TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 10th May, 2010

Petition No.104(C) of 2008
(M.A.Nos.78, 82, 88 of 2008 and M.A.No.112 of 2009)

Tata Sky Limited ...Petitioner

Versus

ESPN Software India Pvt. Ltd. & Anr. …Respondents

BEFORE:

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

For Petitioner	:	Mr.Ramji Srinivasan, Senior Advocate with Mr. Mansoor Ali Shoket, Advocate Mr. Vinoba Bhoopathy, Advocate
For Respondent No. 1	:	Mr. N. Ganpathy, Advocate

JUDGMENT

S.B. Sinha

The effect of and/or interpretation of an order dated 6.6.2008 passed by the Hon'ble Delhi High Court is in question herein.

Petitioner is a company registered under the Indian Companies Act, 1956,

Respondent is also a company registered under the said Act and has been carrying on its business as a 'Broadcaster'.

The parties hereto admittedly entered into an agreement with regard to transmission of the channels of the respondent.

It introduced a new channel. Some cricketing calendar/content properties were shifted from ESPN-Star to Star Cricket.

As cricket series in England were commencing from 19.07.2007, the parties entered into a Memorandum of Understanding dated 18.07.2007.

Some of the provisions thereof are as under:

> "1. Both parties recognize that there already exists a detailed "Affiliate Agreement" dated July 31, 2006 for ESIPL's existing two services i.e. ESPN & Star Sports which is valid from July 31, 2006 for a period of 19 months expiring on February 28, 2008.
>
> 2. It is agreed between the parties that TATA SKY shall carry and distribute STAR Cricket on their DTH platform (Tata Sky) w.e.f. July 19, 2007 on the terms and conditions already defined in the above said "Affiliate Agreement".

3. ESIPL had offered STAR Cricket to TATA Sky at the rate of Rs.28 per subscriber TV per month. However, TATA Sky has counter offered to ESIPL to pay a fixed subscription fee, for eight months, amounting to US$ 3.25 Million, payable in Indian Rupees, forex rate for conversion of US dollars to Indian rupees applicable to each payment shall be the Reserve Bank of India reference rate for converting US dollars to Indian rupees as at the close of business on the business day immediately preceding the invoice date, to be paid in the following manner:

Monthly payment schedule for Star Cricket to ESIPL

Month	**USD**
Jul'07	US$ 150,000
Aug'07	US$ 350,000
Sep'07	US$ 380,000
Oct'07	US$ 400,000
Nov'07	US$ 450,000
Dec'07	US$ 470,000
Jan'08	US$ 500,000
Feb'08	US$ 550,000
Total (Jul'07 – Feb'08)	US$ 3250,000

4. The above subscription fee payable for STAR Cricket is in addition to the subscription fee payable under the said Affiliate Agreement.

5. TATA Sky has agreed to make available STAR Cricket in the same entry level basic pay tier, wherein ESPN and STAR Sports, are available.

6. The parties may convert the above understanding into an Addendum to the Affiliate Agreement, as soon as practicable, but not later than 30 days, failing which, this MoU will be treated, as the Addendum."

Some correspondences passed between the parties with which we are not concerned for the present.

According to the petitioner, the respondent illegally had been making attempts to bundle its news channels to the existing channels and continued demanding payments therefor in term of the invoices issued in this behalf.

TRAI amended 2004 Regulations notifying The Telecommunication (Broadcasting & Cable Services) Interconnect (Fourth Amendment) Regulation, 2004, which inter alia provides as under:

"13.2A.1 Every broadcaster, providing broadcasting services before the date of commencement of the Telecommunication (Broadcasting and Cable Services) Interconnection (Fourth Amendment) Regulation, 2007 (9 of 2007) and continues to provide such services after such commencement shall, within ninety 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 ninety 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 following terms and conditions, namely:-

(a) rates of the channels on a-la-carte basis and the rates of bouquets offered by the broadcaster to the direct to home operator;

(b) details of discounts, if any;

(c) payment terms;

(d) security and anti-piracy requirements;

(e) subscriber reports based on subscriber management system and audit;

(f) tenure of agreement;

(g) termination of agreements.

13.2A.7 (1) Every broadcaster shall, within a period of forty-five days from the date of receipt of request from a direct to home operator for entering into interconnection agreement or for modification of an interconnection agreement already entered, shall enter into an agreement, or, modify such agreement already entered, with such direct to home operator, in accordance with the Reference Interconnect Offer published under these regulations.

(2) In case a broadcaster intimates any modification as referred to in regulation 13.2A.5, the agreement referred to in sub-regulation (1) shall be modified at the option of the direct to home operator, in the same manner as that of entering into of an agreement under sub-regulation (1).

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."

An RIO was issued by the respondent on 28.02.2008 purported to be in terms of clause 13.2A.1 of the amended 2007 Regulations specifying the technical and commercial terms.

It offered an option to the parties to enter into agreement in line with terms and conditions contained in RIO or continue with the agreement.

Another RIO was posted by it on its website by the respondent which according to the petitioner is contrary to 13.2.A.5 of the 2007 Regulations. The terms and conditions offered to the DTH operators are contained in Annexure P-N to the petition.

The Affiliate Agreement expired on 15.03.2008 but the arrangement continued.

ESPN by a letter dated 09.04.2008 informed the petitioner. It reads as under:

"Dear Sir,

This has reference to the contacts dated July 31, 2006 & July 18, 2007, executed by and between us and Tata Sky Limited, vide which our services were made available on your DTH platform ("Contracts"). This also has reference to our numerous meetings and e-mails, since December 2007, on the above subject.

In this connection please note that though the Contracts have expired on March 15, 2008 we are, pursuant to your request, agreeable to extend the arrangement recorded in the Contracts for a period of 6 weeks, from the date of expiry of the contract, i.e. till April 30, 2008 or until a fresh contract is executed, whichever is earlier.

We reiterate that we look forward to a long and mutually beneficial association with Tata Sky. Accordingly, we would once again request you to let us know the time convenient to you, for a meeting, for taking forward the negotiations w.r.t. terms for renewal of the Contracts.

You will appreciate that this meeting is urgent and these negotiations have to be finalized within the above mentioned interim period of 6 weeks because in the absence of a contract, after the expiry of the said interim period, it will be difficult for us to continue making available our Services on Tata Sky's DTH platform.

Looking forward to meeting you and your team, at the earliest."

