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

**DATED 23 NOVEMBER, 2010**

**Petition No.245 (C) of 2009**
**(With M.A. Nos. 149 of 2009 & 76 of 2010)**

Hathway Cable & Datacom Ltd. ...Petitioner

Vs.

Sahara Sanchar 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.Arun Kathpalia, Advocate<br>Mr. Nasir Husain, Advocate |
| For Respondent No.1 | : | Mr.Somesh Arora, Advocate<br>Mr.Robin Chacko, Advocate |
| For Respondent No. 2 | : | Mr. Navin Chawla, Advocate<br>Mr.Sharath Sampath, Advocate |

**JUDGEMENT**

**S.B. Sinha**

The Petitioner is a Multi Service Operator. In the aforementioned capacity it carries on business of transmissions of channels of various broadcasters. The Respondent No. 1 is a broadcaster, inter alia in respect of its products 'Sahara Samay' and 'Sahara NCR'. The Respondent No. 2 is a distributor of the Respondent No. 1.

It is stated that the respondents inter se entered into a distributorship agreement in terms whereof the Respondent No. 1 is said to have outsourced its business of distribution of its Television Channels for a valuable and fixed consideration.

The Respondent No. 2 admittedly entered into a Memorandum of Understanding with the petitioner herein with regard to the placement of two channels of the Respondent No. 1 known as 'Sahara Samay' and 'Sahara NCR' for the period 1st April 2008 to 31st March, 2009.

The said placement was to be carried out on the frequency of 558 MHz. The total deal value was to be Rs. 3 Crores besides the applicable tax, payable in advance on a quarterly basis. The period of agreement was from 1st April 2008 to 31st March, 2009

According to the petitioner, after entering into the aforementioned Memorandum of Understanding on or about 17th July, 2008, the Respondent No. 2 had sent a draft agreement known as carriage agreement which was to

be executed on the same day. The petitioner allegedly signed the said agreement upon filling up the blanks thereof whereafter the same was sent to the Respondent No. 2. It, however, stands admitted that the petitioners have not received the agreement after having been signed either by the Respondent No. 1 or the Respondent No. 2.

We may notice that the format of the said agreement is a tripartite one. The first party therein is the Respondent No. 1; whereas the second party is the Respondent No. 2. The agreement in question is in a printed form and names of the Respondent No. 1 and the Respondent No. 2 as also the terms and conditions of the contract are printed.

Annexure 1 appended to the said format of agreement, however, contains some blanks. The name of the authorized signatory of both the Respondent No. 1 and the Respondent No. 2 (ABS) have also been printed in the said form. The other details of the MSOs however, are blank. According to the Respondent No. 1, the said agreement had neither been signed by it nor was it sent to it by the petitioner and the same is a forged document.

We may notice certain terms thereof for completion of the narration of facts :-

> "ABS has negotiated the placement of Sahara Channels with the aforesaid MSO/CO;
>
> The MSO/CO agrees to place the Sahara Channels on its cable network as negotiated by ABS on behalf of SAHARA on terms and conditions mentioned in Annexure-I hereto.
>
> In consideration of the covenants contained herein and payment of carriage fees by Sahara, the MSO/CO agrees and undertakes retransmit and/or carry the Services of Sahara Channels from its head-

end at as described in Annexure I, during the term of this Agreement.

MSO/CO shall not, without the written consent of SAHARA, change the frequency allotted to the Services of SAHARA. The frequency may be required to be altered to accommodate compulsory Carriage of any Doordarshan Channels, or any other channels as directed by the regulatory authority, which may be required to be carried by MSO/CO on its Cable Services by virtue of the provisions of any Govt. directive, enactment or rules and notifications thereunder or any rulings of any Court or Statutory Body.

MSO/CO may reasonably alter the frequency allotted to the Services of SAHARA under compulsions stated above but with prior written notice to SAHARA and reset the appropriate frequency band at which the Services of SAHARA will be carried thereafter. Further, SAHARA reserves the right to interchange the placement of its Channels with MSO/CO (through this Agreement or any other Agreement executed between the parties) on agreed frequencies, at any time when SAHARA deems fit."

For the carriage of Sahara Channels across the entire Cable TV networks of MSO/CO and/or its affiliates/associates SAHARA shall pay to MSO/CO. through ABS, Carriage Fees as per Annexure I against appropriate invoices raised by MSO/CO.

Agrees to pay carriage fee to MSO/CO as agreed by and between ABS and MSO/CO for placement of Sahara Channels to the entire cable network of MSO/CO."

In terms of said Memorandum of Agreement, indisputably the petitioner on the same day had sent two invoices, one for the period 1.4.2008 to 30.06.2008 and the other for 1.7.2008 to 30.09.2008. Two other invoices were also sent to the Respondent No. 2, one being for the period dated 1.10.2008 to 31.12.2008. The said invoice

was dated 1st October 2008 and the other invoice being dated 1st June 2009 was for the period 1.1.2009 to 31.3.2009.

