

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI****DATED 16th DECEMBER, 2010**

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Appeal No. 1(C) of 2010

(M.A. No. 190 & 266 of 2010)

ESPN Software India Pvt. Ltd. : Appellant

Vs.

Telecom Regulatory Authority of India & Anr : Respondents

Appeal No. 2 (C) of 2010

-

Sun Direct TV Pvt. Ltd. : Appellant

Vs.

Telecom Regulatory Authority of India & Anr : Respondents

Petition No. 176(C) of 2010

Tata Sky Ltd. : Petitioner

Vs.

ESPN Software India Ltd. : Respondent

Petition No. 179 (C) of 2010

Tata Sky Ltd. : Petitioner

Vs.

ESPN Software India Ltd.

:

Respondent

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

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Appeal No. 1(C) of 2010

For Appellant : Mr. N. Ganpathy, Advocate

For Respondent No. 1 (TRAI) : Mr. Saket Singh, Advocate

For Respondent No. 2 (Sun Direct): Mr. Aman Lekhi, Advocate
Mr. Kaushik Mishra, Advocate
Mr. Abhishek Malhotra, Advocate

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Appeal No. 2(C) of 2010For Appellant : Mr. Aman Lekhi, Advocate
Mr. Kaushik Mishra, Advocate
Mr. Abhishek Malhotra, Advocate

For Respondent No. 1 : Mr. Saket Singh, Advocate

For Respondent No. 2 : Mr. N. Ganpathy, Advocate

Petition Nos. 176 (c) & 179 (c) of 2010For Petitioner : Mr. Aman Lekhi, Advocate
Mr. Kaushik Mishra, Advocate
Mr. Abhishek Malhotra, Advocate

For Respondent : Mr. N. Ganpathy, Advocate

J U D G M E N T

S. B. Sinha

Introduction:

These appeals and the original petitions involving common questions of Law and fact were taken up for hearing together and are being disposed up by this common judgment.

2. For the purpose of these matters, however, we would consider the paper book of ESPN software India Ltd..

3. The questions involved in these matters are; (a) as to whether the impugned order dated 29th June, 2010 issued by the Telecom Regulatory Authority of India (TRAI) was issued under Section 11(2) of the Telecom Regulatory Authority of India Act, 1997 (the Act); and (b) whether in relation to the rate specified by the appellants (hereinafter called and referred to for the sake of privity as the broadcasters) to the DTH operators being Sun Direct Pvt. Ltd. and Tata Sky would amount to reasonable conditions within the meaning of Clause 3.2 of the Telecommunication (Broadcasting & Cable Services) Interconnection Regulations 2004 as amended from time to time!

4. **Factual Background**

The basic fact however is not in dispute. The broadcaster intended to introduce 'High Definition' feed for transmission of Wimbledon Championship and FIFA World Cup for a period of about 40 days beginning from 11th June, 2010.

For the aforementioned purpose, it filed an application before the Ministry of Information & Broadcasting to downlink their channel as required in terms of down linking and up linking guidelines. The Ministry of Information & Broadcasting, however, asked for certain clarifications, which now stands admitted, were not necessary having regard to the Sports Broadcasting Signals (Mandatory sharing with Prasar Bharti) Act, 2007.

Clarifications, however having been issued, the Ministry of Information & Broadcasting gave permission to the Broadcasters to downlink their channels.

FIFA world Cup began on 11th June, 2010 and ended on 11th July, 2010; whereas the Wimbledon Lawn Tennis Championship commenced on 21st June, 2010 and ended in the first week of July, 2010. The French Open also commenced and ended in between the aforementioned two events. The permission granted to the Broadcasters by the Ministry of Information & Broadcasting reads as under:-

“Subject: Permission to M/s. ESPN Software India Pvt. Ltd. for live downlink of clean feed of FIFA World Cup 2010 (from 11.6.2010 to 11.7.2010 to be held in South Africa) and Wimbledon 2010 (from 21.6.2010 to 4.7.2010 to be held in England) in HD format as additional temporary feeds of ‘ESPN India’ and ‘Star Sports’ permitted channel.