The petitioner contends that, thus, what remained was finalization of the agreement.

Before, however, the parties could carry on with their negotiations; TRAI came out with two press notes on 18.04.2008 being press Note No.38 and 39.

Respondent pursuant to the said press note offered two rates, which are as under:-

"Bouquet Rate:

M/s ESPN Software India Pvt.Ltd.	Bouquet 1	ESPN+STAR SPORTS	Rs.44.17

A la carte rate:

M/s ESPN Software India Pvt.Ltd.	ESPN	33.13
	Star Sports	33.13

	Star Cricket	28.00”

Some correspondences thereafter passed between the parties.

On or about 28.02.2008, the petitioner issued the following communication to the respondent –

> “1. We can carry your 3 channels i.e. ESPN, STAR Sport and STAR Cricket on the basis of guidelines issued by the TRAI, whereby the same are to be offered at a-la-carte rates by broadcasters while the prices of the pay channels so offered will follow the principles laid down by Hon.TDSAT in its judgment dated 31st March, 2007 in petition No.189(C) of 2006. Applying the above principles, the possible rates for your 3 channels would be Rs.39/- per subscriber per month. We expect that a suitable discount will be offered since the three channels will be bought collectively.
>
> 2. We can pay you @ Rs.39/- per subscriber per month while agreeing to put your 3 channels in our existing base packs, however we shall have the right as provided under 13.2A.11 (clarified as per the corrigendum) of the Regulations.
>
> 3. We are agreeable to pay you a fixed fee of @ Rs.35 crores for initial 12 months and Rs.40 crores for the following 12 months.”

The said communication was not responded to.

An E-mail was sent to the respondent by the petitioner on 30.04.2008, stating:

"Subject: ESS/Tata Sky association

Dear Vijay,

As we have received no response from you on our letter dated April 30th, '08 and the Corrigendum dated May 5th '08.

We are proceeding with Option I and kindly take note of the same."

The respondent, however, issued a revised RIO on 15.05.2008. It informed the petitioner the following:

"Accordingly, you now have a choice between our offer as stated in the RIO and our offer dated April 25, 2008. You are requested to consider both the offers and let us know your choice by or before May 20, 2008, failing which we will proceed as per TRAI's applicable regulation."

A perusal of the revised RIO forwarded by ESPN shows that the following rates have been offered by ESPN:

Bouquet Rate:

M/s ESPN Software India Pvt.Ltd.	Bouquet 1	ESPN+STAR SPORTS	Rs.44.18

A la carte rate:

M/s ESPN Software India Pvt.Ltd.	ESPN	33.13
	Star Sports	33.13

	Star Cricket	28.00

In response to the above communication of ESPN-Star, Tata Sky by its communication dated 16.05.2008, informed ESPN-Star that:

(i) There are significant variations in your revised RIO, many of which are contrary to the provisions of The Telecommunication (Broadcasting & Cable Services) Interconnect (Fourth Amendment) Regulation, 2007 (hereinafter "**Regulation**") and also the Press Note No.39 of 2008 issued by the TRAI in this respect.

(ii) In view of the above and in order to act in consumers' interest, we shall carry your 3 channel i.e. ESPN, STAR Sports and STAR Cricket on the basis of principles enunciated by the **Regulations**, read with the advisory of TRAI, as on **interim measure and without prejudice**, the same will be offered to our subscribers, effective June 1, 2008, at their option.

(iii) We hereby expressly disagree with the terms and conditions of your RIO dated May 15, 2008 and the rates stated therein."

The petitioner thus objected thereto.

It is on the aforementioned premise that this petition has been filed inter alia for the following reliefs:

"(a) Hold that actions/communications issued by ESPN-STAR (including letter dated 25.4.2008 and 15.4.2008) regarding extension/ renegotiation of Agreement are contrary of Telecommunication (Broadcasting & Cable Services) Interconnect (Fourth Amendment) Regulations, 2007.

(b) Hold that RIOs submitted by Respondent/ESPN-STAR with TRAI, posted on its website and forwarded to Tata Sky is contrary to Telecommunication (Broadcasting & Cable Services) Interconnect (Fourth Amendment) Regulations, 2007.

(c) Direct TRAI to implement Press Note 39 of 2008 issued on 18.04.2008.

(d) Direct the Respondent to enter into an interconnect agreement with the Petitioner while complying with the Interconnect Agreement in terms of Telecommunication (Broadcasting & Cable Services) Interconnect (Fourth Amendment) Regulations, 2007 with the principles laid down by the Hon'ble TDSAT in its various judgments and as has been reiterated by the TRAI in its Press Note No.39 dated 18.04.2008."

The respondent, however, contends that its RIO was within the purview of the TRAI Regulations.

On the aforementioned premises the following questions arise for our consideration:

(i) Whether the terms of the Reference Interconnect Offer (RIO) are consistent with the TRAI's 4th Amendment Regulation dated 03.07.2007 read with TRAI's Press Note dated 18.04.2008?

(ii) Whether the respondent ESPN is entitled to payment of subscription fee for the period June 2, 2008 on the basis of the entire subscriber base of Tata Sky (Petitioner) or to be on the basis of the subscribers registered in the subscriber management system who have opted for ESPN channel?

Before, however, we advert thereto, we may at the outset notice the events subsequent thereto. The respondent issued a communication to the petitioner herein on or about 9.6.2008 inter alia contending:-

(i) The petitioner is obliged to provide channels of the respondent to its subscribers in all its existing best-bouquets.

(ii) Even if the petitioner is providing the said channels free of cost to its subscribers, it was obliged to pay it therefor.

(iii) The guidelines issued by the petitioner on the ESPN channels amounted to tampering thereof and violative of its intellectual property rights (IPRs).

(iv) The petitioner replied to the said communication by its letter dated 17.6.2008 stating -

- ESPN has denied that you are compelling Tata Sky to place your channels in the entry tier pack (para 15) and that you were not seeking to interfere in our packaging rights (para 28).
- Tata Sky is free to offer three ESPN channels free of cost to its subscribers.
- Tata Sky has a right to communicate with its subscribers and keep them updated. Such Consumer Communication in no way violates any intellectual property rights as have been alleged.