According to the petitioner, it had received a sum of Rs. 2,47,51,224/- and, thus, it was entitled to the remaining sum of Rs. 89,56,776/-. The petition has been filed for realization of the aforementioned amount and the applicable interest at the compoundable rate till realization.

The first respondent in its reply has inter alia contended:-

1) It is not a necessary party as it had not entered into any agreement with the Petitioner.
2) The purported agreement dated 17th July, 2009, was merely a proposal by the petitioner and was not supported by any authority, by way of any Board Resolution of the petitioner company and in any event the same had not been accepted by the Respondent.
3) The Respondent No. 1 had not authorized anybody to enter into an negotiation with the Petitioner and/or execution of the said document. The terms of the said document appears to be highly improbable and should not be relied upon as it was given a retrospective effect from 1.4.2008.
4) The case of the petitioner is frivolous as though minutes of the meeting dated 17.7.2008 are purported to be signed in the name of the Petitioner and the Respondent No. 2, but there is no reference to the Respondent No. 1 therein.

5) There is also no mention of the said minutes of meeting in the agreement although it is purported to have been executed on the same day.

6) The entire operations of the Respondent No. 1 with respect to the distribution of its Television Channel were outsourced to the Respondent No. 2 for a fixed consideration and never approached any third party far less the Petitioner who is a total stranger.

It is however, accepted that the petitioner and the other MSOs having not been paid their bills for placement and carriage of the channels of the Respondent No. 1, the MSOs threatened to disconnect the same.

It is also not denied and disputed that the parties inter se had a dispute on the question as to whether the Respondent No. 1 had paid the entire amount of distribution agreement to the Respondent No. 2, whereas according to the Respondent No. 1 all payments due to the Respondent No. 2 have been made; the Respondent No. 2 contended that no such payment was made.

It furthermore stands admitted that the Respondent No. 1 had paid the placement and carriage charges amounting to Rs. 75 lacs for the last quarter namely, for the period 1.1.2008 to 31.03.2008.

It is also not denied or disputed that the Petitioner and the Respondent No. 1 thereafter entered into an agreement for the placement and carriage of the channels of the Respondent No. 1 for the year 1st April 2008 to 31st March 2009.

The Respondent No. 2, however having not filed any written statement within the time granted by this Tribunal was not permitted to file the same.

We may also notice that Mr. Sudip Kumar Shrotriya, the learned advocate had been representing both the respondents. However, on or about 26th March, 2010 on a prayer made by him in this behalf, he was permitted to withdraw his Vakalatnama on behalf of the 1st respondent, on which day Mr. Somesh Arora appeared for it.

We may also notice that the issues were framed on 7th January, 2010 and Mr. Arora on 26th March, 2010 raised a contention that issues No. 3 & 4 should be deleted. It was directed that the said question shall be considered at the time of hearing.

The said application was also not entertained as the witness of the petitioner was present in the court.

At that stage an application was filed on behalf of the Respondent No. 2 to take its reply on record. This Tribunal by a detailed order refused to acceed to the said request. We are informed that the Respondent No. 2's writ petition filed against the said order has been dismissed by the Delhi High Court.

We may also place on record that, however, the Respondent No. 2 was permitted to cross-examine the witness only for the purpose of demolition of the case of the petitioner.

We may, furthermore notice that the petitioner in its rejoinder to the reply raised several contentions, some of which are :-

a) The Respondent No. 1 although otherwise bound by the terms of the agreement, failed to clear their dues along with the Respondent No.2.

b) The Respondent No. 1 having enjoyed the benefit under the agreement and/or understanding with regard to placement of its channels is estopped and precluded from questioning the validity of the same, especially since both the parties acted in terms thereof.

c) An alternative case was also made out, stating :

> "Be that as it may, the very fact that the Respondents have made payments of placement charges is an acceptance by them of their contractual relationship with the Petitioner and their obligations to make payment to the Petitioner for placement/carriage charges. The Agreement being for the benefit of Respondent No. 1, it cannot deny its liability thereunder. It is further stated that after due negotiations the Minutes of Meeting dated 17th July 2008 was signed, pursuant to which the detailed placement agreement dated 17th July, 2008 was also entered into."

d) Shri Harish Reddy AGM, Operations was duly authorized by the company to enter into and execute placement agreements.

e) The respondent had enjoyed full advantage of the said agreement. It is a known fact in the industry that very often agreements are written after signing.

f) In regard to the minutes of the meeting, it was stated :

"The contents of para 11 are wrong and denied. It is denied that there is no reference to Respondent No. 1 as alleged. The minutes clearly state that "Placement deal for two channels by the name of Sahara Samay & Sahara NCR" which are both admittedly, channels of Respondent No.1. It is stated that Respondent No. 2 clearly represented as an Agent for and on behalf of Respondent No. 1 and indeed, on that basis the minutes were drawn up and the Agreement signed by the Petitioner. The Respondent No. 1 itself admits that Respondent No. 2 was its agent in this period."

