

The subscription fees payable under the said agreement were under the said agreement to be in the following terms :

“FEES : Affilite Subscription Fees :

Immediately upon execution of this agreement, based on the subscriber base as represented by the Affilite, affilite shall pay to the Licensor a sum of Rs. 27,12,600/- towards the subscription Fee for the term of the contract in respect of

ESPN Service

Star Sports Service

ESPN Service and Star Sports Service (Bouquet)

The Affilite has requested for permission to pay above subscription fee in advance as per Annexure 1^a to the agreement and the licensor has agreed for the same.

For purposes of this Agreement, the ‘subscription fee’ referred to above shall be equal to the number of subscribers multiplied by the price per subscriber home.

The licensor reserves its right to revise the Price per subscriber home from time to time. Upon such revision, the affilite agrees and unconditionally undertakes to pay the revised subscription fee pro rata from the effective date of such revision.

In the event the licensor believes in its reasonable discretion that the affilite has under declared its subscriber base or there has been an increase in the base of the affilite’s subscribers, the licensor may call for an increase of the affilite subscription fees payable hereunder. If after a period of seven days, the affilite fails to pay the increased subscription fees as requested by the licnesor, the licensor may at its sole discretion, deactivate/disconnect the service hereunder provided and / or terminate this agreement without prejudice to its right to claim additional affilite subscription fee resulting from such under declaration by the affilite or the increase in its subscriber base referred above. For avoidance of doubt, an increase of affilite’s subscribers shall include, without limitation, increase of subscriber to which affilite directly

distributes the service or an increase of such subscriber to which the service is distributed by the sub-operators and sub-affiliates / cable operators listed in Annexure –I and other sub operators and sub –affiliates / cable operators added by the affiliate to its/ his cable network and / or distribution system(s) during the term of the agreement.

All payments to licensor under this paragraph shall be net of all taxes and net of any bank or transfer or similar fees or charges and shall be made in the name of licensor. The amounts contemplated hereinabove shall be payable by Demand Draft in favor of ESPN Software India Private Limited payable at its regional office or any other place that may be specified by licensor from time to time.”

2. The monthly payments in terms of the said agreement as specified in Annexure 1-A thereto i.e. for a total sum of Rs. 27,12,600/- were payable in 12 monthly instalments.

According to the petitioner, the respondent herein acquired the network of Adarsh Nagar and Madhurawada and by a letter dated 21.4.2006, it was communicated to it as under :

“Sub : Settlement and revival of Adarshnagar & Madhurwada Networks.

This has reference to the subject captioned above we would like to inform you that we have taken over the abovementioned networks w.e.f. April 21st 2006.

Since we have taken over, we are in the process to settle the outstanding pertaining to the above networks and cleared Rs. 50000/- each for A&M against the actual outstanding of Rs. 97,144/- of Adarsh Nagar & 144568/- of Madhurawada.

Also please note that we shall clear the balance outstanding of Rs. 47,144/- and 94,568/- before the month end of April 2006 and shall start the networks effectively by Ist May 2006 onwards.

Furthermore, we have signed the upgradation from our end, but shall let you know before 25th April whether A&M to be billed separately or to be added in Saidarshan Media Network Pvt. Ltd.”

3. According to the petitioner respondent did not inform it as to whether A&M (said to be a separate legal entity) was to be billed separately or to be added in respondent's network and thus petitioner had no other option but to include the bills of A&M also. As noticed above, the respondent did not contemplate billing of these two networks upto 25.4.2006. It is however, accepted that at a later stage i.e. on 29.09.2006, the respondent asked the petitioner to bill the said A&M network separately.

4. It furthermore appears that the subscriber base was increased from 6600 to 8200 on 01.05.2006, and later on from 8200 to 10585 on or about 1.6.2006. The parties yet again on or about 23.11.2006 agreed that the subscriber base should be increased from 10585 to 11585, as a result whereof, the respondent became liable to pay a sum of Rs. 3,96,786.25 only p.m. Upon completion of the tenure of the first agreement, the parties entered into a separate agreement containing almost similar terms.