Indisputably, however, pursuant to the Order issued by TRAI, the respondent withdrew this RIO with effect from 16.6.2008 to which TRAI by its communication dated 29.6.2008 informed the respondent that it could not do so till the new RIO was filed. TRAI issued a direction to the respondent on or about 24.6.2008 stating that clause C-1 of its RIO was contrary to the Interconnect (4th Amendment) Regulations and directed it to provide its channels / bouquets to DTH operators at rates equivalent to 50% of the non-CAS areas. The respondent, filed its fresh RIO and sent the same to the petitioner on or about 08/09 July, 2008. It is, however, not in dispute that the respondent preferred an appeal thereagainst before this Tribunal which was marked as Appeal No. 10 of 2008 impugning the direction dated 24.6.21008 and seeking a declaration that its RIO dated 8.7.2008 be held as legal and binding on all DTH operators. The said Appeal was disposed of by this Tribunal by an Order dated 13.5.2009 opining inter alia as under:-

> "In the light of our observation that the entire question of tariff for 'add on packages' should be re-considered, we feel it appropriate to direct the Respondent not to proceed further with any action in pursuance of the impugned direction. We would also like to make it clear that that this should not be read as our endorsement of that portion of the amended RIO dealing with 'add on packages'. This is evidently a grey area. Considering that we have held that the 50% tariff is not necessarily applicable to the 'add on packages', we leave the question of 'add on packages' for negotiation between the respective parties but only till such time as TRAI issues a Regulation in this regard. Needless to state, we hope that the Authority will, having already initiated the exercise of fixing the DTH tariff, complete the same within the next 4 months."

Although the petitioner was not a party therein, it preferred an appeal before the Supreme Court of India in May, 2009 which was dismissed by an Order dated 6.7.2009, stating as under:-

> **"**Heard learned counsel for the parties. Permission to file civil appeal is granted. We do not find any ground to interfere with the impugned order. The civil appeal is, accordingly, dismissed. Let Telecom Regulatory Authority of India decide the entire matter within a period of two months from the date of receipt/production of copy of this order without being influenced by any observation made in the impugned order."

The question which is required to be taken into consideration is as to whether in exercise of its jurisdiction under Section 14 of the Act can this Tribunal direct payment of the amounts said to be due to the respondent herein for the months of June, July, August and September, 2008 pursuant to and/or in furtherance of the order of the High Court of Delhi dated 6.6.2008, passed in CCP No. 347/2008 as also the Order dated 23.6.2008 passed by the said Court.

We may however notice that the aforementioned directions for payment sought for by the respondent herein for the aforementioned months, must be considered, having regard to the order passed by this Tribunal on or about 21.5.2008, the operative portion whereof reads thus:-

> "Accordingly, it is ordered that the terms of the RIO mentioned under head C-1 at page 25 of the paper book shall not be given effect to by respondent no. 1. Further, respondent No. 1 will not disconnect or disrupt supply of signals of the said three channels to the petitioner in the meanwhile subject to the petitioner continuing to pay as per the rates prescribed by respondent No. 1 mentioned in the RIO at page 25 of the paper book under heads 'A' and 'B'."

Indisputably, the respondent preferred a Writ Petition thereagainst before the Delhi High Court, inter alia, contending that this Court in its order dated 21.5.2008 has, for all intent and purport, granted the final relief to the petitioner and that too, without giving it an opportunity of being heard. It is in the aforementioned context, the High Court passed the following Order:-

> "Issue notice to the respondents to show cause as to why rule nisi be not issued. Mr. Vikas Mehta and Mr. Mansoor Ali appears on behalf of respondents No.1 and 2 respectively. They accept notice and waive service.
>
> Petitioner is aggrieved of the order dated 21.5.2008 which was an interim order passed by the Telecom Disputes Settlement and Appellate Tribunal, New Delhi. After some hearing, counsel for the respondent No. 2, on instructions, states that he would be satisfied if the ad interim directions of the nature sought by his clients in paragraph 32 of the petition filed before the Tribunal is granted.
>
> Under the circumstances, the impugned order dated 21.5.2008 is set aside and it is directed that pending final disposal of the respondent No.2's petition by the Tribunal, the petitioner shall not in any manner disconnect or disrupt the signals of

the three channels, i.e., ESPN, Star Sports and Star Cricket to Tata Sky Limited as were being provided by it upto 20.5.2008."

Whereas Mr. Ramji Srinivasan, the learned senior counsel appearing on behalf of the petitioner would submit that the said order having been passed at the instance of the respondent itself, no payment can be directed to be made; submission of Mr. Ganpathy is that it is the petitioner itself who had volunteered therefor and, thus, bound by it.

It is in the aforementioned context that we may notice the reliefs prayed for by the petitioner in this petition:

"(a) Hold that actions/communications issued by ESPN-STAR (including letter dated 25.4.2008 and 15.4.2008) regarding extension/renegotiation of Agreement are contrary to Telecommunication (Broadcasting & Cable Services) Interconnect (Fourth Amendment) Regulations, 2007.

(b) Hold that RIOs submitted by Respondent/ESPN-STAR with TRAI, posted on its website and forwarded to Tata Sky is contrary to Telecommunication (Broadcasting & Cable Services) Interconnect (Fourth Amendment) Regulations, 2007.

(c) Direct TRAI to implement Press Note 39 of 2008 issued on 18.4.2008.

(d) Direct the Respondent to enter into an interconnect agreement with the Petitioner while complying with the Interconnect Agreement in terms of Telecommunication(Broadcasting & Cable Services) Interconnect (Fourth

Amendment) Regulations, 2007 and with the principles laid down by the Hon'ble TDSAT in its various judgments and as has been reiterated by the TRAI is its Press Note No. 39 dated 18.4.2008."

It is also relevant to notice the interim prayer made by the petitioner:

"Ex parte ad-interim direction restraining the respondent ESPN-STAR from in any manner disconnecting or disrupting the signals of its three Channels, i.e., ESPN, Star Sports and Star Cricket to Tata Sky, presently being provided, pending hearing of the present Petition."

We have noticed heretobefore that according to the respondent, the petitioner was liable to be proceeded against for committing contempt of the Delhi High Court as it purported to have violated the said interim Order dated 6.6.2008.

It is not in controversy that the Delhi High Court recorded an undertaking made by the learned senior counsel appearing on behalf of the petitioner which reads as under:-

"After extensive arguments, Mr. Ramji Srinivasan, learned Senior Counsel for Respondents, on instructions, states that his clients, without prejudice to their rights and contentions, undertake to this Court as an Interim arrangement to restore all subscribers of Tata Sky to a pack which is inclusive of the three ESPN channels. He further undertakes that the status quo as prevalent on 20.5.2008 would be restored.

