

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

DATED 28th MAY, 2010

Petition No. 153(C) of 2009

Asianet Satellite Communication Ltd. Petitioner

Vs.

ESPN Software India Pvt. 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

For Petitioner : Mr. C.S. Vaidyanathan, Sr. Advocate
Mr. Ramji Srinivasan, Sr. Advocate
Ms. Shirin Khajuria
Ms. Savita Sinha Advocate

For Respondent : Mr. N. Ganpathy, Advocate

ORDER

G.D. Gaiha, Member

1. The petitioner is a Multi Service Operator and the respondent is a broadcaster.

The petitioner, for obtaining signals of the channels run by the respondent, entered into agreements with it, the details whereof are as under:

“MOU dated 18th December 2003 up to Rs.85 Lakhs @ ESS pricing of Rs.39.70/- for (ESPN and Star Sports Services).

MOU dated 08th March 2005 up to Rs.67 Lakhs @ ESS pricing of Rs.42.48/- for (ESPN and Star Sports Services).

MOU dated 17th June 2006 up to Rs.67 Lakhs @ ESS pricing of Rs.42.48/- for (ESPN and Star Sports Services).

MOU dated 04th July 2007 from Rs.80 Lakhs to Rs.1.10 Crores @ ESS pricing of Rs.42.48/- for ESPN and Star Sports Service and @ Rs.28/- for Star Cricket Services.

MOU dated 09th July 2008 for Rs.1.10 Crores + service tax @ ESS pricing of Rs.44.17/- for ESPN and Star Sports Service and @ Rs.28/- for Star Cricket Services.”

It is accepted that in the year 2008-09, the total income of the petitioner from cable operation was Rs.129.19 crores and the total payment made to the channels as per its balance sheet was Rs.35.79 crores. An annual growth of approx.40% is in the subscription amount from Rs. 80 lakhs to Rs. 1.1 crores. It is also accepted that its list of subscribers runs into 5000 pages.

2. The petition has been filed by the petitioner company to set aside the disconnection notice dated 18.06.2009 issued by the respondent followed by a public notice published in a local newspaper threatening to disconnect its signals w.e.f. 9.7.2009. The ground invoked by the respondent therefor is the non-payment of outstanding dues and after the expiry of the present agreement not showing any interest in the renewal of the same as per Clause 8.1.

- 3.** The main questions, which fall for our determination, are:
- i. Whether the Respondent is providing signals to the Petitioner on discriminatory terms.
 - ii. What should be the monthly subscription fee payable by the Petitioner to the Respondent for the year 2009-10 and subsequent period, by applying the principles of non-discrimination with other Cable Operators in the State of Kerala, as mandated by The Telecommunication Services (Broadcasting and Cable Services Interconnection) Regulation of 2004, by taking into account the correct market share of the Petitioner.
- 4.** The points of disputes as per contentions of the petitioner are as under :-
- i. The Respondent fixed subscription fee for the previous year, i.e. 2008-09 at Rs. 110 lacs per month (with a further discount of Rs 4 lacs per month for the period of the MOU and an additional discount of Rs 16 lacs w.e.f. Dec 2008 and admittedly accepted Rs. 90 lacs p.m. for the period of the Agreement) based upon its assumption that Asianet has 76% of the Kerala C & S market and hence, the fees was at parity with other operators in the State. The learned counsel for petitioner would contend that it has about 20% of the Kerala market, which was communicated repeatedly and hence, there is no parity and the subscription fee should be fixed at a much lesser amount for the period after the expiry of the Agreement i.e. w.e.f. 1st March 2009. (Petitioner's share being 1.1 crore vis-à-vis 62 lakhs from rest of Kerala).
 - ii. The total admitted C&S homes in Kerala in 2009, in the relevant year, were 40 lacs.
 - iii. Petitioner has a direct subscriber base of 6.67 lacs and its link connectivity is 1.67 lacs i.e. total subscriber base of 8.34 lacs, which is relevant for the year 2009-10.

- iv. The cable operators other than the Petitioner have accordingly, a subscriber base of 31.5 lacs (approx)
 - v. The Petitioner, accordingly, does not have 76% of the Kerala market as alleged by the Respondent, which was the basis for fixing Rs. 1.10 crores as the monthly subscription fee for year 2008-09 and demand of Rs. 1.60 crores for subsequent year 2009-10.