This is with reference to M/s. ESPN Software India Pvt. Ltd’s letters dated 30.4.2010, 1.6.2010, 7.6.2010 and 8.6.2010 on the above subject and to convey permission of this Ministry for live downlink of clean feed of FIFA World Cup 2010 (from 11.6.2010 to 11.7.2010 to be held in South Africa) and Wimbledon 2010 (from 21.6.2010 to 4.7.2010 to be held in England) in HD format as additional temporary feeds of ‘ESPN India’ and ‘Star Sports’ permitted channels on permitted broadcasting distribution platforms during above-mentioned event period subject to the following conditions:-

i) No advertisements will be carried on the additional feeds.

ii) Downlinking Guidelines of the Government, Directions, Orders, Regulations issued by TRAI and other laws as applicable to satellite TV channels will also apply to additional feeds and the applicant will be bound to ensure

compliance accordingly.”

The Broadcaster issued a modified reference interconnect order on or about 11.6.2010 *inter-alia* stating as under:-

“A. A-la-carte and Bouquet Rates for basic packages (widely distributed packages providing ESPN, STAR Sports and STAR Cricket Channels reach in excess of 50 % of total platform subscribers) DTH Platform#

A-la-carte

Channel/Service	Price (INR) Per Set Top Box Per Month
ESPN	17,72
STAR Sports	17,72
STAR Cricket	14,98

Bouquet Rates for DTH Platform#

<u>Bouquet</u>	Price (INR) Per Set Top Box Per Month
ESPN & STAR Sports Bouquet	23,64

Company reserves its right, subject to applicable regulations of Telecom Regulatory Authority of India’s (“TRAI”) to revise the Price per Set Top Box per month mentioned herein above. Upon such revision, DTH Operator agrees and unconditionally undertakes to pay the revised Subscription Fee pro rata from the effective date of such revision.

B. Add on Packages

In furtherance to the Order dated May 13, 2009 passed by the Hon’ble TDSAT wherein it was held that 50% tariff was not necessarily applicable to the “add on packages”, and the question of add on packages was left for negotiation between the respective parties, the Company hereby invites the DTH operators to come forward to negotiate the tariff applicable on “add-

on-packages”. However, if the parties pursuant to such negotiations agree on rates for add-on-packages then such agreed rates will apply. In the event the negotiations fail then the following slabs will apply:-

ESS Channel subs as a % of total platform subscribers	% Discount on full Non-CAS prices	ESPN	Star Sports	ESS Bouquet	Star Cricket
➤ 50%	50%	17,72	17,72	23,64	14,98
40-50%	40%	21,26	21,26	28,37	17,98
30-40%	25%	26,58	26,58	35,46	22,47
Less than 30%	Nil	35,45	35,45	47,28	29,96

The Tariff for add-on packages will be applicable till TRAI comes out with the Tariff Order for DTH.”

It was furthermore stated :-

“C. Provision of Event Specific HD technical upgrade for FIFA World Cup and Wimbledon commencing on 11th June and concluding on 11th July, 2010.

Based on numerous requests and queries made by several DTH operators in relation to the provision of Event Specific HD technical upgrade for some of our events, more specifically the FIFA World Cup and the Wimbledon Tournament 2010, the Company is proposing to provide Event Specific HD technical upgrade as on a one off basis for the aforementioned events, commencing on June 11th, 2010 and concluding on July 11th, 2010. The Company currently does not provide for such Event Specific HD technical upgrade. It should also be noted that there is a substantial fixed cost associated with this, and the

Company concurrently has to make substantial investments to ensure provision of this Event Specific technical upgrade to the DTH operators, more specifically including but not limited to, in enhancement of the existent technical systems currently utilized by the Company. It should also be appreciated, that in return for provision of this Event Specific HD technical upgrade, the revenue generated will be accruable to the Company for the limited period of the two aforementioned events. It should be additionally noted that provision of this Event Specific technical upgrade does not involve the launch of a separate HD channel. Consequent to the Hon'ble TDSAT's Order dated 3rd June, 2010 in Petition No.176(C) of 2010 between Tata Sky and the company, and keeping in view the high fixed costs associated with the provision of Event Specific HD technical upgrade, the company proposes the following slabs for the provision of Event Specific HD technical upgrade:-

>1 million subscribers	:	Rs.40/- per subscriber
500,000-1 million subscribers	:	Rs.60/- per subscriber
250,000-500,000 subscribers	:	Rs.100/- per subscriber
100,000-250,000 subscribers	:	Rs.175/- per subscriber
50,000-100,000 subscribers	:	Rs.400/- per subscriber
25,000-50,000 subscribers	:	Rs.1000/- per subscriber
10,000-25000 subscribers	:	Rs.2500/- per subscriber
5000 – 10000 subscribers	:	Rs.5000/- per subscriber
0-5000 subscribers	:	Rs.9000/- per subscriber

The company reserves the right that in the event there is not an adequate response from or uptake sufficient to cover the costs from DTH platforms prior to the commencement of the events the company may at its sole discretion decide not to provide the Event Specific technical upgrade in its entirety.