However, Mr. Ramji Srinivasan points out that this exercise shall be carried out in a phased manner due to technological constraints but not later than 12 days from today.

Parties also agree that they shall cooperate in the expeditious disposal of the main petition pending before the TDSAT.

The above undertakings are accepted by this Court and the parties are held bound by the same.

In view of the above, the present petition is not pressed by the Petitioners and is accordingly disposed of.

Copy of the order be given to the parties under the signature of Court Master."

However, on an application filed by the petitioner in the said contempt application during vacation the Delhi High Court in its Order dated 23.6.2008 recorded as under:-

"Mr. Ganpathy accepts notice.

With the consent of the counsel for the parties, the instant application is disposed of.

The learned counsel for the petitioner, Mr. Chandhiok submits that the application is premised on the basis that the earlier reference interconnect offer (in short RIO) dated 15.5.2008 was withdrawn by ESPN.

Mr. Ganpathy, learned counsel for the ESPN submits that the position as communicated by Tata Sky is not correct. He placed reliance on a letter dated 19.6.2008 issued by TRAI. This letter is not on record. He submits that by virtue of this letter, he has been prevented from withdrawing the RIO dated 15.5.2008 in view of TRAI's

opinion that it can only be done after a fresh RIO has been filed. Mr. Ganpathy further submits that no fresh RIO has been filed with the TRAI till date.

Per contra the learned counsel for Tata Sky Mr. Chandhiok submits that his difficulty arises on account of an order dated 6.6.2008 passed in CCP No. 347/2008 wherein Tata Sky has been impleaded as Respondent No. 2, and by virtue of the said order Tata Sky has undertaken to maintain status quo.

Both counsels, however, agree that the main petition bearing No. 104(C)/2008 is pending adjudication before the TDSAT.

In the above circumstances, I am of the view given the fact that the main petition bearing No. 104(C)/2008 is pending adjudication, the TDSAT may after considering the totality of facts and circumstances take a decision as to whether the Tata Sky ought to be bound down by the undertaking and if so, to what extent.

In view of the above, CM stands disposed of."

The matter was thereafter considered by this Tribunal on 24.7.2008 in the following terms:-

"I have heard learned counsel for the parties for quite some time. During the course of hearing, the counsel for both the parties have agreed to make an effort for an amicable settlement. However, for the time being following interim directions are issued:-

1. Without prejudice to its rights and contentions and subject to adjustments, the petitioner will pay to the respondent for the three channels upto 31.5.2008. This payment will be made within 10 days.

2. The petitioner is relieved of its undertaking provided to the High Court on 6.6.2008 that it will restore all subscribers of Tata Sky to a pack which is exclusive of the three ESPN channels and that status quo as prevalent on 20.5.2008 would be maintained.

Learned counsel appearing for TRAI alleges certain violations of directions issued by the TRAI on the part of Respondent No. 1, for which he submits that the Authority has issued a show cause notice on 22.7.2008. Let him place on record by way of an affidavit whatever he would like to point out as violation as per the stand of the TRAI.

Learned counsel appearing for Respondent No. 1 submits that payments for the months of June and July 2008 for the third channel should also be ordered to be made. Since I am allowing time to the parties to negotiate for an amicable settlement, I am not passing any order in respect thereto at this stage. This will be considered later on if there is no settlement.

The petitioner will be free to provide channels to its subscribers as per the Regulations. The petitioner will continue to pay for the channels availed of by the subscribers of the petitioner as per the applicable Regulations.

Learned counsel for Respondent No. 1 submits that the petitioner should pay for the two channels for the months of June and July 2008. Petitioner's objection is only qua third channel regarding which the order has been made. In reply, learned counsel for petitioner submits that since the petitioner was relaying these channels under Orders of the High Court, the petitioner did not charge anything from its subscribers for these two channels and therefore is not liable to pay anything to the respondent. Let this aspect be also considered in course of 'negotiations'. Failing settlement, this aspect will be decided by this Tribunal.

List the matter for hearing on 23.9.2008."

Although it may not be of much relevance, we may, however, notice that the parties at one stage intended to settle the matter amicably. However, no settlement had been arrived at. It is furthermore, of some significance to place on record that whereas pursuant to the Order of this Tribunal as also the High Court, the petitioner has also made payments from the months of October onwards, namely, that for non-CAS areas, the payment was to be made on 50% basis.

The principal contentions raised by Mr. Ramji Srinivasan, the learned senior counsel appearing on behalf of the petitioner, are as under:-

(i) The agreement having expired in the month of February, 2008 and the parties having not been on negotiating terms after 30.4.2008, no payment can be directed to be made in terms of the said agreement or otherwise.

(ii) The offending part of the offer made by the respondent being para 'C-1' of the RIO being contrary to or inconsistent with the Regulations issued by the TRAI, neither any undertaking could be given in contravention thereof nor in any case, the petitioner can be made liable which will be violative thereof.

(iii) The petitioner inter alia having given the option to it's viewers to opt for viewing the channels of the respondent on a-la'carte basis, the petitioner having not realised any money from its customers, in equity, also no direction therefor should be made against it, for payment for the months of June, July, August and September, 2008.

(iv) The petitioner having never agreed to broadcast the channels of the respondent, in terms of the offending clause '-1(c)' of the RIO and in any event, having questioned the validity thereof, in this Tribunal, the interim Orders

passed by the High Court and the undertaking of the petitioner recorded by the High Court in the aforementioned Order dated 6.6.2008 should be considered in terms of the said Regulations and not otherwise.

(v) Keeping in view the fact that only a few persons had opted for the channels of the respondent including 'Star Cricket', it would be wholly unjust if the petitioner is made to pay as if all the viewers had opted therefor.

Mr. Ganpathy, the learned senior counsel appearing on behalf of the respondent, on the other hand, would contend :-

(a) It is wrong to say that after 30.4.2008 no negotiations had been going on in between the parties as would appear from the correspondences between the parties.

(b) The petitioner and the respondent having been making offers and counter-offers and neither the parties having issued notices in terms of clauses 4.1 and 4.3 of the Regulations, it must be held that the parties were on negotiating terms till May, 2008.