- 5.** The learned counsel for the petitioner has urged that since the petitioner has in fact only 20% market share i.e. about 8.5 lacs subscribers and accordingly it is entitled to a proportionate reduced fixation of subscription fee. For a universe of 31.5 lacs of subscribers for the rest of the Kerala the declared subscriber base is admittedly 1.11 lacs and hence the percentage of declaration is only 3.52%. The percentage of declaration is 19 to 20% in regard to the petitioner is much higher and is highly discriminatory in nature because the petitioner is required to pay a sum of Rs. 1.1 crore for declared subscriber base 1.55 lacs @ Rs. 72.17 per subscriber (which comes to about 19% of 8.5 lacs),

The learned counsel for petitioner would strongly rely upon the fact that the interconnection Regulations and its provisions as to non-discrimination in a Non-CAS market has been construed and applied by this Hon'ble Tribunal in the similar case of Star India Pvt. Ltd vs. Asianet Satellite Communications Ltd., E.A. No.3 (C) of 2006 in Petition No. 39(c) of 2004, (Reported at page 62 @ para 8 page 86 of Cable Petitions of 2004 published by TDSAT). In the aforesaid case where the issue of discrimination was raised, it was held that the principle of parity requires that similarly placed Cable operators be charged on similar basis by the Broadcaster. Further, Parity/non-discrimination was held to have two aspects:

- (i) parity with regard to the rate per subscriber and also
- (ii) parity as to the percentage the declared subscriber base bears to the Universe/actual subscriber base of the Cable operator.

6. We would proceed in this matter on the following :

- (i) Parity as a basis for determining the declared subscriber base and the subscription fee is not disputed.
- (ii) The total cable and satellite homes in Kerala for the year 2009 were Rs. 40 lacs.
- (iii) The Petitioner is both an LCO and an MSO since it has direct, last mile connectivity and also link operators.
- (iv) There are 4,000 cable operators in Kerala.
- (v) The Petitioner has 912 operators. (This is admitted as on 25.11.2008. However, it is the contention of the Petitioner that 80 link operators have left since then.)
- (vi) The subscription fees from the rest of Kerala operators is Rs. 7.44 crores for the year 2008-09 i.e. Rs. 62 lacs p.m.
- (vii) The subscription fee collected from the Petitioner for the last agreement period 2008-09 is Rs. 10.95 crores. (This is as per the statement of the Respondent's witness in cross-examination. However, as per the Petitioner a marginally lesser sum than Rs.10.80 crores, i.e. @ Rs. 90 lacs p.m. more or less has been paid by them for the aforesaid period.)

7. The learned counsel for the petitioner would contend that the number of subscribers' base is always a negotiated figure which is also known as declared subscriber base and is lesser than the actual subscriber base because the subscribers viewing, or desiring to view a channel of a broadcaster, cannot be exactly predicted. Also not all subscribers view all channels and further, not all channels shall be the respondent's channel which have only sports

content and does not have any other attractive programmes throughout the year so that it can be viewed by all the subscribers of a cable operator. Accordingly every cable operator pays to the broadcaster only for a percentage of its total subscriber base/universe and this subscriber base depends upon the popularity of the channel particularly for that region. In case the total universe of the subscriber is to be paid by the distributor of the channel, the total monthly charges for each subscriber will range upto Rs. 700/- per subscriber per month which is much higher than the higher ceiling for a type-A city as per Regulation i.e. Rs. 268 per month. The only safeguard which has been provided in the Regulation in non-CAS areas is that the broadcaster shall provide TV channels on non-discriminatory and reasonable terms.

- 8.** The learned counsel for the petitioner would further contend that to arrive at the total amount to be paid to the broadcaster as subscription fee, the following process is adopted:
- (i) the rate per subscriber as declared to the TRAI, and,
 - (ii) the subscriber base for which the cable operator is to be charged i.e. 'declared subscriber' base or the negotiated subscriber base. On multiplying both, we get the subscription fee payable.
- 9.** The learned counsel would strongly rely upon the following steps for calculating the subscription amount.
- (i) Universe/total C&S Homes in Kerala;
 - (ii) portion of Universe/total C & S Homes of Kerala covered by other MSO/CO i.e. other than Asianet, hereinafter referred to as Rest of Kerala operators (ROK),
 - (iii) The Total subscription fee collected by the Respondent from the Rest of Kerala operators (ROK),
 - (iv) the rate per subscriber,
 - (v) The declared subscriber base of other MSO/Cable Operators to the Respondent
 - (vi) The percentage the declared subscriber base which it bears to its Universe (i.e. declared subscriber at (V) above divided by Universe of ROK at (II) above multiplied by 100)
 - (vii) The Universe/total subscriber base of Petitioner-Asianet Satellite Communications.

- (viii) The Declared subscriber base for which Asianet is liable to pay, which can be determined by applying the above percentage of declared subscriber base derived at (VI) to the Universe of Petitioner-Company.
- (ix) Monthly Subscription fee payable by Petitioner i.e. rate at (IV) multiplied by the declared subscriber base as determined above at serial no.VIII

10. The learned counsel further submitted that in what way the discrimination affected the petitioner in paying much more than appropriate amount to the respondent.