5. The petitioner being a company incorporated under the Companies Act, 1956 maintains its books of accounts, said to be in the regular course of business.

Before this Tribunal, the said statement of accounts from 01.01.2006 has been filed from a perusal whereof, it appears that the opening balance as on 1.1.2006 was Rs. 5,37,018/-. During the period 3.1.2006 to 02.01.2007 the respondent paid a sum of Rs. 38,99,253/- leaving a balance of Rs. 8,89,403. It furthermore appears that a cheque for a sum of Rs. 2,00,000/- credited in

the earlier account was not shown in the subsequent account from 01.01.2007. The accounts produced before us show that a sum of Rs. 31,57,064/- was owing and due from the respondent.

6. We may furthermore, notice that according to the respondent it had not been availing the services of the channels of the petitioner with effect from 2.1.2008. It is also accepted that on or about 24.01.2008, the respondent has also switched off/ disconnected the signals of the petitioner.

7. We have referred to hereinbefore that a service contract was entered into on or about 19.07.2007 which was valid for a period of 12 months i.e. upto 18.07.2008. The subscription fees payable thereunder was a sum of Rs. 52,43,712/- from which a discount of Rs. 7,79,712/- was given and thus a total sum of Rs.44,64,000/- was payable in 12 monthly instalments payable in the manner as specified therein. Other terms and conditions, however, remained the same, save and except in the Bouquet of ESPN and Star Sports another channel namely Star Cricket on a la carte basis was also made available to the respondent.

The respondent, however, contends that it was not ready and willing to avail the signals of Star Cricket and the same was thrust upon it by the petitioner upon creating undue pressure therefor. According to the respondent on that ground alone, its representative signed the said agreement on all copies of the said agreement except page three 'under protest'.

8. The petitioner has filed this petition praying, inter alia, for the following reliefs :

“a) the respondent be directed to pay to the petitioner a sum of Rs. 31,57,064(Rupees Thirty one lakhs fifty seven thousand sixty four only) alongwith interest @ 12% annum from the due date till realisation by the petitioner herein.

(b) The respondent be penalised for violating with impunity the provisions of clauses 4.2 and 4.3 of the Telecommunication (Broadcasting and Cable Services) Interconnection (3rd Amendment) Regulation, 2006 dated 04.09.2006 and be imposed a fine of not less than Rs. 1,00,000/- (Rupees one lakh);”

9. Before we proceed to consider the materials brought on record by the parties we may notice that the petitioner does not press prayer ‘b’ of this petition.

10. The respondent in their written statement interalia raised a contention that the parties have entered into a settlement in terms whereof upto 30.06.2007, the arrears, as would be evident from the letter from Sai Darshan Media Network Pvt. Ltd. to the R.D. Network Services stated to be the distributor of the petitioner, were to be Rs. 10 lakhs as would appear from the following:

“We hereby thank you for having paid heed to our repeated requests to your management by finalizing Rs. 10 lakhs as the full and final payment till June 2007 Invoice (Including June month invoice)”

11. It is further the case of the respondent that petitioner is not entitled to the benefit of increase of 4% in the tariff for two months i.e. Decemeber 2007 and January 2008 in as much as the tariff order issued by the Telecom Regulatory Authority of India (TRAI) merely created enabling provisions in terms whereof fresh agreement was required to be entered into by and between the parties herein.

12. In view of the rival contentions of the parties, the following issues arise for our consideration :

1. Whether the respondent had taken over Adarsh Nagar and Madhurawada Network?
2. Whether parties have entered into a settlement in terms whereof the petitioner agreed to receive a sum of Rs.10 lakhs being the full and final settlement till June 2007?
3. Whether the respondent was put under undue pressure to agree to take signals of the channel of the Star Cricket ?
4. What would be the effect of the respondent's entering into the said agreement under protest?
5. Whether in absence of any agreement, the petitioner was entitled to increase in the subscription fees to the extent of 4% in terms of the order of the TRAI dated 4.10.2007 or otherwise?
6. Whether unilateral termination of the contract by the respondent by switching off signals on 2.01.2008 is legal and valid?
7. What relief, if any, to which the petitioner is entitled to?