Price per subscriber for technical upgrade to High definition for FIFA World Cup 2010 and Wimbledon 2010. (Note: Only the live matches pertaining to the aforementioned events will be transmitted in HD as we do not have an ongoing HD service for our three channels viz ESPN, STAR Sports and STAR Cricket).”

5. Sun TV filed a writ petition on or about 16th June, 2010 before the High Court of Judicature Madras wherein by an order of the said date it was directed as under:-

“ORDER: These petitions coming on for orders upon perusing the petitions and the respective affidavits filed in support thereof and upon hearing the arguments of M/s P.S. Raman, Senior counsel for M/s S.B.K. Grish Neelakantan, Advocate for the petitioner in both the petitions and of M/s M. Ravindran, Additional Solicitor General for the 1st respondent in both the petitions and of M/s Yashod Vardhan, Senior counsel for the 3rd respondent in both the petitions the court made following order:-

“Heard Mr. P.s. Raman, Learned senior counsel appearing for the petitioner, Mr. M. Ravindaran, learned solicitor General appearing for the 1st respondent and Mr. Yashod Vardhan, learned senior counsel appearing for the 3rd respondent.

Mr. Raman, learned senior counsel appearing for the petitioner has submitted that as FIFA World Cup and Wimbledon matches are going on an urgency is involved in the matter and, therefore, he requested the court to hear the matter on an urgent basis.

The writ petition has been filed for a direction to the 3rd respondent to forthwith provide the High Definition (HD) Feed of its channel at 25 % increase on the present al-a-carte rate of the 3rd respondent to the petitioner. M.P.No. 1 of 2010 has

been filed for an interim direction directing the 3rd respondent to forthwith make available the HD feed of its channels at 25% higher rate than the current rate of its channels.

Earlier, the petitioner filed a petition against the 3rd respondent before the Telecom Disputes Settlement & Appellate Tribunal (TDSAT) which in turn directed the 3rd respondent to provide its channels at 50% of the cable rate without any increase and maintain status quo till TRAI comes out with its DTH tariffs.

Learned senior counsel for the petitioner submits that since TDSAT is closed for vacation till 28.6.2010 and there are no special vacation sittings, the petitioner has no other remedy except to move this court under Article 226 of the constitution of India and in as much as the third respondent is statutorily bound to render service as a public duty which they are not doing, much prejudice would be caused to the petitioner, in view of the urgency that FIFA World Cup and Wimbledon Tournament are to be telecast and, therefore, there is every need for taking an immediate decision in fixation of rate and also for supply of signals by the agencies concerned.

He would further submit that since the claim of the petitioner for determination of the rate is in the preliminary stage and as there is no dispute over the fixation of rate of HD services, the petitioner is not in a position to move TDSAT for the present and hence he has approached this court for the relief as stated above.

When the matter was taken up for admission on 10.6.2010, this court felt that the 3rd respondent be put on notice and hence the petitioner was permitted to service notice on the 3rd respondent. Accordingly, the 3rd respondent was served. It is informed that on the date when the writ petition was filed, no permission was granted by the Government to the 3rd respondent and subsequently, on 11.6.2010, permission was granted to them and now, they have to provide signals to all DTH Operators on a non-discriminatory basis.

The learned Additional Solicitor General appearing for the 1st respondent, on instructions, submits that the fixation of rate is within the domain of TRAI and it has to fix the rate after consultation with the operators and therefore, they may require time to arrive at such a fair rate between the parties.

It is also submitted by the learned counsel for the 3rd respondent that one of the Operators viz, DISH TV has already offered a rate, but that rate is not acceptable to the petitioner and hence, a rate may be fixed by TRAI only.

In that view of the matter, the learned Additional Solicitor General appearing for the 1st respondent would submit that the 1st respondent is the competent authority to take a decision in respect of fixation of rate. We also informed that the consultation process of TRAI is in the advanced stage and a decision may be taken on or before 30.6.2010 and the petitioner alongwith others may participate in the process and negotiate for the rate.

Under the above circumstances, the 1st respondent is directed to fix the rate on or before 30.6.2010 after affording an opportunity of hearing to the parties to the writ petition.”