- i) **Discrimination as to rate per subscriber:-** Admittedly the rate charged from the Petitioner for the agreement period 2008-09 was Rs. 72.17 per subscriber. However, it emerges from the cross-examination of the Respondent's witness that since the total monthly collection from rest of Kerala operators was Rs. 62 lacs and their declared subscriber base was 1.1 lacs, the rate charged per subscriber for the rest of Kerala operators was only Rs. 55.
- ii) **Discrimination as to percentage of declaration:-** If the subscriber base of the Petitioner is held to be Rs.8.5 lacs as contended by it, the subscriber base of rest of Kerala in a total universe of Kerala C & S homes of 40 lacs would be 31.5 lacs. Hence, taking the declared base as 1.1 lac subscribers as stated by the Respondent during cross-examination(though the Petitioner denies the same and contends that the declared subscriber base of the other Kerala operators is only 85,000), the percentage of its declaration is $1.1 \text{ lacs} / 31.5 \text{ lacs} \times 100 = 3.49\%$. However, for the Petitioner the Respondent is admittedly charging for 1.55 lac subscribers though its universe is only 8.5 lacs. This is a declaration of about 19%.
- iii) **Discrimination in the subscription fees charged from the Petitioner based upon the market share of the Petitioner:-** The Respondent claims vide its letter dated 16.12.08 that there is parity since the market share of the Petitioner is 76%. In fact, this is reiterated in the minutes of the meeting held on 14.07.2009, submitted on

25.07.09. However, the Petitioner has shown that it has only 20% of the market. Accordingly, based on its correct share the Petitioner is entitled to a proportionate reduction in the subscription fee demanded from it.

11. The learned counsel would further contend that there is clinching evidence to support the claim of % of market share being 20% on the following grounds:

- i) As per the Petitioner-Company's **Auditors certificate** dated 25.11.09 the total subscriber base of the company, including its link operators, as on 31.9.09 was 8.31 lacs.
- ii) **Annual report** for the year 2007-08 shows that its subscriber base as on 31.3.08 was 1.72 lacs subscriber/secondary subscribers and 6.04 lacs primary/direct subscribers, totalling 7.76 lacs subscribers. This also shows the growth in its subscriber base from 5.48 lacs in 2003 to 5.44 lacs in 2004, to 6.20 lacs in 2005 to 6.94 lacs in 2006 to 7.35 lacs in 2007.
- iii) The annual report for the year 2008-09 also shows that the direct subscriber base for the year ending 31.03.09 was 6.58 lacs.
- iv) The link subscriber base of the Petitioner at the time of filing the petition was about 1.69 lacs as is evident from the billing done for the month of June 2009. So also the direct subscribers were about 6.67 lacs in May, 2009 as is evident from the soft copy of the total subscribers filed before the Hon'ble Tribunal.
- v) The breakup of Petitioner's subscribers, both direct and link subscribers, in the various Districts of Kerala, is substantiated by inter company communication of Regional Heads.
- vi) Auditors Certificate stating the Subscriber base as on 25th Mar 2007 was sent to the Respondents vide letter dated 31st May 2007 showing total sub base of 7.09 lacs. The Respondent did not dispute this.

- vii) The Petitioner does not have any subscriber base in Idduki and Wayand District, though the Respondent has shown the Petitioner to have connectivity through link operators in these areas.
- viii) Infact since May 2009, the subscriber base of the Petitioner has fallen from 8.5 lakh subscribers to 7.90 lacs subscribers in December 2009. This statement is based upon billing for the month of January 2010 and June 2009. This is due to severe competition from DTH and organized cable operators like DEN etc., besides lack of parity and non-discrimination granted by broadcasters such as the Respondent herein in fixing subscription fee charged from the Petitioner.
- ix) The billing of Link Operators in the month of June 2009 (showing connectivity as on 25.5.09) also shows that the link subscribers are approximately 1.7 lacs. The Five New MSO's have not joined the Petitioner since the signing of the previous agreement, while only two of the MSOs have joined the Petitioner i.e. ACS Communications and M/s Star Cable Network. They have a combined subscriber base of only 2,197. In the places Koothatuukulam in Ernakulam District and Quilandy in Kozhicode District, the Petitioner is not present at all. On the request of the Petitioner, this was also confirmed by another broadcaster, MSM Discovery (Sony).

12. The learned counsel for the respondent, on the other hand, has brought to our notice various inconsistencies in the pleadings and the material placed on record by the petitioner with regard to the subscriber base to all others in Kerala as well as with regard to the petitioner's market share :

- (i) The petitioner's contention that DEN has 10 lakhs subscriber base is contradicted by evidence to be as 4.5 lakhs.
- (ii) The figure of 40 lakhs mentioned as the subscriber universe of Kerala by the Petitioner is an assumed figure.
- (iii) The market share being 25% vis-à-vis 75% is not supported by any cogent arguments and supporting material. It would be pertinent to mention that the Petitioner in their audit report of 2006-07 had very clearly stated that

the Petitioner's company had held a share of 30% + as direct points (without the link operators) in the State of Kerala.