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Issue No.1

13. The petitioner in support of its case has examined one Shri S. R. Bhandary whereas the respondent has examined one Mr. M. Satish Kumar.

The respondent by a letter dated 21.04.2006 addressed to the petitioner in no uncertain terms stated that they had taken over the networks of Madhurawada and Adarsh Nagar. The respondent, however, contends that the said letter was issued by

mistake as in fact only a proposal was being mooted for taking over of the said networks, which did not fructify. The further case of the respondent, as would appear from the trend of cross examination of the witness of the petitioner is that Adarsh Nagar Network being belonging to a company known as A & M Entertainment Pvt. Ltd. registered and incorporated under the Indian Companies Act, 1956; the same neither could have been taken over nor the bills payable by it could have been clubbed with those of the respondent.

14. In an issue of this nature, the conduct of the respondent plays a vital role. The respondent clearly gave out that it not only had taken over the said Networks and they were to be revived, as would appear from the aforementioned letter dated 21.04.2006, but they even intended to settle the outstanding dues pertaining thereto.

15. It is on account of the said networks, the respondent has also made part payment of the dues of the petitioner, namely, a sum of Rs.50,000/- for A&M against the actual outstandings of Rs.97,144/- relating to Adarsh Nagar and Rs.1,44,566/- towards the dues of Madhurawada.

16. The respondent furthermore promised to clear the balance amount due to the petitioner. According to it, the network effectively started their operation from 01.05.2006 onwards. The respondent did not stop there. It also in unequivocal terms stated that they had signed upgradation forms and promised further that the respondent would be informed as to whether A&M were to be billed separately. The petitioner acted on the said representation. It, moreover, stands admitted that only after a period of five months, the respondent categorically stated that bills for Adarsh Nagar should be raised separately.

17. Having considered the evidences brought on record, we have no doubt that the respondent had taken over the aforementioned networks. It is one thing to say that a company incorporated under the Companies Act, 1956 is a separate entity but it is another thing to say that the management of the networks run by a company could not be taken over in law. Nothing has been pointed out before us that it is impermissible in law to take over the management of a broadcasting network run by one MSO by another.

18. What was the arrangement by and between the respondent and the said company is not known. It was for the respondent to disclose the same being within its special knowledge. The respondent furthermore, save and except making a bald statement that the said letter was issued by mistake, did not elaborate as to what type of mistake it was. It is only during the hearing, the learned counsel for respondent made a feeble attempt to contend that there was a proposal to take over the networks which did not fructify. No material was brought on record in support of such a stand. The respondent neither in its reply pleaded the same nor Shri M. Satish Kumar, the witness examined on behalf of the respondent made any statement in this behalf. In fact Mr. M.Satish Kumar did not make any statement whatsoever in his evidence before this Tribunal with regard thereto.

Issue No. 1, therefore, is answered in favour of the petitioner and against the respondent.

Issue No. 2

19. This brings us to the question as to whether the parties arrived at a settlement with regard to the arrears. The respondent, in support of its plea of settlement of the disputes, has produced a letter dated 30.6.2007 addressed to the distributor of the petitioner. The petitioner does not deny or dispute that the R.D. Networks Services was its distributor. It is also not in dispute that the petitioner does not have a local office at Vishakhapatnam. The receipt of the said letter by the

said distributor is also not in dispute. The petitioner unequivocally accepts that it received three cheques for a total sum of Rs. 9,79,400/-. The statement of accounts produced by the petitioner also clearly shows that the said cheques were credited to its account. It is the contention of the petitioner itself which is again not denied and disputed by the respondent that the cheque dated 30.6.2007 for a sum of Rs. 3,79,400/- bounced. In view of the categorical stand taken by the respondent, that a settlement had been arrived at by and between the parties, it was obligatory on the part of the petitioner's witness to deny and dispute the said contention. Shri Bhandari in his evidence, did not deal with that aspect of the matter at all. Even he, in his evidence, did not make any statement that the aforementioned R.D. Networks was not authorized to enter into the said settlement on behalf of the petitioner.