g) The invoices having been raised in respect of channels of Respondent No. 1 and therefor the Respondent No. 1 is liable for making payment jointly and severally with the Respondent No. 2.

h) It is of significance that even the agreement was negotiated and executed by the Respondent No. 2 and the Respondent No. 1 accepted its liability thereunder.

i) With the expiry of the agreement dated 17.7.2008, the placement agreement for the year April 2009 to March 2010 was entered into directly between the petitioner and the Respondent No. 1 for the same channels.

j) The Respondent No. 1 is a party to the understanding of the agreement with the subject matter of the petition."

We may notice the issues framed by this Tribunal at this juncture:-

"1. Whether the petition is maintainable in the present form?

2. Whether there exists any agreement between the parties and the respondents for carriage fee and placement charges for the period 01.04.2008 to 31.03.2009?

3. Whether respondent no. 2 was authorised to act as an Agent for and on behalf of the respondent no. 1?

4. Whether respondent no. 1 enjoyed the benefit of the carriage fee and the placement agreement and if so, is respondent no. 1 estopped from impugning the same?

5. Whether the respondents are liable, jointly and / or severally to pay carriage fee and placement charges to the petitoiner?

6. If so, whether any amount is outstanding and payable to the petitioner as carriage fee and placement charges for the period 01.04.2008 to 31.03.2009?

7. Whether the petitioner is a MSO?

8. What relief, if any, the petitioner is entitled to ?"

The petitioner in support of its case has examined Shri Harish Reddy, who had signed the MoU, and the agreement on its behalf. The Respondent No. 1 has examined Shri Ramesh Kundu, one of its authorized

representatives. The Respondent No. 2 examined one Shri Atul Saraf, who is a signatory to the MoU.

We have noticed heretobefore that on 17th July, 2008 not only a memorandum of understanding was executed and an agreement was allegedly received by the petitioner, but also it had signed the same and furthermore raised 2 invoices. The Respondent did not deny or dispute the statement of account filed by the petitioner.

The dispute is principally with regard to the liability of the respondents inter se.

We, with that end in view, may notice that the documentary evidences have also been filed by the petitioner but the execution of any of the documents has not been denied or disputed.

The 1st respondent having come to learn, as stated heretobefore, that the MSOs intended to discontinue the placement of its channel by reason of non-payment, issued a letter on or about 17.2.2009 to the petitioners' representatives being Mr. Harish Reddy and Mr. Alok Govil.

Within 3 days of the issuance of the said letter, evidently the Respondent No. 2 having come to learn thereabout wrote a general letter to all the MSOs/Operators in regard to the purported misleading letter of the Respondent No. 1 against it.

It is not in dispute that the payment for the last quarter of the year in question was made to the petitioner directly by the Respondent No. 1.

Mr. Arun Kathpalia, the Learned Counsel appearing on behalf of the petitioner urged:

(a) The Respondent No.2, having entered into the carriage and placement charges agreement, not only for itself but also for and on behalf of the Respondent No.1, both the respondents are jointly and severally liable to pay to the petitioner a sum of Rs. 89,56, 776/-;

(b) In any event, the Respondent No. 2 being the agent of the Respondent No. 1, and having represented its interest, the Respondent No. 1 cannot escape its liability.

(c) In any view of the matter, the 1st respondent having accepted and acknowledged the liability is bound to reimburse the petitioner the claimed amount.

(d) The 1st respondent, even otherwise, having regard to the principle contained in Section 70 of the Indian Contract Act, is bound to restore the benefit received by it towards placement and carriage charges.

Mr. Arora, the learned counsel appearing on behalf of the Respondent No. 1 took us through almost the entirety of the pleadings of the parties and urged :-

1) From the description of the parties hereto as disclosed by the petitioner himself, it would appear that the Respondent No. 2 has been carrying on the business of distributorship of the channels of

various broadcasters and, thus, it must be inferred that the agreement by and between the Respondent No. 1 and the Respondent No. 2 was a distinct and separate one.

2) The petitioner although is said to have executed the agreement on its own behalf, but having failed to file the original document and/or otherwise prove the same, it must be held that the said agreement had not been executed and in any event no concluded contract had been arrived at by and between the parties hereto in absence of any signature having been put thereupon by or on behalf of the respondents.

3) The petitioner has failed to file any documentary evidence to show that the Respondent No. 1 has agreed to pay any amount in terms of the agreement and/or the MoU.

4) The purported trade practice alleged by the petitioner in the petition has absolutely no legs to stand upon as it has not been proved that the payments have been made by the Respondent No. 1 through the agency of the Respondent No. 1.