(c) It is incorrect to say that the petitioner had been forced and/or coerced to make the aforementioned undertaking and in fact it had on both the occasions, namely, 6.6.2008 and 23.6.2008 volunteered therefor.

(d) The contempt petition was filed by the respondent as the petitioner deliberately and willfully made a wrong representation to its subscribers in relation to the add-on packages without seeking any reservation as is provided for in the Regulations.

(e) The petitioner has wrongly contended that the advertisement issued by the respondent was in any manner disparaging as it in its commercial interest was bound to give sufficient notice, appears that the petitioner in fact had taken out the ESPN bouquet and only making an offer in respect thereof to the viewers on charging a further sum of Rs. 45 apart from levying the charge of Rs. 300 in respect of the entire bouquet. The petitioner was bound

to show the respondent's channels to its viewers as in terms of the Regulations guiding the DTH operators, known as The Direct-to-Home Broadcasting Services (Standards of Quality of Service and Redressal of Grievances) Regulations, 2007, No. 8 of 2007, the relevant portion whereof is as under:

> **"9. No increase of subscription for direct to home service for six months.-**
>
> (1) No direct to home operator shall, increase the charges for a direct to home subscriber, or change the charges to the disadvantage of the direct to home subscriber for a minimum period of six months from the date of enrolment of the subscriber for such subscription package.
>
> (2) The provisions of sub-regulation (1) shall not prevent any direct to home operator to reduce the price of the subscription package within the period of six months referred to in that sub-regulation to the advantage of direct to home subscriber.
>
> (3) Nothing contained in sub-regulation (1) shall prevent any direct to home subscriber to opt, during the period of six months referred to in that subregulation, for any other subscription package offered by such direct to home operator or any other direct to home operator."

Our attention in this behalf has also been drawn to the fact that a consumer group had made complaints against the petitioner herein in relation whereto, the respondent in its rejoinder had stated as under:-

> "11. The contents of paragraph 11 as stated are denied and contents of paragraph 4(c) of the Affidavit are repeated and reiterated. There is no question of payment being made by the Petitioner to represent those subscribers who allegedly willingly opted for Respondent's channels. It would also not be out of place to mention that Tata Sky

> Limited in Petition No. 150(C) of 2008 had made a statement before this Tribunal that they would not change the terms of service for a period of six months and consequent thereto had shown the Respondent's channel to all their subscribers though in the present case they fraudulently claim that they retransmitted the Respondent's channels only on account of the contempt petition."

Indisputably, the agreement between the parties expired in February, 2008. In terms of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation, 2004 (Amended in 2006) if the parties had been on negotiating terms, the agreement will be deemed to be valid for a period of three months more from the date of expiry thereof.

It is also not in controversy that the parties herein did not serve any notice of 21 days on the other expressing its intention to discontinue giving and/or taking of the signals of the channel of the respondent nor issued any public notice in terms of Clause 4.3 thereof. It is in the aforementioned context it is required to consider as to whether the parties had been on negotiating terms after 30.4.2008.

We may notice that the respondent by its letter dated 25.4.2008 stated as under:-

> "We value Tata Sky as an important business partner. Hence, while the negotiations for the renewal/execution of a fresh Agreement were going on, we had, at the request of your team, extended our service till April 30, 2008. However, we regret that despite this extension and persistent follow up, we did not receive any positive response from Tata Sky on the issue until our meeting mentioned above.

> Nonetheless, we are keen to support you in meeting your stated goal of aggressive subscriber growth at reduced consumer prices and your desire for continuation of a fixed fee deal with us."

It was further observed:

> "Considering that the extension of our service is only till April 30, 2008, we request your prompt response to close the matter in time, so that your Tata Sky subscribers are not put to any inconvenience."

From the said letter, it is evident that the arrangement between the parties continued. Yet again, by its letter dated 15.5.2008, the respondent made an offer to the petitioner in the following terms:-

> "Accordingly, you now have a choice between our offer as stated in the RIO and our offer dated April 25, 2008. You are requested to consider both the offers and let us know your choice by or before May 20, 2008, failing which we will proceed as per TRAI's applicable regulation."

The aforementioned para makes it clear that the two offers were made to the petitioner and it was required to accept one of them on or before 20.5.2008.

The petitioner, however, by its letter dated 25.4.2006, stated as under:-

> "5. In this situation, we are agreeable to carry your channels beyond April 30, 2008, on the basis of the amended Interconnect Regulations, as have been notified by the TRAI with their position.

6. At the same time, it is suggested that both commercial teams may explore if there are any other meeting options available which enables the parties to sign a negotiated deal in this respect, to go beyond April 30th, 2008."

We may notice that whereas the petitioner stated that beyond 30.4.2008, they would be proceeding on the basis of the Interconnect Regulations but it did not close its doors completely as another meeting was sought for so that the parties may sign a negotiated deal in that behalf to go beyond 30.4.2008. It is, therefore, difficult to accept that the parties had closed their doors beyond 30.4.2008. We may furthermore notice that the petitioner even by its letter dated 30.4.2008 gave three options which are as under:-

"Keeping the above background in view, we make the following offers to you which are, in alternate, to each other:

1. We can carry your 3 channels i.e. ESPN, STAR Sports and STAR Cricket on the basis of guidelines issued by the TRAI, whereby the same are to be offered at a-la-carte rates by broadcasters while the prices of the the pay channels so offered will follow the principles laid down by Hon. TDSAT in its judgment dated 31.3.2007 in petition No. 189(C) of 2006. Applying the above principle, the possible rates for your 3 channels would be Rs. 39/- per subscriber per month. We expect that a suitable discount will be offered since the three channels will be bought collectively.
2. We can pay you @ Rs. 39/- per subscriber per month while agreeing to put your 3 channels in our existing base packs, however we shall have the right as provided under 13.2A.10 of the Regulation.
3. We are agreeable to pay you a fixed fee of @ Rs. 35 crores for initial 12 months and Rs. 40 crores for the following 12 months."

The said letter also makes it abundantly clear that at the end of the month of April, three options were given and, thus, it is difficult to hold that the negotiations between the parties came to an end.