6. On the perusal of the said order, it would appear that the TRAI appeared before the High Court in the said proceeding and made a suggestion that it having regard to the ongoing consultation process which have been issued in the matter of determination of tariff so far as each operators are concerned, would be able to do so in the meantime.

The Tata Sky however, filed a petition before this Tribunal which came up for Preliminary hearing on 16th June, 2010. Elaborate arguments were addressed by the learned counsel for the parties and by an order of the said date it was directed:-

“We are prima facie satisfied that the orders of status quo passed by this Tribunal in the aforementioned petitions are in respect of the said Add-on Packages. We are furthermore satisfied that the rates provided for in respect of number of subscribers is otherwise covered by Clause 3.5 of the Interconnect Regulations. It may be true that this Tribunal in its order dated 03.6.2010 had issued the aforementioned directions but at that point of time, it was not aware that the Ministry of Information & Broadcasting was required to issue a separate permission for supply of HD feed which would, inter alia, contain a term prohibiting the respondent from issuing any advertisement whatsoever therein and in that view of the matter, prima facie the applicability of the Regulations vis-à-vis the said permission of the Ministry of Information & Broadcasting dated 10.6.2010 requires a serious consideration. We are, however, albeit prima facie, satisfied that the

respondent is bound to provide signals on a non-discriminatory basis and although the respondent by reason of the amended RIO for all intent and purport has fixed a charge of Rs.4.5 crores for 0 to 5000 subscribers; keeping in view the offer made by it to M/s DISH TV, we are of the opinion that the interest of justice would be sub-served if the respondent is directed to supply signals of its channels at HD feed on the same terms and conditions of the parties and subject to final decision of this Tribunal including adjustment of equities between them. We may furthermore observe that the petitioner may be found to be entitled to proportionate reduction of the aforementioned amount keeping in view of the lapse of time between the date of commencement of event vis-à-vis date of actual supply of signals pursuant to this order. This order, we may mention, is being passed keeping in view the offer made by the respondent itself.”

7. Indisputably pursuant to the said order, Tata Sky has paid a sum of Rs. 1 crore 77 lakhs to the Broadcaster. It's not in dispute that having regard to the order passed by the High Court of Madras, the Chairman of TRAI held deliberations with the Chief Operating Officer of the Broadcaster asking for some data in regard to costs attached with procuring such HD technical upgrade as was published in its RIO. The Chief Operating Officer of the Broadcaster, however, vide a letter dated 24th June, 2010 stated as under:-

“Without prejudice to our rights and contentions, should the TRAI still decide to prescribe the tariff rates for HD feed, a proper consultation process needs to be applied to arrive at the fixation of the rates, as is the common practice, wherein all stakeholders are notified for their inputs and views, rather than going through a hurried process of tariff fixation. It would also be appropriate to bring to your attention at this stage, that based on our RIO two (2) DTH Operators have entered into arrangements with us on a fixed fee basis after due negotiations with us. While the third DTH operator being Tata Sky, has paid us on same rates as Dish TV, subject to the determination of the appropriateness of the rates by the Hon'ble TDSAT, before whom the petition filed by Tata Sky is pending. In light of the above, please also find attached the due confirmation of the commercials arrived at with the Dish TV, Airtel and Tata Sky. In relation to the internal costs, we would request for a week's time, based on the reasons cited above. We do hope that the issues raised during our discussions yesterday have been suitably addressed.”

8. It now stands admitted that the said letter was not responded to by TRAI. It however, also stands admitted that during discussions, TRAI refused to grant such adjournment on the premise that it would not be able to meet the target of 30th June, 2010 as directed by the High Court of Madras.

It is alleged that during the course of discussions, the Managing Director of one of DTH operators being the SUN Direct accepted that for the cricket matches held on Indian Premier League Series, it had paid a sum of Rs.4.5 crores. The Broadcaster also had given out as has been done before this Tribunal also that some other DTH operators had entered into contracts with it for a consolidated sum of Rs.2.5 crores. By reason of impugned order dated 29th June, 2010, the TRAI directed the appellant to offer its HD feed at ten times of its standard rate.

The said order is in appeal before us both at the instance of the Broadcaster as also two of the service providers, namely, Tata Sky and Sun Direct TV Ltd.

