

65. Even assuming that the letter of 1.8.2008 was a general letter as contended by the Respondent, there was no letter from the Respondent to the Petitioner in response to the latter's letter of 30.7.2008. The Respondent contends that in the absence of a response from the Petitioner to their letter of 1.8.2008, the earlier Agreement is considered to have expired. By the same token, it is expected that the Respondent also should respond to the letter dated 30.7.2008 from the Petitioner. It is significant that the receipt of letter dated 30.7.2008 is not denied by the Respondent. Even assuming, for the sake of discussion, that the letter dated 1.8.2008 was sent to the wrong address because the letter of 30.7.2008 was not received by then, nothing prevented the Respondent from issuing another letter specifically to the Petitioner giving its response to the letter of 30.7.2008. Absence of any such response coupled with the fact that the letter dated 1.8.2008 was sent to the earlier address, in the face of a prior notification by the Petitioner of a change of its address, reinforced by the subsequent actions of the Respondent, gives room to the suspicion that there was perhaps a design to deny any opportunity to the Petitioner to seek redressal before the expiry of the earlier Agreement.

66. It is also not brought out as to when Prasar Bharati took the decision to go by TAM ratings. Obviously, it must have been after 1.8.2008. If so, nothing prevented the Respondent from informing the Petitioner immediately. This is particularly so when, as per section 4 of the Indian Contract Act 1872, the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made. If the letter of 1.8.2008 was truly a proposal, as contended, then, in the light of the change of policy, if any, the Respondent must have acted with that much more of alacrity so as to ensure that there was no possibility of the Petitioner accepting the proposal. Since this was not done, it leads to a doubt whether such a policy decision was truly taken and if so, whether it was to deny the petitioner of its right, particularly when the negotiations were completed and there was a consensus *ad idem* by 1.8.2008.

67. The Counsel for Respondent referred to the statement on affidavit by the Petitioner that its officials met the Respondent's officials even on 3.9.2008, to indicate that there was no consensus *ad idem* even at that time. Para 15 of the rejoinder affidavit filed by the Petitioner states that "the officials of Zee Turner met the concerned officials of Prasar Bharati even on 3.9.08 for a continuation of the above mentioned 3 channels on DD direct+ and for completing the formalities in that regard." This by itself does not indicate anything of significance. It is still possible that, as contended by the Counsel for Petitioner, the officials of Petitioner were pursuing the matter as a follow-up to their letter of 30.7.2008.

68. It is true that, as contended by the Counsel for Respondent, the communication of an acceptance is complete, as against the acceptor, only when it comes to the knowledge of the proposer. This is stated in section 4 of the Indian Contract Act, 1872, and has also been cited in **Bhagwandas Goverdhandas Kedia v. Girdhari Lal &co. [AIR 1966 SC 543]**. But in this particular case, the letter dated 1.8.2008, which is an acceptance of the offer contained in the letter dated 30.7.2008 from the Petitioner, was sent to a wrong address. It is therefore not open to the Respondent to now claim that the communication of acceptance was completed only on 17.9.2008 by which time the earlier Agreement had expired. This, in our view, is an unfair contention and we reject the same.

69. We have considered the four elements indicated by the learned counsel for Respondent. As indicated, we find that there is a prima facie case of the existence of consensus *ad idem* between the two parties. The letter dated 30.7.2008 was the offer, and the letter dated 1.8.2008 from Prasar Bharati specifically asking the Petitioner to enter into an Agreement was an acceptance of the proposal made by the Petitioner and is a clear case of existence of consensus *ad idem.* We do not agree with the contention that the offer is contained in the letter dated 1.8.2008, for the reason that admittedly negotiations have taken place even before that including in terms of a higher carriage fee. We do not consider it necessary to examine whether the Petitioner will be put to irreparable loss in the absence of relief. It is a question of honouring an Agreement and it is not relevant to go into the question of the quantum of loss that the Petitioner may otherwise suffer. We do not also agree with the contention of the Counsel for Respondent that since the Petitioner’s Group Company has a DTH platform, the Petitioner’s channels can be broadcast on that platform. This is an extraneous issue. Nor is comparative hardship something easily quantifiable. Obviously, there would be hardship for the Petitioner if its channels are not carried on the Respondent’s platform, particularly when they were being carried on in the past one year.