- (iv) In all MoUs the subscriber base agreed to between the parties over the years was based on negotiations and this means that MoU is based upon mutual acceptance without any room for dissentment as reflected in the petition.
- (v) The petitioner has indulged in under declaration because it has paid 70% of the service tax out of the total service tax collected from Cable operators from whole of Kerala
- (vi) As per website www.asianet.co.in; www.technopark.org

“Asianet Satcom is one of the largest private investors in Kerala with over Rs. 350 crores investments in infrastructure consisting of 50 Earth stations, 40,000 kms of Hybrid Fibre Coaxial cable network spread over almost all the leading cities and towns in the State, an underground Optic-Fibre backbone stretching for 700 kms utilising the special Right of Way given by the Government of Kerala, and sophisticated facilities for Web-based solutions and portal services, including two Satellite Gateways for Internet bandwidth.”

- (vii) As per www.acv.in

ACV is available on Asianet Cable Services, India's premier cable network, available in the state of Kerala. Asianet Cable Services, the largest last-mile cable service provider in India provides analog and digital cable service across Kerala.

ACV bouquet is Kerala's largest TV channel bouquet with 5 channels, namely ACV, Jukebox, Medley, Jukebox Plus and Rose bowl. ACV is a division of Asianet Satellite Communications Ltd., the largest cable network services company in the state of Kerala and one of the largest such companies in India.

ACV was the third channel to be launched with Pan-Kerala presence in 1997. The channel content is primarily serving the needs of the people in the neighbourhood with News, News features, Entertainment, Movies, Music and providing Live coverage of numerous events happening in the neighbourhood besides Live Shows.

Hence, while determining the actual subscriber base of the Petitioner, this under declaration has to be corrected.

Accordingly, the total subscriber base of 8.50 lakhs, as declared by the Petitioner would increase to 24.28 lakhs, if the under declaration of 35% is disregarded. This aspect has been conveniently ignored by the Petitioner. Though, in the cross-examination, Mr. Mahesh Kumar has clearly admitted that the under declaration is 2.5 times.

(viii) there is 'parity' between the petitioner and rest of Kerala

In *Star India Pvt. Ltd. v. Asianet Communications*, dated March 31, 2007 in Petition No. 39(C) of 2004, this Hon'ble Tribunal has held in para 8 that:

"Parity in the present case has two aspects:

- (i) *Parity with regard to rate (urban/rural) per subscriber;*
- and*
- (ii) *Parity as to the percentage, which the declared subscriber base of the Cable Operators bears to his Universe / Total Subscriber Base."*

The petitioner does not claim denial of parity in respect of the rates charged. However, the Petitioner claims denial of parity on the second count i.e. in respect of the percentage, which the declared subscriber base of the Petitioner bears to his Universe, as compared to the percentage which the declared subscriber base of the rest of Kerala bears to their Universe.

13. Before adverting to the elaborate contentions raised by the petitioner, we may make some preliminary observations.

A distinction must be kept in mind between a contract involving commercial nature and other types of contracts, as

for example a contract of services. It has not been argued nor could there be that the parties to a contract in a case of this nature are not evenly situated and do not have the equal bargaining powers. The petitioner requires the channel of the respondent as much as the respondent intends its channel to be broadcasted. If the petitioner cannot afford to lose an important channel like the respondent's, it cannot also lose the MSO of the status of the petitioner. We may notice that the Supreme Court of India recently in Kamal Nayan Mishra Vs. State of Madhya Pradesh 2009(14) Pg. 716 noticed a 7 Judge Bench decision of this Court in Moti Ram Deka Vs. General Manager North-Eastern Frontier Railways 1964(5) SCR 683 in the following terms :

“A seven Judge Bench of this Court held in Moti Ram Deka v. General Manager, N.E. Frontier Railway, (1964(5) SCR 683), observed as follows while negating a contention that a person who enters service by executing a contract containing a rule contrary to Article 311, with open eyes, cannot be permitted to challenge the validity of the said rule or the contract :

“In our opinion, this approach may be relevant in dealing with purely commercial cases governed by rules of contract; but it is wholly inappropriate in dealing with a case where the contract or the Rule is alleged to violate a constitutional guarantee afforded by Article 311(2);...”

We are, however, not oblivious of the fact that a contract of this nature is required to be considered from the point of view of the statutory scheme governing the same. It is, for the said purpose we may notice the provisions of the Regulations.

14. The notice for disconnection can be issued as per regulations 4.1 and 4.3. Regulation 4.1 envisages:

"No broadcaster or multisystem operators shall disconnect TV channels without giving three weeks notice to the distributor, clearly indicating the brief reasons for the proposed action.

Provided that a notice would also be required disconnection of signals to a distributor of TV channels if there was an agreement, written or oral, permitting the distribution of the broadcasting service, which has expired due to efflux of time.