9. **Submissions**

Mr. Ganpathy, the learned counsel appearing on behalf of the 'Broadcaster' would urge:-

- (i) So far as viewership of HD feed is concerned, the same being very minimum, as the requisite TV set therefor must be conducive to transmit a HTV is required and being costly, TRAI could not have issued the impugned order.
- (ii) Such an order could not have been issued having regard to the fact that the Broadcaster could not issue any advertisement which has not been taken into consoration by TRAI, and particularly the industry data of 65% 35 % of the revenue of the Broadcaster being divided to advertising and subscription would not hold good for a sports channel as it obtains an advertisement only when there are events not otherwise.
- (iii) Sun Direct only a few months prior to this said event having accepted the IPL channel from MSM Discovery and having paid 4.25 crores, the same required serious considerations at the hands of TRAI. It proceeded wrongly on the premise that in fact

two other DTH operators had paid a sum of Rs.2.50 crores which was the minimum amount for holding negotiations and the said sum should have been fixed as the Broadcaster was to provide the same on non-discriminatory basis.

- (iv) If the respondent did not intend to make payment on that basis, it could have paid only on a subscriber basis.
- (v) The standard subscription fee on a standard rate could not have been made applicable as the HD feed was required to be given only to a group of consumers who can afford to have a very costly TV.
- (vi) The distribution of ESPN channel on a standard fee being already available to the DTH operators and no complaints having been received as regard the rates, the impugned order is wholly unjustified.
- (vii) Alternatively, Sun Direct having not made any payment whatsoever either on the basis of subscription fees or on the basis of the proportionate rate of Rs. 2.5 crores or in terms of the impugned order of TRAI, its appeal should not be entertained particularly when it made an interim prayer for stay of the operation of the said order.
- (viii) TRAI having gone into the question and having prescribed forbearance in its tariff order issued on 21st June, 2010, the impugned order should not be sustained.

Mr. Saket Singh, the learned counsel appearing on behalf of TRAI urged:-

- (a) Consultation process with regard to the DTH tariff been on HDTV being one of the issues, it made the aforementioned suggestions before the Madras High Court as it was expected that the exercise for fixing the rate on 'Add on Package' would also be over by 30th June, 2010, which however could not be done.
- (b) The impugned order had to be passed within 30th June, 2010, in term of the directions issued by the Madras High Court, and, thus, the insistence on the part of broadcaster to take into consideration, the factum of payment of Rs.2.5 crores by two other DTH operators could not have been held to be the basis for determination of price between two service providers as TRAI was bound to do so in terms of the regulations.

- (c) TRAI in passing the impugned order has taken into consideration the relevant factors including the industry figure of the percentage of advertisement revenue earned by a Broadcaster.
- (d) While fixing the charges, TRAI had taken into consideration that even the DTH operators offered two to three times more charges than the standard rate and the Broadcaster having not given the data with regard to the acquisition costs, the said figure was arrived at.
- (e) The matter relating to alleged agreement entered into by and between Sun direct and ESPN is of no consequence as events in IPL must be viewed differently.

Mr. Lekhi, the learned senior counsel appearing on behalf of the DTH operators submitted:-

- (a) The figure of Rs.2.5 crores or 4.5 crores could not have been treated to be final or sacrosanct having regard to the provisions contained in the Regulations framed by TRAI.
- (b) In terms of the Regulations, the Broadcaster being bound to offer its channels on a la-carte basis, it did not fall within its domain to prescribe the rate offered by one of the DTH Operators; as the same was to be on a la-carte basis.
- (c) In any event, having regard to the second proviso appended to Clause 3.2 of the Regulations, the terms of the offer to a distributor of a TV channel could not have been in breach of law and, in any event some justifications therefor were required to be shown.
- (d) The rate offered by the Broadcaster being not economically viable, the comparison of rate must be held to be arbitrary.
- (e) The parties not being possessed of similar bargaining powers, this Tribunal is required to resort to distributive justice between the parties.
- (f) The permission granted being itself subject to condition of compliance of the regulation, the offer made by the Broadcaster must held to be wholly illegal.
- (g) No rate having been fixed for the subscriber, as from the chart filed by the appellant itself it would appear that Rs.9,000/- per subscriber was prescribed for the slab 0 to 5000 viewers must be held to be wholly arbitrary.

(h) The calculation of the rates having been made being towards the costs of the hardware which is the camera and the transmission cost and the hardware being a permanent assets, it was obligatory of the part of the broadcaster to furnish the details of the costs so as to enable this Tribunal to arrive at a just figure.