Our attention, however, has been drawn to an e-mail dated 9.5.2009 in terms whereof the petitioner informed the respondent that they had been proceeding with option-1. The petitioner yet again by its letter dated 16.5.2008 stated as under:-

> "This has reference to your letter dated May 15, 2008. We also refer to your earlier RIO dated 28.2.2008 and note that there are significant variations in your revised RIO, many of which are contrary to the provisions of the Telecommunication (Broadcasting and Cable Services) Interconnection (Fourth Amendment) Regulation, 2007 (hereinafter "**Regulations"**) and also to the Press Note No. 39 of 2008 issued by the TRAI in this respect.
>
> In view of the above and in order to act in the consumers' interest, we shall carry your 3 channels i.e. ESPN, STAR Sports & STAR Cricket on the basis of principles enunciated in the **Regulations**, read with the advisory of TRAI, as an ***interim measure & without Prejudice,*** the same will be offered to our subscribers, effective June 1, 2008, at their option.
>
> **We hereby expressly disagree with the terms and conditions of your RIO dated May 15, 2008 and the rates stated therein.**
>
> Our key objections to the terms and conditions are, as per **attached Annexure,** and we hope you would make the rates subject to the advisory of the TRAI."

The aforementioned letter also clearly goes to show that they were ready to carry on with the old arrangements till the month of June, 2008.

The petitioner, as noticed hereinbefore, in terms of Regulation 8.1 was required to serve a notice upon the respondent if they were unwilling to show all the three channels. Our attention, however, has been drawn by Mr. Ramji Srinivasan to a letter of the petitioner dated 24.10.2008 wherein it has been stated as under:-

> "You are fully aware that for the months of **June to September, 2008, we have provided the channels free of cost to the existing subscribers and have not recovered anything from them.**
>
> In the light of the meetings and discussions so far, we expected that you would bill us on the basis of the subscribers who had opted for the channels during the said months and the updated details of the same are attached for the months of **June, July, August and September, 2008**."

It is on the aforementioned premise that the orders of the High Court of Delhi are required to be considered.

From a perusal of the order dated 30.5.2008 passed by the Delhi High Court it is evident that the petitioner itself agreed to the modification of this Tribunal's Order dated 21.5.2008.

Para 32 of the petition, wherein the relief has been claimed for by the petitioner before us assumes significance in this regard. The petitioner has filed the petition, inter alia, questioning the right of the respondent to discontinue supply of signals of its channels. It did not terminate the agreement. Indisputably, whether in terms of the regulations or otherwise it had continued to show the channels of the respondent to all its viewers. What was the position, therefore, in fact, as on the date of passing of

the interim order dated 21.10.2008, is the question. A bare perusal of the prayer made by the petitioner for grant of an ad-interim directions would clearly go to show that the respondent was restrained from disconnecting or in any manner, disrupting the signals of its three channels which were being provided theretobefore. The petitioner in its petition and/or in its correspondences, never contended that it had discontinued to take supply of all the three channels. It did not even make an offer to its subscribers in that behalf. It may be true that in its correspondences with the respondent, it had been contending that it was ready and agreeable to accept the offer which would be in consonance with the Regulations issued by the TRAI, but it is not the case of the petitioner that it had discontinued re-transmission of the signals of the channels of the respondent. It is in the aforementioned context that we must also interpret the order dated 6.6.2008. The said order was passed at the instance of the petitioner itself.

In absence of any material placed before the High Court, either prior to passing of the said order or even thereafter, in our considered view, it would be wholly improper for us to even take note of the submissions made by Mr.Srinivasan that the petitioner was forced to give the aforementioned undertaking.

The petitioner is a company. It has millions of viewers. It is a public limited company. It must be having its own legal advisors. It, in all its legal proceedings, had been undertaking negotiations. The petitioner, it is expected, is aware of the consequences of an undertaking. It has not been disputed before us nor could it do so in law that a party making an undertaking before a Superior Court would be bound thereby. It is also beyond any cavil that the consequences of such an undertaking must be held to have been understood by the party making it. It is furthermore apparent from the records of this case that prior to passing of the order dated 21.3.2008 by this Tribunal, the old arrangement had been continuing. It is, therefore, difficult for us to accept the contention of Mr.Srinivasan that the negotiations having come to an end in April, 2008, there was neither any

contract nor any continuing arrangement between the parties after 30.4.2008. The matter might have been different, had the High Court considered that aspect of the matter on such pleas raised by the petitioner. This Tribunal did so in its order dated 21.5.2008 in as much as it specifically referred to the head 'C-1' of the RIO. The offending part 'C-1' of the said RIO reads thus:-

> "1. DTH Operator agrees to keep the all the channels/services i.e. ESPN, STAR Sports and STAR Cricket (hereinafter referred to as the "Channels" or as "Services") in the entry-level pay tier."

The said order, however, stood modified in terms of the Order of the High Court dated 30.5.2008. The petitioner was the respondent No. 2 therein. It made a specific statement that an interim prayer made by it in para 32 will serve its purpose. It did so evidently on legal advice. Para 32 of the petition speaks of an interim order on prohibitory terms. It speaks of all the three channels. It does not speak of supply of any signals in terms of the Regulations or otherwise.

It is in the aforementioned situation, that the respondent herein was asked not to disconnect or disrupt the signals of the said three channels which were specified therein, namely, ESPN, Star Sports and Star Cricket. The petitioner's case, thus, is that the old arrangement continued till 30.4.2008. In absence of any other material brought on record by the petitioner that the old arrangement came to an end or the parties entered into a new arrangement for supply of signals of the channels of the respondent, it must be presumed that the commercial terms terms of the agreement continued. Apart from the fact that even in terms of the Regulations, the parties being on negotiating terms, the agreement entered into by and between them, would be deemed to be valid till the expiry of 90 days, i.e., up to May, 2008. We are, thus, satisfied that the said arrangements continued up to 20.5.2008.

It is, furthermore, in our considered view, wrong to state that the said order was obtained by the respondent of it is own. The said order might have been passed in the Writ Petition filed by the respondent but in view of the well-settled principle of law that an order is required to be considered in its entirety and in the backdrop of events in which it was passed, there cannot be any doubt whatsoever that it was done at the instance of the petitioner and not at the instance of the respondent.

We may now consider the effect of the order dated 6.6.2008. We are not called upon nor are we required to consider as to whether the petitioner was faced with a situation in which it had no other option but to give an aforementioned undertaking. We have noticed hereinbefore that no such case was ever made out before the High Court. Even otherwise, it is not possible for this Tribunal to go beyond the said order and construe the same in the light of the suggestions made by the learned counsel. If the petitioner has made an undertaking, it must face the consequences therefor. It, however, if aggrieved by the said order, could have preferred an appeal thereagainst. It could also have filed an appropriate application before the High Court itself for modification and/or variation of the said order. It did not choose to do so.