20. Submission of Mr. Ganpathy that the distributor of the petitioner had received the letter but thereby contents thereof had not been admitted, cannot be accepted for more than one reason. The contents of the said letter have been proved by Shri M. Satish Kumar. It was, therefore, obligatory on the part of the petitioner to test the veracity of statement made by Shri Prasad in this behalf in cross-examination. No question was put to the said witness in this behalf in the cross-examination at all.

21. It is now well-known that a statement made by a witness, subject to just exceptions, if not tested in cross-examination, would be deemed to be admitted.

In S.C. Sarkars' Commentary on Law Evidence Page 577, it is stated:

“Needless to say, as it is well settled in law, that if witness has not been cross-examined on a point stated in the examination-in-chief, the same remains unchallenged and there is no reason why it should not be accepted.”

[See also Dammu Sreenu Vs.State of A.P. – AIR 2009 SC 2532, Pravin Vs.State of Madhya Pradesh – AIR 2008 SC 1846, Hindustan Steels Ltd. Rourkela Vs. A.K. Roy & Ors. – AIR 1970 SC 1401]

A Division Bench of the Madhya Pradesh High Court in Mohd.Naved Vs. Hindustan Petroleum Corporation & Ors. – 2004(1) MPHT 16, stated the law, thus:

“Needless to say, as it is well settled in law, that if witness has not been cross-examined on a point stated in the examination-in-chief, the same remains unchallenged and there is no reason why it should not be accepted.”

The fact that the said settlement has been acted upon would also be evident from the fact that the petitioner accepts that from July, 2007, the number of subscribers was treated to be 6,500 in stead and place of 11,585. Mr. Ganpati, to our query, very fairly stated that there is no other document to show the basis for drastic reduction of the subscriber base.

22. We, therefore, are of the opinion that the settlement, in fact, was entered into by and between the parties.

23. The authority of the distributor to enter into such an agreement in the aforementioned situation must be held to be implied. It was for the petitioner to produce before this Tribunal the dealership agreement entered into by and between the petitioner and the said R.D. networks. Even an authority to enter into a settlement with a defaulting MSO could be conferred on the distributor by the company even otherwise.

24. Mr. Handoo’s contention that the statement of account filed by the petitioner, is not supported by any document, need not be determined in view of our findings aforementioned. In a situation of this nature, the principles of ‘estoppel by conduct’ can

also be invoked. The petitioner, thus, having accepted the terms of settlement and having acted thereupon is estopped and precluded from contending that no settlement had been arrived at.

25. It, therefore, can safely be presumed that the reduction of subscriber base took place in terms of the said settlement and upon further negotiation after the said letter dated 30.6.2007 was received by the petitioner.

Issue No. 3 and 4

26. Both the issues being inter-related are taken up for hearing together.

27. The respondent contends that only a blank form of the agreement was supplied. Our attention in this behalf has been drawn to the admission of Shri S.R. Bhandari, the witness examined on behalf of the petitioner. He admitted that the one which has been filed with the petition contains blanks whereas the other filed with his affidavit were the filled up one.

28. It is true that the agreement filed with the petition is the blank format of the agreement but bears the signatures of the authorized representative of the petitioners and respondent.

The respondent's witness, Shri Satish Kumar, however, did not say that his signature does not appear in the one which has been filed with the affidavit of Shri Bhandari. The said witness also does not say that he was not aware of the contents of the said agreement. The said agreement, indisputably, was acted upon by the parties. It is also not in dispute that the respondent had been making payments in terms thereof. The respondent by its letter dated 21.4.2006 also promised to clear off the arrears.

29. We, therefore, are of the opinion that neither filing of an agreement containing blanks by itself is sufficient to absolve the respondent from payment of the contractual dues, nor the purported signing of the agreement under protest is of any relevance in the facts and circumstances of the present case.