10. **STATUTE**

At the outset we may notice the statutory regime.

TRAI has not framed any regulations governing supply of HD feed. The Regulations dated 10.12.2004 framed by TRAI does not define HD feed, but in view of the core question as to whether the supply of the HD feed would come within the purview of the clause 3.2, we may notice the same.

“Every broadcaster shall provide on request signals of its TV channels on non-discriminatory terms to all distributors of TV channels, which may include, but be not limited to a cable operator, direct to home operator, multi system operator, head ends in the sky operator; Multi system operators shall also on request re-transmit signals received from a broadcaster, on a non-discriminatory basis to cable operators. Provided that this provision shall not apply in the case of a distributor of TV channels having defaulted in payment. Provided further that any imposition of terms which are unreasonable shall be deemed to constitute a denial of request”.

11. Discount can be granted to a Broadcaster on a volume basis in terms of Clause 3.6 of the Regulations. It reads as under :-

3.6 The volume related scheme to establish price differentials based on number of subscribers shall not amount to discrimination if there is a standard scheme equally applicable to all similarly based distributors of TV channel(s).

(Explanation: “Similarly based distributor of TV channels” means distributors of TV channels operating under similar conditions. The analysis of whether distributors of TV channels are similarly based includes consideration of, but is not limited to, such factors as whether distributors of TV channels operate within a geographical region and neighbourhood,

have roughly the same number of subscribers, purchase a similar service, use the same distribution technology. For the removal of doubts, it is further clarified that the distributors of TV channels using addressable systems including DTH, IPTV and such like cannot be said to be similarly based vis-à-vis distributors of TV channels using non addressable systems.)

12. By reason of 5th Amendment Regulations, 2009 which came into force on or about 17.3.2009, TRAI introduced providing of 'reference Interconnect offer' for 'Direct to Home Service'. Clause 13.2 (A.1) and 13.2 (A.11) read as under:-

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

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

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

- (a) to the following categories of commercial subscribers, namely:-
- (i) hotels with rating of three star and above;
 - (ii) heritage hotels (as described in the guidelines for classification of hotels issued by Department of Tourism, Government of India);
 - (iii) any other hotel, motel, inn, and such other commercial establishment providing board and lodging and having fifty or more rooms; and
- (b) in respect of programmes of such broadcaster, shown on the occasion of a special event for common viewing, at any place registered under the Entertainment Tax Law and to which access is allowed on payment basis for a minimum of fifty persons.”

13.2A.11 It shall be mandatory on the part of the broadcasters to offer pay channels on a-la-carte basis to direct to home operators and such offering of channels on a-la-carte basis shall not prevent the broadcaster from offering such pay channels additionally in the form of bouquets:

Provided that no broadcaster shall, directly or indirectly, compel any direct to home operator to offer the entire bouquet or bouquets offered by the broadcaster to such operator in any package or scheme being offered by such direct to home operator to its direct to home subscribers.

13. 'The Regulations' framed by TRAI govern the contract entered into by and between the parties supplying and obtaining supply of signals of channels of the Broadcasters. Clause 3.2 providing for a must provide clause being inconsistent with the ordinary law of land, namely, Indian Contract Act should receive a strict construction.

It may, however, have to be considered as to whether the said provision would be applicable in a case of this nature. For the aforementioned purpose, we may have to consider the broad meaning of the terms (a) High Definition TV and (b) free channel.

As it now stands admitted that TRAI itself within a few days from making of the impugned order i.e. its 'Tariff Order' dated 21.2.2010 had proposed forbearance for HD feed.

We may notice the literal meaning of forbearance, which is to the following effect:

“Forbearance (n) – Voluntarily refraining from doing something, such as asserting a legal right. For example, a creditor may forbear on its right to collect a debt by temporarily postponing or reducing the borrower’s payments.”

Clause 3.2 providing for a must provide clause would apply, when a request is made for supply of channel.

TRAI in its tariff order dated 21.7.2010, opined in para 4 at page 144 in the Explanatory Memorandum as under:-

“In recent times, the market has witnessed the emergence of a number of niche channels such as HD and 3D TV channels that require special set top boxes. An issue that was posed for comments during consultation was whether tariff for niche channels requiring specialized set top boxes should be regulated.

In case of niche channels requiring specialized set top box e.g. HDTV channels, the stakeholders are generally of the view that such channels have recently appeared in the market and all equipment relating to HD programs including the set top

box and TV set

are relatively costly as compared to standard definition TV sets etc. Therefore, no regulation is necessary.