This Tribunal is bound by the said order. It cannot construe the said order in a manner which for all intent and purport would nullify the effect thereof. The petitioner, admittedly, had been showing all the three channels of the respondent to all its viewers. On what terms it did so, is not the concern of this Tribunal. Ex-facie, it is not even wholly inequitable. The parties entered into a commercial arrangement. The respondent allowed the petitioner to transmit its channels for consideration. The respondent did so on commercial terms. It is, therefore, entitled to be monetarily compensated therefor.

It is furthermore not entirely correct to contend that the undertaking was contrary to the Regulations. The validity or otherwise of the undertaking is not in question before us. Moreover, the Regulations No.13.2A.11 dated 3.9.2007 read as

under:-

> "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."

It is true that the said Press Note was issued in terms of Orders of this Tribunal in ASC Enterprises v. Star India Private Ltd (Petition No. 136(C) of 2006), wherein it was held as under:-

> "Having understood the technology and functioning of DTH system which is not limited to transmission in a smaller area, we feel that this term being imposed by the respondent is not justified and neither in accordance with regulation and amounts to denial of request of the petitioner for supply of signals. We, therefore, direct that signals be given to the petitioner who will pay on the exact number of consumers, list of which will be submitted from the subscriber management system to the respondent every month. This will be applicable to all DTH operators entering into commercial deals with broadcasters."

The said order was passed inter-parties.

In Tata Sky vs. Zee Turner being Petition No.189(C) of 2006 disposed of on 31.08.2007 observed as under:

"It appears to us that reference to the 'must provide' provision contained in Regulation 3.2 was made by the learned counsel for respondent in order to build an argument for a 'must carry' provision which he wants to read in clause 7.6 of the DTH Licence granted in favour of the petitioner by the Ministry of Information & Broadcasting, Government of India. Clause 7.6 provides:

> "the Licensor shall provide access to various content providers/channels on a non-discriminatory basis".

On the basis of this clause it is contented that the Licensee has to carry all the channels of a broadcaster on non-discriminatory basis. This according to learned counsel for respondent means that a distributor or a DTH operator like the petitioner must carry all the channels of a broadcaster. It is not disputed that there is no specific provision in the Regulations for 'must carry' concept. We are unable to read a 'must carry' provision in clause 7.6. A plain reading of clause 7.6 suggests that the obligation is cast on a Licensee to provide access to various content providers/channels on a nondiscriminatory basis. As per this clause, therefore, the Licensee is not the seeker of channels. The broadcasters or the content providers have to approach the Licensee for providing access on its platform for their channels and then the Licensee is required to do so on a non-discriminatory basis. This clause also does not say that a Licensee must carry all the channels of a particular content provider. Therefore, we are unable to see how an argument that a Licensee must carry all the channels of a broadcaster can be, advanced on the basis of the provision contained in clause 7.6 of the Licence. Further, it must be noted that the interpretation suggested by the learned counsel for the respondent in clause 7.6 of the Licence is totally irrational because it overlooks the fact that it will choke the DTH operator if it has to carry all the channels of every broadcaster. A DTH

operator naturally will provide access to every broadcaster because every broadcaster is supposed to have some popular channels which a DTH operator is likely to include on its platform. If a DTH operator has to take all the channels of every broadcaster, it may not be physically possible to do so. Moreover, if every channel has to be taken it means that it will have to be paid for. This will increase the cost for the DTH operator. Ultimately, the cost will get passed on to the consumer. If DTH becomes expensive consumers will keep away from it. It will not be able to compete with CAS or cable. Thus, such an interpretation of clause 7.6 may be anti consumer.

The learned counsel for respondent tried to buttress his argument about the 'must carry' provision which he wants to read in clause 7.6, by stating that even according to the TRAI, clause 7.6 of the License contains 'must carry' provision. We are unable to accept this submission because in the first instance TRAI does not say so. TRAI has simply reproduced clause 7.6 without giving its own interpretation for it. In fact, in the affidavit filed by the TRAI in these proceedings it is stated as under:

> "The Interconnection Regulation of December, 2004 do not have any provision for compulsory carriage (also refer to 'must carry' provision) by any operator including DTH operators of any channels by the broadcasters".

We have held that the parties negotiated only for bouquets 1 and 2 having 19 channels at a price of Rs.83.85. The petitioner is willing to take them all. Therefore, the concepts 'must provide' and 'must carry' do not really arise in this case. Secondly, even if the TRAI was to say specifically what the learned counsel for respondent is suggesting,

such an interpretation will not be binding on us. This entire argument is totally irrelevant besides being misconceived.

At this stage we would like to place on record that DTH is an emerging alternative to Cable TV. It is modern technology. In order to compete with cable it has to operate on a level playing field as far as possible. Competition has to be encouraged because it is in consumer interest. The words 'popular content' become relevant and important in this context. The judgment of TDSAT in ASC vs. Star (supra) takes strength from these words contained in the Regulations. Therefore, it will need consideration in an appropriate case as to how far we can ignore these words by accepting an interpretation advanced by the learned counsel for the respondent that DTH operator must carry the entire content or bundle of channels which a broadcaster has on its DTH platform. When it comes to them, the respondents do not follow this. Respondent 4 is a DTH operator within the umbrella of the respondents Zee group. It was pointed out to us that the said respondent discontinued a particular single channel only on the ground that it had no capacity to carry it even though it is supposed to be a popular channel. A DTH operator has all India operation while the operation of Cable TV is generally localised. The DTH operator being all India operator has to cater to viewers taste all over the country, keeping in view diversity of the language, diversity in viewership habits and tastes. This is not the case with a Cable Operator. As it is a DTH operator will have to carry so many extra channels to cater to a variety of viewers all over the country. Efforts should, therefore, be to give a level playing field to a DTH operator as far as possible so that he can compete with other mediums."