5) The Memorandum of Understanding dated 17.7.2008 having been entered into only by and between the petitioner and the Respondent No. 2 at New Delhi, on which date the Respondent No. 1 was not present and only because its products were mentioned therein, the same would not mean that a third party to the said MoU would be bound thereby.

6) The payments having been required to be made in terms to the said MoU in advance, it must be held that there no amount was outstanding.

7) The purported agreement dated 17.7.2008 can not be believed in as much as the MoU was signed at New Delhi whereas the head office of Respondent No. 1 is at Calcutta or Noida and the franking

of the agreement having been made in Maharashtra and, thus, evidently by the Respondent No. 2 from its office at Mumbai.

8) No board resolution having been filed authorizing PW.1 Mr. Harish Reddy to sign the said MoU or the agreement, it must be held to be an illegal document. The purported document even otherwise appears to be a forged one.

9) The two invoices dated 17.7.2008 having been drawn up in the name of the Respondent No. 2 and having been sent only to it, the Respondent No. 1 cannot be held to be bound thereby as no invoice has been sent to it nor any demand therefor was raised.

10) The Respondent No. 1 having made its own position clear in its letter dated 17.2.2009 that :-

a) It had outsourced its business of distribution to Respondent No. 2.

b) The Respondent No. 1 has stepped-in in view of the stalemate but it has not accepted that the Respondent No. 2 was its agent.

c) The Respondent No. 1 was neither aware of the dues of the petitioner nor was aware of the relationship between the parties.

d) Only for the future it had sought for an independent relationship.

e) The Respondent No. 1 has already paid the entire dues of the Respondent No. 2

f) After 31.12.2008, the Respondent No. 1 had no relationship with the Respondent No. 2. Only in view of the requests made by the petitioner, the Respondent No. 1 acceeded to its request to pay for the month of January to March, 2009.

g) So far as the letter dated 20th February, 2009 issued by the Respondent No. 2 to the all MSOs is concerned, it has not been proved that any correspondence had passed between the Respondent No. 2 and the Respondent No. 1, with regard to payment of its dues.

h) An impression had wrongly been created that the teams for holding negotiations with the petitioner were of two different identities, namely one for Sahara and the other for ABS.

i) Hathway continued to carry the channel of the Respondent No. 1.

j) A bare perusal of the letter dated 16.3.2009 issued by Hathway, it would appear that the same had not been addressed to the Respondent No. 1, despite knowledge of its stand.

k) Neither the agreement referred to any liability on the part of the Respondent No. 1 nor any payment has been made by it and thus, it was in no way liable for to the alleged dues of the petitioner.

11) From a perusal of the letter dated 15.10.2009, it would be evident that the Respondent No. 1 merely issued the same only for the purpose of audit as also in view of the fact that the relationship existed between the parties for the last quarter.

12) The rejoinder filed by the petitioner cannot be considered to be a 'pleading' whereby the petitioner had sought to bring on record new pleas in regard to:-

i. claim on the basis of agency,

ii. claim on the basis of the provisions of the Section 70 of the Indian Contract Act,

iii. the fact it was approached initially by the Respondent No. 1,

iv. that the representation was made by the representatives of the Respondent No. 1,

v. that the Respondent No. 2 was its distributor/agent,

vi. the Respondent No. 1 was a party in the MoU,

vii. the Respondent No. 2 is said to have representated as an agent of the Respondent No. 1,

viii. the liability of the respondents No. 1 and 2 are joint and several

ix. the respondent had a different hypothetic relationship,

13) The averments made in the rejoinder being by way of afterthoughts, it must be held, that the petitioner has failed to substantiate its pleas in the original petition.

14) The rejoinder filed by the petitioner being not a part of the pleadings, no new plea can be permitted to be raised, and as in respect thereof the Respondent No. 1 could file a replication thereof, no issue has been framed by this Tribunal being issue No. 3 & 4 could be framed.

15) The statements made by Mr. Harish Reddy in paragraph 5 of the affidavit being beyond the pleadings and the correspondences, his evidence that he has received a franked document in the evening of 17.7.2008 must be held to be unacceptable as the same are wrong in as much as the parties completed their negotiations for entering into the MoU only during lunch time.

16) The statements made in paragraph 7, 8 & 9 in the Affidavit have been made for the first time by the said PW without any pleading made in this behalf. The statement made in paragraph 10 of his Affidavit cannot be looked into as the Respondent No. 1 had made payments only for a quarter and not on account. The statement made by him in paragraph 12 does not contain any evidence qua the MoU. The witness has admitted that the Respondent No. 1 had outsourced its activity. From the evidence of the PW, it would furthermore appear that the Respondent No. 2 was an agent was stated by way of a presumption, there being no actual basis therefor.

Mr. Sampath, the learned counsel appearing on behalf of the Respondent No. 2 would urge :

(a) The petitioner itself having filed this petition on the premise that the Respondent No. 2 was the agent of the Respondent No. 1, it cannot be permitted to resile therefrom.