70. We had earlier held that the Respondent, Prasar Bharati, is covered under the TRAI Act and the Regulations issued there under. The Counsel for Respondent has stated that for operation of clause 8.1 of the TRAI Regulations, it is necessary that the negotiations must have started 2 months prior to the expiry of the earlier Agreement. His contention is that under the Agreement, the negotiations must have started 3 months prior to the expiry and for the case to be covered under the Interconnection Regulations 2 months before the expiry of the earlier Agreement. As brought out above, the letter of 30.7.2008 could not have come about all of a sudden

and was definitely the result of negotiations. While it is true that there is no indication as to when they have started, it is not, in our view, open to the Respondent to now question the issue on very technical and procedural matters. The very fact that negotiations have been held is an indication that the Respondent had impliedly waived the condition. In any case, having issued the letter of 1.8.2008, the Respondent cannot now claim to take shelter under the 90 days/ 2 months stipulation.

71. The learned counsel for Petitioner has stated that it is not open to Prasar Bharati to raise the question of TAM/TRP ratings after issuing the letter on 1.8.2008 asking the Petitioner to complete the formalities. We are inclined to agree with this contention. We cannot escape the feeling that this is an afterthought. Obviously negotiations were going on between the parties including the issue of letter of 1.8.2008 and nothing prevented the Respondent from placing this issue across the table. It is also not clearly brought out that all channels that have been subsequently selected were selected only on the basis of superior TAM/TRP ratings. The learned counsel for Respondent admitted that some channels now selected may have lower ratings but also stated that Prasar Bharati had to keep in view are the factors such as coverage of different regions as well as topics. We do not wish to go into the selection of channels, but admittedly the TAM/TRP ratings alone did not influence the deletion of these channels or the selection of new channels.

72. We cannot but help expressing that Prasar Bharati, being an instrumentality of the state is expected to conduct its affairs in a fair manner. In the case of '**Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai & Anr. [(2004) 3 SCC 214]** the Hon'ble Supreme Court held that "In the field of contracts the State and its instrumentalities ought to so design their Activities as would ensure fair competition and non-discrimination. They cannot augment their resources but the object should be to serve the public cause and to do public good by resorting to fair and reasonable methods.' Again in the case of '**ABL International Ltd. & Anr Vs Export Credit Guarantee Corporation of India Ltd. & Others [(2004) 3 SCC 553]** the Hon'ble Supreme Court held that when an instrumentality of the State Acts unfairly, unjustly and unreasonably in its contractual, constitutional and statutory obligations, it really Acts contrary to the constitutional guarantee founded in Article 14 of the Constitution. Once an instrumentality of the State is a party it has an obligation in law to Act fairly, justly and reasonably to a contract which is the requirement of Article 14 of the Constitution.'

73. There is another dimension to this case. This issue cannot be and should not be viewed only in terms of offer and acceptance as for the Indian Contract Act, 1872. Prasar Bharati is a DTH operator and it is bound by the Regulations issued by the TRAI. In this regard, Prasar Bharati is guilty of violating clauses 4.2 and 4.3 of the interconnection regulations mandating notice to the Petitioner has also a public notice in two newspapers and giving 21 days notice before disconnection. Clauses 4.2 and 4.3 of the Telecommunication (Broadcasting and Cable Services) Interconnection (Third Amendment) Regulations, 2006 (10 of 2006), issued by TRAI in exercise of the powers conferred upon it by the TRAI Act 1997, read as follows:

"4.2 No distributor of TV channels shall disconnect the retransmission of any TV channels without giving three weeks' notice to the broadcaster or multi system operator clearly giving the reasons for the proposed Action."

"4.3 A broadcaster/ multi system operator/ distributor of TV channels shall inform the consumers about such dispute to enable them to protect their interests. Accordingly, the notice to disconnect signals shall also be given in two local newspapers out of which at least one notice shall be given in local language in a newspaper which is published in the local language, in case the distributor of TV channels is operating in one district and in two national service in more than one district. The period of three weeks mentioned in sub-clauses 4.1 and 4.2 of this regulation shall start from the date of publication of the notice in the newspapers or the date of service of the notice on the service provider, whichever is later."

Admittedly, Prasar Bharati discontinued the carriage of the Petitioners two channels -- Zee smile and Zee Jagran- without any notice on the ground that the Agreement had expired and that Prasar Bharati is not covered under the provisions of the TRAI Act. We have already announced on the latter issue. And since Prasar Bharati is covered under the Regulations, it is clear that in discontinuing the channels, it is in violation of the Regulations.

74. We therefore hold that there was a consensus ad idem before the date of expiry of the earlier Agreement, that the Respondent Prasar Bharati had, in disregard of the Regulations, illegally discontinued the carriage of the petitioner's channels. We accordingly direct the Respondent Prasar Bharati to restore the two channels on payment, by the Petitioner, of the carriage fee of Rs. 60 lakh for each of these channels. It shall do so within two days of the receipt of payment. Similarly, on payment of another Rs. 60 lakh, it will continue to air their third channel -- ETC Music.