Provided further that no notice would be required if there is no agreement, written or oral, permitting the distribution of the signals."

The regulation therefore makes it clear that the reasons for the proposed action had to be clearly spelt out. The further follow-up of this notice is as per the provision in the regulation 4.3 which envisages:

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

This provision has been made to safeguard the interest of the viewers who should not be taken by surprise in case the signal is disconnected without their knowledge. During the period of notice the viewers are expected to make alternate arrangements with other distributor of TV channels so that the programmes being viewed by them of the TV channels, is available to them without any interruption.

The Regulation, therefore, provides safeguard to all the stakeholders, in the event of any disconnection likely to take place because of dispute between the distributor of TV channels the cable operators. In this particular case the notice has been given as per the regulations and there is indisputably a subsisting agreement between the parties. The 4.1 notice has been given on the 18 June 2009 which was followed by a public notice published in a local newspaper threatening to disconnect the signals of the petitioner. The ground invoked by the respondent is non-payment of outstanding dues and on the expiry of the present agreement, the petitioner has not shown any interest for renewing the agreement as per the provisions of Regulation 8.1.

- 15.** We have also noted that the subsisting agreement for the year 2008 -2009 by and between the parties has been entered by the petitioner and the respondent without expressing any reservation and conditionality in the consensus which can be interpreted to affect the relationship in times to come to or during dependency of the subsisting agreement. The agreement is termed as MoU, has been entered into as a renewal of a subsisting MoU and, therefore, the provisions made in the Regulations 8.1, plays an important role.

Regulation 8.1 envisages : **"Parties to an interconnection agreement for the supply of TV channel signals shall begin the process of negotiations for a renewal of existing agreement at least two months before the due date of expiry of the existing agreement.**

Provided that if the negotiations for renewal of the interconnection agreement continue beyond the due date of the expiry of the existing agreement then the terms and conditions of the existing agreement shall continue to apply till a new agreement is reached or for the next three months from the date of expiry of the original

agreement, whichever is earlier . However, once the parties reach an agreement, the new commercial terms shall become applicable from the date of expiry of the original agreement.

Provided further that if the parties are not able to arrive at mutually acceptable new agreement, then any party may disconnect the retransmission of TV channel signals at any time after expiry of the original agreement after giving a three weeks notice in the manner specified in clause 4.3. The commercial terms of the original agreement shall apply till the date of disconnection of signals.

In the present case it can be seen that the new agreement has been arrived at by and between the parties on or about 9th June, 2008, the relevant clauses whereof are as under.

"The monthly payout for the period of 12 months from 1 March 2008 to 29 February 2009 shall be rupees 1.1 crores per month, which shall be exclusive of applicable service tax. These amounts are based on the declared connectivity of Asianet as on 1st March 2008 . In the present case the previous MOU expired on 28th February 2009 and hence, the terms of the 2008-09 MOU would continue only till end May 2009, before which new Agreement had to be entered into for the period starting 1st March 2009. Infact, on the basis of previous agreement, the Petitioner has paid a sum of Rs. 90 lacs p.m. upto June 2009 since discussions were to be held in June 2009. The amounts shall be payable by the 28th of each month.

The MOU contains all the ingredient which fulfils the requirement of Regulation 8.1.

This MOU is in succession of the previous MOU which appears to have been signed on or before July 2007 for providing the signals of the respondent for sum varying from Rs. 80 lakhs to Rs. 1.1 crores at a rate of ESS pricing of Rs. 42.48 per subscriber for ESPN and Star Sports service and at a rate of Rs. 28 per subscriber for Star Cricket services.

16. The question which arises from the point of view of the dispute is that the petitioner is aggrieved after signing this MOU consciously and is complaining about the discrimination for arriving at the subscriber base in the current MOU vis-à-vis other MSOs. The petition in nutshell is asking for a reduction in subscriber base.

For variation of the subscriber base during the currency of a subsisting agreement the relevant Regulation is 10.2. Let us examine the provision made in this Regulation for review of the subscriber base which has been arrived at by and between the parties at the time of signing the agreement.

Regulation 10.2 reads as follows:

"Variation of subscriber base during validity of agreement "

Between multisystem operator and the broadcasters

10.2 In non-addressable systems, the subscriber base agreed-upon by the parties at the time of execution of the interconnection agreement between a multisystem operator and a broadcaster shall remain fixed during the course of the agreement except in exceptional circumstances that warrant an increase or decrease in the subscriber base. In such an eventuality, it is for the service provider seeking a change in the subscriber base to provide **reasons and accompanying evidence including local survey for the proposed change.**

Provided that this sub clause shall not apply to changes in the subscriber base of a multisystem operator, on account of any cable operator joining or leaving the multisystem operator.

Provided further that any change in the subscriber base of a multisystem operator, which is the basis of payment to a broadcaster, on account of any cable operator joining or leaving the network of a multisystem operator shall be equal to the subscriber base of the cable operator, joining or leaving the network.