(b) According to the learned counsel, the Respondent No. 2 must be held to be an intermediary between the petitioner and the Respondent No. 1.

(c) The Respondent No. 2 being not a service provider, this petition is not maintainable under Section 14 of the TRAI Act or otherwise.

(d) The Respondent No. 1 having not filed the distributionship agreement, the provisions of Section 230 of the Indian Contract Act shall apply in the instant case.

(e) The Respondent No. 2 having acted on the instructions of the Respondent No. 1 only, subject of course to the fact that it was authorized to negotiate by and between the petitioner and the Respondent No. 1,

the Respondent No. 2 is not liable to pay the amount in dispute.

(f) The memorandum of understanding having been entered into on 17.7.2008, it could not have been given a retrospective effect and in any event, no such claim having been raised in the petition, no decree can be passed for the said amount.

(g) The Respondent No. 2 had instructed the petitioner to stop the digital feed in September 2008 and the price fixed being for a sum of Rs. 2 crore therefor and 1 crore for the analogue mode, the amount claimed in the petition is not maintainable.

Before adverting to the rival contentions of the parties, we may notice the relevant provisions of the Act.

Section 2 (f) defines 'service providers' to mean :

"service provider" means the Government and includes a licensee."

Telecommunication Services has been defined in Section 2 (k) to mean :-

" 'telecommunication service' means service of any description (including electronic mail, voice mail, data services, audio tex service, video tex services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electro-magnetic means but shall not include broadcasting services."

Indisputably, by reason of a notification issued by the Central Government on or about 9th January 2004, Broadcasting and Cable Services were also brought within the purview of the definition of Telecommunication Services.

The Telecom Regulatory Authority of India (TRAI) in exercise of its jurisdiction conferred upon it under Section 11 (1) (b) read with Section 36 of the Act made a regulation known as the Telecommunication (Broadcasting & Cable Services Regulation) 2004 (The Regulation).

It is not in doubt or dispute that the said regulations govern the field.

'Addressable system' has been defined in regulation 2 (a)of the Regulations' to mean :-

> " **'addressable system'** means an electronic device or more than one electronic device put in an integrated system through which signals of cable television network can be sent in encrypted or unencrypted form, which can be decoded by the device or devices at the premises of the subscriber within limits of the authorization made, on the choice and request of such subscriber, by the distributor of TV channels to the subscriber."

'Agent or intermediary' has been defined in Section 2 (b) to mean:-

> " **'agent or intermediary'** means any person including an individual, group of persons, public or body corporate, firm or any organization or body authorised by a broadcaster/multi system operator to make

available TV channel(s), to a distributor of TV channels."

The term 'broadcasting services' has been defined in Regulation 2(f) to mean :-

" 'broadcasting services' means the dissemination of any form of communication like signs, signals, writing, pictures, images and sounds of all kinds by transmission of electro magnetic waves through space or through cables intended to be received by the general public either directly or indirectly and all its grammatical variations and cognate expressions shall be construed accordingly."

One of the questions which would arise for consideration would be as to whether the Respondent No. 2 is a service provider.

We may, at this stage, however, notice certain provisions of the Indian Contract Act, 1872 (The Contract Act).

Chapter X of the Contract Act deals with 'Agency'.

Section 182 defines 'Agent' and 'Principal' in the following terms :-

**" 'Agent' and 'principal' defined. –** An "agent" is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal".

For entering into any relationship of principal and agent, passing of any consideration is not necessary. His authority may also be either 'express' or 'implied'.

The definition of 'express' and implied authority has been stated in Section 187 of the said Act, which is to the following effect :-

> "An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case."

Section 200 of the said Act reads as under :-

> "An act done by one person on behalf of another, without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect."

Section 211 provides for the agent's duty in conducting the Principal's business. Section 212 speaks of the skill and diligence required from agent. An agent is bound to render proper accounts to his principal on demand as led down in Section 213 thereof. It has also his duty to communicate with the principal as provided for in Section 214.

Section 220 reads as under :-

"An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which he has misconducted."

Section 222 imposes a duty on 'Principal' to indemnify the 'Agent'. Section 227 reads thus :-

"When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal."

The core question, which in our opinion, arises for our consideration in this petition is as to whether the Respondent No. 1 is bound by the acts of omission & commission on the part of the Respondent No. 2.

With a view to determine the said question, we may notice certain admitted facts.

The Respondent No. 1 admittedly is a broadcaster. It entered into an agreement with the Respondent No. 2. The terms and conditions of which are not known to us, as a copy thereof for one reason or the other had not been produced by either of the Respondents and, thus, an adverse inference should be drawn against them and in particular against the 1st Respondent.

Two of the products of the Respondent No. 1 are 'Sahara News' and 'Sahara Samay'. For its own commercial reasons it wanted its channels to be placed on prime slots in the petitioner's network.