The niche TV channels can only be viewed in an addressable environment and that too with the help of specialized set top boxes. These channels which have been recently introduced employ advanced technology and therefore, can be considered premium in nature. As these channels are viewed by an elite section, the Authority is of the view that there is no general public interest involved and the tariff dispensation for niche channels requiring specialized set top box TV channels should be left to market forces. The Authority will review the position at an appropriate time.”

TRAI, therefore, was of the opinion that it was not necessary to make any regulation separately. It was of the opinion that general public is not involved. It took cognizance of the fact that the HD feed involves a huge expenditure for a broadcaster to acquire its contents and technology, although used by only a small number of subscribers and moreover it is event based ones. HD feed technology is applied only event-wise in respect whereof, even a particular period is involved and which indisputably require a separate agreement and in any event TRAI itself having prescribed forbearance, in our opinion, the contention of the DTH operators has no substance.

At the relevant point of time also, there was no regulation in force.

14. Another aspect of matter must also be taken care of. While replying to the submissions made by Mr. Ganpathy the Sun Direct itself had offered 4.25 crores for taking the signals on HD feed from MSM for a period of 45 days (which however according to the Broadcaster, some DTH operator has paid a sum of Rs.8 crores and the allegations made in the petition have not been specifically traversed), Mr. Saket Singh contended that the cost of acquisition of IPL and cost of acquisition of other events, namely, football and tennis would be different.

But that is itself a relevant fact.

15. For the purpose of making regulations, more than one party should be held to be situated in similar positions.

If the position of a large number of persons was the same one party could be compared with another but even therefor for a detailed study was required to be made. No rate or tariff should be fixed on an ad-hoc basis. Reasons therefore are required to be assigned. Transparency is required to be maintained. TRAI had undertaken a process of fixing the tariff/rate.

We appreciate that it had made an offer before the Broadcaster on the basis of standard rate but even therefor TRAI had no data. It even did not call for the amount of costs involving supply of HD feed by some broadcasters for broadcasting sports events or some other specific events. It therefore, cannot be said to have gathered sufficient materials for fixation of the charges between the broadcaster and the DTH operator which is event specific.

16. It is not, furthermore, correct as has been contended by Mr. Lekhi that the hardware required therefor would be only cameras which would be permanent acquisition of the broadcasters and the transmission cost for the said purpose.

The Broadcasters were required to hire transponders on a per hour basis apart from paying a huge amount to the organizers of the event.

17. It may be true that Broadcaster although in possession of the costs of acquisition of the events did not produce the details thereof. It should have at least produced the cost of acquisition of the product before us, but we must place on record that a certificate by the chartered accountant i.e. M/s Price Water House Coopers has been produced before us, the relevant portion whereof reads as under:-

“We have performed the following procedures agreed with you with respect to the ‘cost relating to High Definition Contracts for the FIFA 2010 World Cup and Wimbledon 2010’: (a) Obtained the cost allocation workings (“workings”) for the ‘cost relating to High Definition Contracts for the FIFA 2010 World Cup and Wimbledon 2010’ and agreed the details of the workings to the accounting records of ESPN Star Sports.

We report our findings as follows:-

- (a) *The details on the workings for the 'Cost relating to High Definition Contracts for the FIFA 2010 World Cup and Wimbledon 2010' agree to the accounting records of ESPN Star Sports.*
- (b) *Based on the workings, the 'Cost relating to High Definition Contracts for the FIFA 2010 World Cup and Wimbledon 2010' amounts to US\$1,906,000."*

18. We may also notice that whereas according to Mr. Lekhi and Mr. Saket Singh, the broadcaster was to transmit the said feed not only for the Indian viewers but to others including the neighbouring countries, south Asian countries. Mr. Ganpathy urged that basically the broadcast was meant for the Indian viewers. We have noticed heretofore that M/s Tata Sky had shown the HD channel only for a few days, i.e. from 16th of June, 2010.

It, in its petition, has disclosed that it had 5,382 subscribers as on 11th July, 2010.

Sun Direct however for the reasons best known to it did not chose to disclose the figures of its subscribers to whom it had supplied HD feed either before TRAI or before us.