The provisions which have been made in this regulation cast responsibility on the petitioner' to provide reasons and accompanying evidence including the local survey for the proposed change. **There is no provision of discrimination to be one of the reasons for change in the subscriber base.** Without going into the merit of the subscriber base determined for the other multisystem operators by the same broadcasters, the petitioner has to prove and provide evidence which supports its claim for a reduction in the subscriber base. The question of comparison of the subscriber base with the other Multi System Operators is only possible in case the MSOs are operating within the same/similar areas and under similar circumstances and similar network architecture. The comparison of other MSOs with the petitioner, therefore, should only be possible in case they are comparable with the petitioner and can be placed on the same pedestal.

- 17.** Regulation 10.2, in our opinion, should be read with other relevant Regulations, e.g. 9.2 and 11.1. The statutory scheme, it is relevant to mention, should be noticed, must be considered having regard to all the provisions in mind. No provision, in our opinion, should be read in isolation, far less, any sentence or any word.

In Reserve Bank of India vs. Peerless G.F. & I. Co. Ltd. reported in AIR 1987 SC 1023 it has been held as under :

“33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With those glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. It is by looking at the definition as a whole in the setting of the entire Act and by reference to what preceded the enactment and the reasons for it that the Court construed the expression ‘Prize Chit’ in Srinivasa and we find no reason to depart from the Court’s construction.”

- 18.** Clause 3.2 of the Regulation, although is not a standalone clause which used the word ‘non-discriminatory’ ordinarily would apply to a case of first contract to be entered into by and between a broadcaster/MSO and another MSO/LCO. We, however, feel that the same would not mean that it would keep outside its purview the parties who have earlier entered into a contract. We, however, need not delve deep into the matter for the present.
- 19.** The petitioner in this petition has principally raised two pleas. The first relates to the alleged non-discriminatory terms of the contract vis-à-vis the others and the second with regard to the terms of future contract. If we are correct, in our observations, that in a case of this nature, the parties were at equal footing, evidently the question arises as to what would be the principle to be considered therefor. The agreement dated 9th July, 2008 is a commercial document. It was entered into by and between the parties on the basis of their respective commercial expediencies. Till the said agreement was arrived at, the petitioner did not show any difficulty in the matter of enhancement of the subscription fee. The matter relating to variation/modification of the existing terms of contract as also the renewal

thereof, are covered by different clauses of the Regulations. When the provision of Regulation 10.2 is attracted, in our opinion, Regulation 3.2 may not be of much significance. For attracting the exceptional circumstances specified in Clause 10.2 of the Regulation, it is for the MSO to show that there has been a substantial decrease in the subscriber base warranting a downgradation therefor and consequently the reduction in the subscription fees. We do not think that such an exceptional case has been made out by the petitioner.

- 20.** The entire case of the petitioner is based on a comparison with the other multisystem operators and service providers in the State of Kerala. The main theme of the petitioner's case is based on the premise that the petitioner has been discriminated in determination of the subscriber base vis-a-vis the other Multi System Operators in the state of Kerala. The most important issue which arises for determination is whether at the time of renewal of MoU, which is as per Regulation 8.1, can we accept the contention of the petitioner based upon the theory of discrimination. The points of discrimination have been emphasised while seeking signals for the first time under the must provide Regulation i.e. Regulation 3.2.

Regulation 3.2: “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 not limited to a cable operator, Multi System Operator, head ends in the sky operator.....”

Even if we extend the theory of discrimination at the time of renewal of agreement to achieve the natural justice and equity concept amongst the similarly placed MSOs, we have to carefully examine the major characteristics of the petitioner vis-à-vis the other MSOs in the rest of Kerala as also their respective areas of operation, which is mostly the urban area for the petitioner vis-à-vis the urban rural area mix for other MSOs in the rest of Kerala.

21. The clinching characteristics of the petitioner are:

- (i) Asianet is one of the most leading CATV Company in India in terms of Revenues, EBITDS and infrastructure with about 600K + Primary (including 90K + Digital Subs) and 176K secondary connections.
- (ii) It is also a dominant broadband player with over 60K broadband Internet connections through data over cable. Overall it provides a host of services including Analogue/Digital Cable TV, broadband internet and exclusive cable channels.

Company Advantages:

- (iii) Asianet has a very strong subscriber base in the affluent State of Kerala that can be cross-sold/ up sold VAS/Digital offerings, which is backed by a State of the art network spanning 700 kms UG fibre network, 40,000 kms of HFC, 20,000 amplifiers and benchmarked on international quality standards.
- (iv) It is offering CATV & Broadband bundle to subscribers and progressively moving towards “Triple Play” strategy.
- (v) Unlike most of the major players in India, it has a unique Primary Point business model, which gives greater share of subscription revenue for Asianet and control over critical last mile and, therefore, it is one of the most powerful brands in the State of Kerala.
- (vi) It has access to over 600,000 KSEB poles due to its Right of Way arrangement with the KSEB, can reach any location with its cables and equipments in the minimum possible time. Its 700 kms of UG OFC ensures that it can effortlessly take its signals across the entire length and breath of Kerala at minimal cost.