Indisputably, the petitioner is a multi service operator. The Respondent No. 2 has also been described in the petition as a multi service operator which has not been denied or disputed but only during arguments a contention

has been raised that it is not. What would be its effect, would be noticed at a later stage.

Construction of a document as is well known must not only be done on the basis of the language thereof but also the circumstances attending thereto.

In B.K. Muniraju v. State of Karnataka,(2008) 4 SCC 451, at page 455 the Apex Court has held that:

**18.** […]

> "In order to know the real nature of the document, one has to look into the recitals of the document and not the title of the document. The intention is to be gathered from the recitals in the deed, the conduct of the parties and the evidence on record. It is settled law that the question of construction of a document is to be decided by finding out the intention of the executant, firstly, from a comprehensive reading of the terms of the document itself, and then, by looking into—to the extent permissible—the prevailing circumstances which persuaded the author of the document to execute it. With a view to ascertain the nature of a transaction, the document has to be read as a whole. A sentence or term used may not be determinative of the real nature of transaction."

It has not been denied or disputed that the parties had entered into a similar contract in the year 2007-2008. It is in the aforementioned backdrop, the minutes of the meetings dated on 17.7.2008. by and between the petitioner and Respondent No. 2 assumes great significance.

The first paragraph of the said MoM provides for placement of channels from 1st April 2008 to 31st March, 2009.

The case which would be covered by the said agreement as also the frequencies have been mentioned. The two channels namely – 'Sahara Samay' and 'Sahara NCR' admittedly are the products of the Respondent No. 1. Ultimately it is the Respondent No. 1 who was benefitted by reason of such placement.

The consideration amount fixed therefor was Rs. 3 crores payable in four quarters. There is nothing on record to show that out of aforementioned amount of Rs. 3 crores, 2 crores were to be apportioned towards the digital system and one crore towards analogue system.

In fact that was nobody's case and in any event even if that be defence of the Respondent No. 2, it having not filed any written statement can not be permitted to raise any such contention.

The period of agreement has been mentioned as 1st April, 2008 to 31st March, 2009.

The Respondent No. 2 is a business concern. It must have been entering into such placement dealings with other broadcasters.

Mr. Atul Sarraf while examining himself on behalf of the Respondent No. 2 however, in his deposition has taken a peculiar stand that immediately after the meetings were drawn up, he read the same hurriedly and left for

Mumbai. His evidence, in our opinion, does not inspire confidence, in view of the fact that the memorandum of minutes refers to certain events which had taken place, and, thus, it is too much to contend that the same was not given a retrospective effect.

It is not much in dispute that on the same day, the Respondent No. 2 had sent a franked document being a carriage agreement to the petitioner which according to it were filled up, signed and sent to the Respondent No. 2 for its execution. The original of the said agreement had not been placed on the record. Mr. Atul Sarraf has maintained silence in that regard. It, however, is admitted that neither the Respondent No. 1 nor the Respondent No. 2 executed the said agreement.

We, therefore, are of the opinion that the terms and conditions contained therein can not be looked into by us, it being not embodying in a concluded contract.

What is, however, of some importance is that on the same day two invoices were sent to the Respondent No. 2; one for the period 1st April, 2008 to 1st June 2008 and the second for the period 1st July 2008 to 30th September 2008.

It is also not denied or disputed that part payments in respect of the said invoices have been received by the petitioner.

As per the statement of account appended to the petition, the Petitioner has received a sum of Rs. 41,26,702 and 41,18,022 by Cheque No. 23976 and 23993 on or about 25th July 2008 and 31st July 2008.

Yet again a cheque was received by it on 30th September, 2008 for a sum of Rs. 41,18,022. The payments made in part towards the invoiced amount of Rs. 84,24,000, in the facts and circumstances of this case, must be held to have been made for the period for which the invoices were drawn namely 1.4.2008 to 30.6.2008 and 1.7.2008 to 30.09.2008.

Similarily, the fact that the petitioner has raised another invoice for the period 1st October 2008 to 31st December 2008 on 1.10.2008 and for the period 1st January 2009 to 31st March 2009 on or about 1.1.2009 is not in dispute.