19. On a pointed query made by us, however, Mr. Lekhi stated that number of subscribers should be approximately 6000.

20. According to Mr. Ganpathy, Sun Direct had availed the said HD feed only for three days.

21. It is in the aforementioned situation, we are of the opinion it must be held that Clause 3.2 of 'the Regulations' being not applicable, the question of determination of reasonable terms of contract which according to Mr. Lekhi would include reasonable rate would not arise, particularly in view of the fact that apart from the standard rate for each of the channels and bouquets offered by the Broadcaster, we do not have any rate for a similar event with which we could compare rates and which would enable us to arrive at a conclusion as to what should be a reasonable rate within the meaning of the aforementioned provision or otherwise.

This takes us to the contention as to whether Clause 13.2 (1) and 13.2 (11) would be attracted.

22. When rate on a la-carte basis was to be fixed, it would become a subject matter of a RIO. It means it should continue for some time.

23. It cannot be event-wise. We may state that event specific broadcast on a different technological mode having not been regulated, the aforementioned two provisions also may not have any application, particularly, when standard channels were available, for which separate RIOs have been notified.

24. There cannot, however, be any doubt or dispute that it was for TRAI to make an appropriate Regulations if it so desired. Furthermore, tariff should be fixed under Section 11 (2) of the Act.

25. Mr. Saket Singh concluded that it was for the purpose of giving effect to the order of the High Court of Madras, TRAI had to adopt the role of a mediator/conciliator to determine rates between the broadcaster and a DTH operator. It could not have done so. It being a Statutory authority was required to confine its activities within the four corner of the Statute.

26. It, in our opinion, should have clarified its stand before the Madras High Court that either it would make regulations or refuse to do so. It should have exercised its own prerogative. As a regulator, it cannot be dictated by a third party including the State.

The High Court of Madras did not ask it to frame tariff. It did not interfere with its jurisdiction.

We, therefore, with respect, are of the opinion that TRAI had undertaken a process which was not warranted in law.

When it appeared before the Madras High Court, we may presume, it was aware that it would be prescribing 'forbearance'. We expect that an independent Regulator would be bold enough to disclose its position before any forum whatsoever. Before TRAI there were two rates, one of the rates offered in the RIO and the other three times of the standard rate offered by DTH operator. It could not

have for any reason whatsoever said that rate should be charged by the broadcaster from two DTH operators should be ten times of the standard rate. Neither any basis therefor has been laid down nor any reason in support thereof has been assigned.

In view of our findings aforementioned, we need not go into the other contentions raised by the parties.

While saying so, we cannot however refuse to fix a reasonable rate.

Before us Mr. Lekhi contended that business model would be premised on the viability of the venture undertaken by a party.

The offers made by other two DTH operators have been noticed by us in our order dated 16th June, 2010. It, therefore, provides for some guidance.

There is nothing to show that number of viewers of those two DTH operators were different.

It has been the submission of Mr. Lekhi that from the slab provided for the broadcaster itself it would appear that it intended to earn about 4.00 crores for the entire event from each of the DTH operators.

27. If upon negotiation, two of the DTH operators, similarly situated, had thought that a sum of Rs.2.5 crores would be a commercially viable amount, we fail to understand as to why the same business model should not be applied by us in the case of the two other DTH operators, who are before us. We have passed a similar order in the case of Tata Sky.

In a case of this nature, it is wholly incorrect to suggest that the parties have different working models.

The decision of the Supreme Court of India in Central Inland Water Transport Corporation Ltd. Vs. Brojo Nath Ganguly reported in 1986 (3) SCC 156, in our opinion has no application to the fact of the present case. When two top businessmen having equal

bargaining power have entered into a commercial contract, even the doctrine of 'Distributive Justice' would have no application.

28. Furthermore, evidently the viewership in the last three days would be much more than the earlier days. We are of the opinion, that while making the Interim Order absolute in the case of Tata Sky, we direct Sun Direct also to pay to the Broadcaster on the same basis.

Keeping however in view the fact that it has not paid any amount whatsoever and even the amount fixed by TRAI which it should have done, and also keeping in view of the observations made by the Madras High Court itself, we are of the opinion that it should pay interest at the rate of 24 percent per annum on the amount due.

29. We, however, are of the opinion that the stand of the petitioner before TRAI was not fully free from blemish, although it was sinned against more than sinning.

We, therefore, direct that the parties shall pay and bear their own costs.

30. These Appeals and Petitions are disposed of on the above terms.

.....,J
(S.B. Sinha)
Chairperson

.....
(G.D. Gaiha)
Member

.....
(P.K. Rastogi)
Member

HKC/