Asianet has seen a steady growth in its revenues and EBITA over the last decade due to its various growth strategies both organic and in organic. The graphs depict this strategies' growth.

- (vii) It, on its own showing, has about 8.50 lakhs of cable subscribers spread over a large part of the State of Kerala. It, for obtaining signals of the channels run by the respondent, entered into agreements with the respondent, the details whereof are mentioned in Para-1 of this Judgment.
- (viii) Its audited balance sheet and its pay out to the channels read as under:

FYI	Total income from Cable Operation (Subscription Fee Only) as per Balance Sheet	Total payment made to pay channels as per Balance Sheet	% of Pay channel amount over collections
2002-03	81.40	26.24	32%
2003-04	84.60	29.50	35%
2004-05	87.21	27.30	31%
2005-06	103.90	26.98	26%
2006-07	109.36	28.49	26%
2007-08	113.67	33.12	29%
2008-09	119.35	35.44	30%
**Estimated figures of 2008-09.		N.B. Steadily rising in the past 4 years.	
***INR and in Crores			

- (ix) It has, however, been accepted that in the year 2008-09, its total income from cable operation was Rs.129.19 crores and the total payment made to the channels as per its balance sheet was Rs.35.79 crores showing an annual growth of 40%. It is accepted that its list of subscribers runs into 5000 pages.
- (x) ACV bouquet largest TV channel bouquet with 5 channels namely ACU, Jukebox, Jukebox plus and Rose Bowl. This is a comprehensive bouquet of channels which serves the needs of masses in Kerala and there the most distinguished feature of the petitioner is that it is broadcaster as well. **It is virtually a broadcaster, MSO, LCO, Internet Service Provider and is heading for triple play all over the state and thereby virtually taking over majority of the entertainment and IT requirements of the State.**

(xi) The following calculation will reveal that there is more or less parity in between petitioner and ROK in regard to % of declared subscribers.

- a) The Declared Subscriber base of the Petitioner is 1.52 lakhs;
- b) The Universe of the Petitioner above after ignoring the under declaration, is 24.28 lakhs, as pleaded by learned counsel for respondent;
- c) Hence, the percentage which (a) above bears to (b) above will be **6.26%**. In other words, the Petitioner is paying for 6.26% of its actual Universe to the Respondent.
- d) The Declared Subscriber base of the rest of Kerala is 1.09 lakhs.
- e) The Universe of the rest of Kerala is to be determined. According to the Petitioner, the total Universe of Kerala is 40 lakhs, out of which:
 - i. 4 lakhs are DTH subscribers; and
 - ii. 24.28 lakhs are the actual subscribers of the Petitioner, after ignoring the under declaration.

Hence, it is reasonable to assume that the balance 11.72 lakhs is the maximum limit of the total Universe of the rest of Kerala since out of 40 lakhs, all cable homes may not have access to ESPN signals.

- f) Hence, the percentage which (d) above i.e. 1.09 lakhs (declared subscriber base of the Rest of Kerala) bears to 11.72 lakhs ($40 - 4 - 24.28 = 11.72$), as mentioned in (e) above will be **9.3%**.

The learned counsel for the respondent, therefore, concludes that the above calculation will clearly show that there is no disparity in term of the percentage which the Declared Subscriber base of the Petitioner bears to the total Universe of the Petitioner when compared with the rest of Kerala. In fact, rest of Kerala is paying for 9.3 % of its Total Universe, whereas, the Petitioner is paying only for 6.26% of its Universe.

(xii) The actual billings of rest of Kerala and Asianet do not support the petitioner's claim

Year (FY)	Asianet	% of Rest of	% of Total
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	(in crores)	Total billing	Kerala (in crores)	Total billing	(in crores)
2006-07	10.76	64.70	5.87	35.29	16.63
2007-08	14.02	61.76	8.69	38.28	22.70
2008-09	15.14	63.21	8.81	36.78	23.95
2009-10	---	---	9.52	39.25	--

It can be seen that if we follow the principle that compare only comparables, we can easily conclude that because of most special and specific features of the operation and spread of the petitioner in Kerala, there is hardly any difference in the % of declared subscriber base and, therefore, there is no discrimination.