The payments which have been received by it against the said invoices are as under :-

| Date | Particulars | Period | Location | Amount (Dr) | Amount (Cr) |
|---|---|---|---|---|---|
| 7.17.2008 | Placement Income | 1.4.08 to 30.6.08 | Delhi-NCR | 8,427,000.00 | |
| 7.17.2008 | Placement Income | 1.7.08 to 30.9.08 | Delhi-NCR | 8,427,000.00 | |
| 7.25.2008 | Ch. No. 23976 | | Delhi-NCR | | 4,126,702.00 |
| 7.31.2008 | Ch. No. 23993 | | Delhi-NCR | | 4,118,022.00 |
| 9.30.2008 | Ch. No. 24061 | | Delhi-NCR | | 4,118,022.00 |
| 10.01.2008 | Placement Income | 1.10.08 to 31.12.08 | Delhi-NCR | 8,427,000.00 | |
| 11.17.2008 | HO | | Delhi-NCR | | 2,196,278.00 |
| 01.01.2009 | Placement Income | 01.01.09 to 31.3.09 | Delhi-NCR | 8,427,000.00 | |
| 01.30.2009 | Ch. No. 50600 | | Delhi-NCR | | 1,098,139.00 |

| | | | | | |
|---|---|---|---|---|---|
| 02.28.2009 | Collection | | Delhi-NCR | | 220,091.00 |
| 02.28.2009 | Collection | | Delhi-NCR | | 605,250.00 |
| 4.20.2009 | Collection | | Delhi-NCR | | 3,382,020.00 |
| 5.16.2009 | Collection | | Delhi-NCR | | 2,443,350.00 |
| 5.16.2009 | Collection | | Delhi-NCR | | 2,443,350.00 |
| | | | | | |
| | | **Total** | | 33,708,000.00 | 24,751,224.00 |

Disputes and differences between the parties arose at about that time. The MSOs including the petitioner who had not received their due payments threatened to switch off the channel placement of Sahara Samay and Sahara NCR.

The blame game between the Respondent No. 1 and Respondent No. 2 started. We, however, before referring to the correspondences exchanged between the parties at the relevant time may also notice that both of them have been approaching the MSOs to keep on placing the channels as per the MoM. It is with that end in view we may notice some letters, which were exchanged amongst the parties.

The Respondent No. 1 having come to learn about the probable steps taken by the petitioner for non-receipt of its invoiced amount in full, by a letter dated 17th February, 2009, stated as under :-

> "On behalf of team Sahara Samay Network, we extend you warm Greetings. We take this opportunity to thank you immensely for being a responsible business partner and ensuring a proper visibility of our channels through out your networks. We do hope that we continue to grow together from strength to strength for the days to come.

As you are aware Sahara Samay News Channel had outsourced its complete distribution activity to M/s. ABS Media Reach Pvt. Ltd. from 1st April, 2008 to 31st March, 2009 in turn, for which you had entered into an agreement with the above firm.

Off late it has been brought to our notice that few of our business associates/operators have not been paid by M/s. ABS Media Reach Pvt. Ltd. under the pretext of non payment from Sahara. As a responsible Media house we would like to clarify and inform you that all the dues of M/s. ABS Media Reach Pvt. Ltd. have been paid by us as on 31st December, 2008, therefore we request you to kindly follow up with M/s. ABS Media Reach Pvt. Ltd. to collect your dues (if any). While you are following up M/s. ABS Media Reach Pvt. Ltd. for your dues, a copy of such communication may be marked to us so that we can also take appropriate steps. Further, our distribution team shall be approaching you within 7 days to discuss the carriage deals for the remaining 3 months i.e. January to March 2009 including the deals for next year. Meanwhile, we seek your support to ensure the visibility of our channels across the network."

The tenor of the said letter is revealing. The petitioner was described as a 'business partner'. It speaks of 'growing together'.

Evidently, the Respondent No. 2 came to know of the contention of the said letter either from the petitioner or from the other MSOs. It, therefore, with a view to save its own reputation and clear its own stand that it had not made payments to the petitioner despite receiving the amount in question form the Respondent No. 1 circulated a general letter to all the MSOs and operators on or about 20th February, 2009, stating :-

"This is to inform you and place on record that we have not received the payments up to 31.12.2008 as alleged by the Sahara Distribution team to all the MSO/Cable operators through correspondence.

As soon as we got the information from few MSO about the said correspondence, we have approached the Senior Management to clarify the said issue on priority basis and are expecting the same issue will be resolved soon.

In the mean time on behalf of Sahara, we request you to run the Sahara News channels on your network, as the Senior Management had verbally assured us that they will honour their commitment towards MSO/Cable Operators.

We will endeavor to resolve your issue with Sahara, once Sahara pays us their respective Outstanding Dues. We were also surprised seeing the misleading letter issued by Distribution team to tarnish our image with operators.

Your kind cooperation will be highly appreciated by us and would request you not to enter into any dialogue with their Distribution team till 31st March, 2009."

(Emphasis supplied)

In that letter, thus, it had made an appeal on behalf of 'Sahara'. It assured payments on behalf of 'Sahara', having allegedly been in term assured by its 'senior management'.

It, therefore, considered itself competent to represent the Respondent No. 1. It accepted that there were certain issues with Sahara which it promised to resolve subject, however to its stand that and if the former pays to it

the outstandings payable to the MSOs, the amounts due to them would be cleared. No contention other than blaming each other for not paying the balance amount payable to the petitioners by eithers of the respondents.