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Issue No. 5

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30. The petitioner in its bills for the months of December, 2007 and January, 2008 claimed an increase of 4% over the agreed amount. Such an increase in the subscription fee was premised on the tariff order issued by the Authority.

31. It is not in dispute and in fact has been admitted by Mr. Bhandari that no fresh agreement was entered into by and between the parties in respect of the increase of the subscription fee by 4%. The demand for the said increase was made by a letter dated 16.11.2007 which reads as under:-

“16th November, 2007
Ref: 814954

M/s Sai Darshan Media NW P. Ltd.
Mr.P. Srinivasa Rao
9-1-222/1, 2nd Floor
C B M Compound
Visakhapatnam, Visakhapatnam District
Andhra Pradesh - 530003

Sub: Revision of ESPN, STAR Sports and STAR Cricket Rates.

“This has reference to the Telecommunication Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order, 2007 (“Tariff Order”) issued by the Hon’ble Telecom Regulatory Authority of India (TRAI) for non-CAS Areas on October 4, 2007.

As you may be aware the Tariff Order allows an increase of upto 4% on the current charges/rates of pay channels with effect from December 1, 2007.

Accordingly, we are also revising our a-la-carte and bouquet rates and the revised rates are as under:

Channel(s)	Price (per subscriber home per month) (INR)
ESPN	33.13
STAR Sports	33.13
STAR Cricket	29.12
ESPN and STAR Sports Bouquet	44.17

Please note that the above listed rates will be applicable only with effect from December 1, 2007.

Since the above revision would require a change in the subscription fee, currently paid by you, we will shortly apprise you of the revised subscription fee in a separate communication.

Thank you,

Yours truly,

For ESPN Software India Private Limited

Authorised Signatory”

32. There is nothing on record to show that the revised subscription fee was communicated to the respondent separately. The petitioner had merely sent its invoices for the billing period 19.11.2007 to 18.12.2007, 19.12.2007 to 18.1.2008 and 19.1.2008 to 18.2.2008. Even the said bills did not contain any bifurcation.

33. It is true that the agreement contains a clause which has been reproduced hereinbefore, in terms whereof the licensor reserved its right to revise the fees. It may also be that increase of 4% by itself may not be unreasonable. We, however, are at present, advised, keeping in view the fact that the respondent admittedly had stopped availing the signals of the channels of the petitioner from 2.1.2008, are of the opinion that it is not necessary to go into this aspect of the matter in details in view of the fact that it was obligatory on the part of the petitioner to intimate to the respondent its intention to increase the subscription fee immediately.

34. This issue is decided against the petitioner.

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Issue No. 6

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35. The respondent being a MSO could have terminated the agreement only in terms of the Regulations framed by TRAI. As transmission of signal of a broadcaster is also meant for general public, not only the MSO/distributor who transmits such signals on behalf of the broadcaster, is entitled to a notice in terms of Regulation 4.1 but also the public would be entitled thereto

having regard to Clause 4.3 thereof. It is not the case of the petitioner that such a notice has been issued or a public notice was published in two newspapers as provided for in Clause 4.3 of the regulations. We, therefore, are of the opinion that unilateral termination of the contract by respondent is not valid. However, as the claim of decree for payment of damages has not been proved, no further deliberation on this issue is necessary.

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Issue No. 7

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36. In view of our findings aforementioned, we are of the opinion that the petitioner is entitled to recover from the respondent a sum of Rs. 4 lakhs upto 30.6.2007 i.e. the amount which had not been paid in view of bouncing of the cheque and on and from 1.7.2007 to 24.1.2008 at the agreed rate of Rs.3,72,000/- per month. The petitioner is also entitled to interest @ 12% p.a. from the due dates of payment till the date of filing of this petition. It shall also be entitled to interest at the rate of 12% p.a. during the pendency of this petition and future till realisation.

37. The petitioner shall also be entitled to all costs. Counsel's fee assessed at Rs. 2 lakhs.

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

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(G.D. Gaiha)
Member