- 22.** Keeping in view the aforementioned backdrop and furthermore not being oblivious of the principles of level playing field as has been advocated by the Supreme Court in Reliance Energy Ltd. And Ors. vs. Maharashtra State Electricity Distribution Company Ltd. (2007)8SCC 381, we must also keep in mind what would be meant by a non-discriminatory term. Is it in absolute lines. Should it not form the class on the basis of the same homogeneous group? If that be so, even a sub-classification between two such groups namely big MSOs and small MSOs and who, thus are operating in big towns and semi-urban or rural areas must be kept in mind. One may have good customers like hotels, nursing homes, clubs, malls, which are plenty in the State of Kerala and thus can be treated to be the creamy layers amongst the customers and the rest in another class. The class of customers, the petitioner offers to pay services may found the same to be inevitable, for others it may not be so. One sector of MSOs may be wholly unorganised, they may not be able to realise the subscription fee from a good number of their customers, whereas the subscription fee of big MSOs like the petitioner except in some exceptional cases would be almost secure. It is beyond any doubt or dispute that rates of subscription fee not only varies from metropolitan towns to the hilly areas, they do vary from area to area in the same town. We, therefore, must have the requisite facts and figures for invoking

the equality clause vis-à-vis the level playing field. There cannot be any doubt or dispute that clause 3.2 being an exception to the common Law principles of Contract, should be construed accordingly. It is in the aforementioned situation, a question must be put as to what is meant by non-discriminatory term. If a person is, sui generis, he should not ordinarily be compared with others, if that be so, the comparison on the basis of total universe of the petitioner and the rest of Kerala or the number of its connections vis-à-vis others or the amount of service tax paid by it on the one hand and the rest of the operators on the other, in our opinion, loses much significance. We, for the aforementioned reasons have no ground to enter into the thicket of those submissions made with great elaborations based on the contentious facts, brought on record by the parties, as we are of the opinion that the matter can be disposed of on other grounds.

- 23.** As we are of the opinion that the petitioner is a class by itself, we may refer to the decision of the Apex Court in its judgment in Ram Krishna Dalmia Vs Justice S.R. Tendolkar (1959)SCR 279.

“The provisions of Article 14 of the Constitution have come up for discussion before this Court in a number of cases, namely, Chiranjit Lal Choudhuri V Union of India, State of Bombay v. F.N. Balsara, State of West Bengal v Anwar Ali Sarkar, Kathi Raning Rawat v. State of Saurashtra, Lachmandas Kewalram Ahuja v. State of Bombay, Qasim Razvi v. State of Hyderabad and Habeen Mohamad v. State of Hyderabad. It is, therefore, not necessary to enter upon any lengthy discussion as to the meaning, scope and effect of the article in question. It is now well established that while article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be found on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded

on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is not only by a substantive law but also by a law procedure.”

The principle enunciated above has been consistently adopted and applied in subsequent cases. The decisions of this Court further establish –

(a) That a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself; (underlining is ours)

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(b) *That there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;*

(c) *That it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;*

(d) *That the legislature is free to recognise degrees to harm and may confine its restrictions to those cases where the need is deemed to be the clearest;*

- (e) *That in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and*
- (f) *That while good faith and knowledge of the existing conditions on the part of legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and un-known reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.*

The above principles will have to be constantly borne in mind by the court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws.”

- 24.** The petitioner is a class in itself and, therefore, the negotiated terms and conditions as per MoU valid upto 28.2.2009 and extended for 90 days as per Regulation 8.1 during the period of negotiations for future is held to be valid.
- 25.** The only question which survives for our consideration, therefore, is as to whether we can issue any direction in regard to the future agreement which may be entered into by the parties in future. The parties to a commercial document and even as envisaged under the Regulations should arrive at a negotiated figure of subscriber base which is also stated to be the declared subscriber base vis-à-vis universe of the petitioner. Keeping in view the status of both the parties, we have no doubt in mind that they would be reasonable in their approach and consider all aspects of the

matter. We, however, do not intend to lay down any principle in this behalf but we can only hope and trust that both the parties would enter into the negotiated terms with an absolute open mind. We have also no doubt in our mind that while doing so the various contentions raised by the petitioner shall be taken into consideration by the respondent. We have not entered into the said arena because of the legal principles involved herein. It is from that point of view, we thought, although permissible in law, having regard to the decision of this Tribunal in Star India Pvt. Ltd. (supra), which according to us is not applicable in the facts of the case as parity on the ground of declared subscriber base alone may not be a relevant criteria. We have furthermore found that the petitioner has already supplied set-top boxes at a grossly subsidised price to a large number of consumers and furthermore it supplies signals to a majority of subscribers directly.

- 26.** The petitioner appears to have not made the entire payment to the respondent herein in terms of the interim Order passed by us, therefore, we are of the opinion that any payment due from it shall be made. However, as we had passed interim orders subject to certain conditions, we direct the petitioner to make all the payments to the respondent of the amount which falls due to it in terms thereof. Such payment should be made within a period of 12 weeks from date. We have passed this order in exercise of our inherent jurisdiction so as to bring the parties to the same position as if our interim orders have been complied with fully.

This petition is disposed of with aforementioned observations.

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

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

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