75. The petition is disposed of accordingly. No costs.

Petition no. 216 (C) of 2008 Enter 10 Television Pvt. Ltd v. Prasar Bharati

76. The Petitioner in this case, Enter 10 Television Pvt. Ltd has also a similar grievance. It had entered into an Agreement with the Respondent in the year 2007, which was effective from 7.9.2007 for a period of one year. Clause 1 of the Agreement contained a stipulation that the Agreement between the parties may be extended for such further period and on such terms as may be mutually agreed upon. It is the Petitioner's contention that on 1.8.2008, it had offered to renew the Agreement at the new rates of carriage fee – Rs. 60 lakh beside service tax -- and was told by the officials of the Respondent to bring the complete amount. On 3.9.2008, the officials of the Respondent are alleged to have told the Petitioners representatives that the full payment would be received only with the signed new Agreement and were given a draft of the new Agreement. The Petitioners contention is that the Respondent had thereafter, in an arbitrary manner, disconnected the carriage of the channel of the Petitioner on 7.9.2008 without any the notice that is mandatory under clauses 4.2 and 4.3 of the TRAI Regulations.

77. In reply the Respondent raised the issue of jurisdiction of TDSAT as well as its power to grant the injunction, which issues have already been dealt with above. On the facts of the case, the Respondent contended

that the Petitioner did not exercise the option of extension within 90 days before the expiry of the said Agreement. He also stated that being a public broadcaster, Prasar Bharati is free to balance its bouquet of channels and in the process giving due regard to TAM rating of TV channels. The Respondent also stated that there is no provision that the Respondent must carry the Petitioner's TV channels.

78. During the course of arguments, the learned counsel for Petitioners, Mr. Maninder Singh, pointed out that Prasar Bharati issued a letter dated 1.8.2008 asking the Petitioner to renew the Agreement and in pursuance of this, the Petitioner's representatives met with the officials of Prasar Bharati and were also prepared to deposit the entire amount of rupee 60 lakh for which they had taken out Demand Drafts for a sum of Rs. 25 lakh, and the balance being made available by way of cheques. His contention is that he drafts and cheques were deposited in Prasar Bharati on 8.9.2008. The contention of the counsel is that Prasar Bharati, being a statutory authority, cannot function in an arbitrary manner, first asking the Petitioner to renew the Agreement, acting in pursuance of this and later arbitrarily disconnecting the signals with effect from 7.9.2008. The learned counsel for the Respondent, Mr. Puri, argued that between 1.8.2008 and 6.9.2008, there was no correspondence from the Petitioner and that the Petitioner cannot now claim a consensus *ad idem* except stating that they have deposited the money on 8.9.2008. According to him, the only letter that came after 1.8.2008 is the letter on 8.9.2008. His contention is that there being no contract on expiry of the earlier Agreement, Prasar Bharati cannot be forced to execute a commercial contract.

79. From the pleadings and arguments in this case, it is clear that there is admittedly an Agreement effective from 7.9.2007 for a period of one year and that this Agreement contained a clause which is similar to what has been extracted in the case relating to petition no. 195(C) of 2008 above. The Petitioner was given a letter dated 1.8.2008 by the Respondent offering renewal of the said Agreement but at a higher carriage fee of Rs. 60 lakh. Having done so, it is now not open to the Respondent to claim that the Petitioner had not sought renewal 90 days prior to the expiry date of the earlier Agreement. The Petitioner having accepted the offer, there is a clear case of a consensus *ad idem*. Apparently, the Respondent had changed its mind but this was not communicated to the Petitioner. While the Respondent claims that there was no correspondence between 1.8.2008 and 6.9.2008, it is equally true that the Respondent itself did not address any correspondence during this period particularly bringing out that they would be deciding the choice of channels based on TAM ratings. An important decision such as this cannot suddenly be sprung on the channels. It appears to us that Prasar Bharati was taking these decisions under the mistaken notion that they are not covered by the provisions of the TRAI Act and the Regulations issued there under. Even assuming it were so, it was incumbent on the part of Prasar Bharati, being a statutory body and charged with public service broadcast, to conduct its affairs in a fair and transparent manner. We cannot but observe that this reflects an attitude to the contrary.

80. We hold that keeping in view the facts of the case, the Petitioner is entitled to an extension of the Agreement for a period of one year on payment of rupee 60 lakh as carriage fee to the Respondent. We accordingly directly Respondent, Prasar Bharati, to restore the carriage of the signals of the Petitioner on its DTH platform within two days of the realisation of the demand drafts and cheques, the same being presented to

the banks within the next three days. If they have already been encashed, the Respondent will restore the signals immediately.

81. The petition is disposed of accordingly. No costs.

.....**J**

(Arun Kumar)

Chairperson

.....

(J.S. Sarma)

Member

.....

(G.D. Gaiha)

Member