We are, however, not oblivious of the fact that in the case of the respondent itself, this Tribunal by its order dated 13.05.2009 stated as under:-

> "18. We have carefully considered the arguments of both the learned counsels. As per clause 13.2A.11, it is mandatory on the part of the broadcaster to offer pay channels on a-la-carte basis to DTH operators and such offering shall not prevent the broadcaster from offering such pay channels additionally in the form of bouquets. It is further provided that the broadcaster shall directly or indirectly not compel any DTH operator to offer the entire bouquet or bouquets offered by the broadcaster to such operator in any package or scheme being offered by such DTH operator to its subscribers. This regulation does not appear to have been violated by the Appellant because there is no compulsion imposed by the Appellant to take the entire bouquet or bouquets. The fact that the RIO envisages the placement of all channels and services in the entry level tier because of attracting the viewership on the basis of the total subscriber base of the DTH operator and to offer a volume based discount as has been offered in the two cases decided by this Tribunal and referred to the directions issued by the Respondent. It is to be examined, whether the Clause 13.2A.11 envisages any embargo on placement of channels in a particular tier. The plea of the Appellant is that the 50% price envisaged in the Tata Sky and ASC Enterprises cases is for the viewership of the channels on being placed in the Basic Service Tier. The main thrust of 13.2A.11 is that once the pay channels are obtained on a-la-carte basis by the DTH operator, the broadcaster cannot prevent the offering of such pay channel in the form of bouquets. In case the broadcaster obtains all the channels of a bouquet by paying a-la-carte rate for each channel, protection has been offered in Clause 13.2A.13. This clause mentions that in case the DTH operators packages the channels comprised in such opted bouquet in a manner resulting in different subscriber

base for different channels comprised in such opted bouquet, then, the payment, to the broadcaster for such entire opted bouquet by the DTH operator, shall be calculated on the basis of the subscriber base for the channel which has the higher subscriber base amongst the channels comprised in that bouquet. It is clear from this clause that the viewership is a very important consideration for tariff fixation for DTH operators. This was also decided by us in the case of Sun Direct TV Pvt. Ltd. Vs MSM Discovery Pvt. Ltd (62(C) of 2008). The petitioner in this case was entitled to receive channel/channels of his choice from the Respondent and position them in the manner of his choice but at the same time it is obliged to pay to the broadcaster as per Clause 13.2A.13.

19. The Regulation 13.2A.12 imposes limitations on rates for pay channels while Regulation 13.2A.13 provides protection to the broadcasters where the DTH operator repackages the bouquets obtained from the broadcasters and it requires that the broadcasters will be paid for the entire bouquet opted on the basis of the subscriber base for the channel which has the highest subscriber base amongst the channels in that bouquet. Since the Respondent has pleaded that this regulation has not been questioned by the Appellant, and, therefore, the Clause 13.3 empowers the Respondent to intervene by modifying the RIO submitted by the broadcasters, if it is against the regulations or if it is necessary so to do, in the interest of service provider or consumers or to promote and ensure orderly growth of broadcasting and cable sectors. The Respondent has pleaded that in view of this Regulation 13.3, the direction has been properly issued."

While, however, holding so, this Court, upon referring to the case of ASC Vs. Star(Supra), opined:-

"21. There remains the question whether the impugned direction itself should be pursued. We did not find any impropriety or irregularity in the direction issued by the Respondent. It had done so in the bona fide exercise of its powers and keeping in view the two judgements in the ASC Enterprises and Tata sky cases. As observed by us above, the directions in those two cases were keeping the general situation in mind and also as an interim measure. Nevertheless, In the light of our observation that the entire question of tariff for 'add on packages' should be re-considered, we feel it appropriate to direct the Respondent not to proceed further with any action in pursuance of the impugned direction. We would also like to make it clear that this should not be read as our endorsement of that portion of the amended RIO dealing with 'add on packages'. This is evidently a grey area. Considering that we have held that the 50% tariff is not necessarily applicable to the 'add on packages', we leave the question of 'add on packages' for negotiation between the respective parties but only till such time as TRAI issues a Regulation in this regard. Needless to state, we hope that the Authority will, having already initiated the exercise of fixing the DTH tariff, complete the same within the next 4 months."

We are, however, informed at the bar that the matter is pending consideration before the Supreme Court of India. We are, however, not concerned therewith. We have not been called upon to consider the validity or otherwise of the offer made by the respondent to the petitioner. We, in this petition, are called upon to consider the effect of the orders passed by this Tribunal vis-à-vis those of the High Court of Delhi dated 30.5.2008, 6.6.2008 and 23.6.2008.

This Tribunal, as noticed hereinbefore, in its order dated 24th July, 2008 relieved the petitioner from its undertaking with a prospective effect. Even otherwise, it could not have relieved the petitioner from its undertaking in totality. The respondent was directed to make payments up to 31.5.2008. The said order has been complied with. The petitioner, as noticed hereinbefore, has

also discharged its obligations to pay to the respondent in terms of the regulations of the TRAI from October, 2008 onwards. We, therefore, fail to see any reason that the petitioner, being bound by the undertaking, in terms whereof, the parties were required to maintain status quo ante as prevailing on 20.5.2008, would not be bound to make payments for the four months in question.

Whether the petitioner had realized the subscription fee from its viewers or not is its own concern. The respondent is a pay channel. If by reason of its own action and having volunteered therefor, it had invited an Order from the High Court, we see no reason as to why they would not be liable to make payments. Adjustment of equity or an order based on equitable principles could have fallen for our consideration provided there was any scope therefor. It is not a case where adjustment of any equity between the parties is required.

The transaction between the parties is a commercial one and such commercial arrangement should be given due weight unless there exists any sufficient or cogent reason therefor.

Before us, Mr. Ganpathy would contend that the petitioner has fudged its record simply in relation to the number of its viewers. The said contention is denied or disputed by the petitioner. We, as at present advised, need not go into the aforementioned question. The records of the case categorically show that the channel was being shown by the petitioner to all its viewers. The petitioner from the very beginning had sought for an injunction restraining the respondent from disconnecting or disrupting its supply. The status quo as on 20.5.2008 had all along been maintained. The petitioner has accepted that the said arrangement never discontinued. The respondent did not expressly or by necessary implication, asked the petitioner to

retransmit the channels free for the said purpose. Even no permission was taken from it. The order dated 6.6.2008 itself shows that the petitioner agreed to restore the supply to all its subscribers. It is bound thereby.

For the reasons aforementioned, we direct the petitioner to make all due payments to the respondent for the months of June, July, August and September, 2008.

……J
(S.B. Sinha)
Chairperson

…….....
(G. D. Gaiha)
Member

…….....
(P.K. Rastogi)
Member