The petitioner by a letter dated 16th March, 2009 demanded a sum of Rs. 1,80,50, 837/- from the Respondent No. 2, stating :-

> "You are aware that under the minutes of meeting dated 17.07.2008 entered into between you and us in order to promote your channels namely Sahara Samay and Sahara NCR for Digital network at Delhi/NCR and analogue network of JDC, GT, Noida, Preet Vihar and Jail Road region we agreed to place these channels at the agreed frequency on our network in the above said regions. In consideration of which you agreed to pay to us a sum of Rs. 3,00,000,00/- (Rupees Three Crores Only) for the said region which was to be paid for the period between 1st April 2008 and 31st March, 2009, in the manner as set out in clause 2 to the Minutes of Meetings dated 17.07.2008.
>
> As per the said clause, payment towards placement charges was to be made on quarterly basis at the beginning of each quarter. We have been raising invoices upon you for payment of amounts specified therein for each quarter.
>
> Huge sums of money still remain outstanding due and payable against the invoices raised by us and you have failed and neglected to pay these amounts, despite repeated requests and reminders.
>
> In these circumstances we hereby call upon you to pay to us the total sum of Rs. 1,80,50,837.00 outstanding as on 09th March, 2009 in respect of placement fee inclusive of service tax and cess on

service tax with interest @ 21% per annum for the delayed payment with effect from the date of accrual till payment and/or realization. Please make the payment immediately."

The Respondent No. 2 by its letter dated 23rd March, 2009 replied to the petitioner's aforementioned letter dated 16th March, 2009 in the following terms :-

"At the outset we deny and disagree with the amount stated in your said letter under reply as the said amount is in excess of our negotiated amount and is without any adjustment towards disruption of service.

We intend to inform you and place on record that we are mere Distributors of Sahara Sanchar Ltd. and due to some misunderstanding created by distribution team of Sahara Sanchar Ltd. between their Senior management and us, the disbursement of amount are been stalled by the Sahara Sanchar Ltd. which has ultimately resulted in delay in disbursement of payment to MSO.

Meanwhile as a Distributor of Sahara Sanchar Ltd. we are trying to resolve the issue in respect to payment of the respective Dues of all the MSOs as soon as possible and will be reverting back to you as soon as payment is effected by Sahara Sanchar Ltd. to us."

Evidently, therefore, only at that stage, it started raising some other contentions.

It appears that the Respondent No. 1 issued a similar letter to all the MSOs or operators and yet again on or about 8th April, 2009, it by a letter dated 8th April, 2009, stated :-

"This is in continuation to our earlier communication in the month of February' 2009 sent to you by our respective Regional Managers. While appreciating the cooperation extended by you in ensuring the visibility of our channels, we also understand the issues being faced by you vis-à-vis the payments on account of the agency to whom we had outsourced the distribution for Financial Year 2008-2009. Needless to mention that, we shall leave no stone unturned in our efforts to resolve all your pending issues.

As the above process takes place, and meanwhile, in view of the fact that, the month of April has already begun, in mutual interest of the business, our team will approach you directly to work on the deals which will be executed exclusively between Sahara and your firm, for the of Financial year 2009-2010, with immediate effect.

While thanking you for your valued support, we do extend our sincere apologies for the issues and would like to re-iterate that, not only as a responsible media house but also as a credible corporate, we are committed to safeguard the interests of our associates as we have done it in the past years since the inception of our business in the electronic media.

Meanwhile, we sincerely request you to keep our channels on and give me a personal audience at an earliest date convenient to you after 12th April, 2009."

The second sentence of the said letter, therefore, is of some significance as indisputable, the petitioner has ben placing the channels of the Respondent No. 1 at the agreed 'frequency'.

The petitioner in a situation of this nature was not and could not be expected to be interested in being a party to a dispute between the respondents inter se.

Admittedly, however, the Respondent No. 1 with a view to ensure that the placement of its two channels are not disrupted, paid the amount due for the 4th quarter. What would be the effect thereof is the question. Before, however, adverting thereto we may notice that the Respondent No. 1 furthermore wanted a balance confirmation from the petitioner in terms of its letter dated 15th October, 2009, which reads as under :-

> "As per our Book of Account for the financial year 2008-2009, your account shows a credit balance of Rs. 8,886,700.00 as on 31.03.2009. You are requested to confirm the same. However, in case of any difference please send our account statement as appears in your Book of Account, so that reconciliation can be made.
>
> If we do not receive any confirmation within 15 days of this correspondence the balance shown in our records shall be treated as correct."

The balance confirmation was, therefore, sought for in relation to the entire financial year. It was not reiterated that it did not have any liability. It did not reiterate that it had paid the entire amount to the Respondent No. 2. It is, therefore, by its own conduct.

According to the petitioner, however, the figure 88,86,700 was not correct as evidently because, it was entitled to a bit more than 89,000,00. It sent a statement of account for the said period which is as under:-

**Statement of Account of ABS Media [Sahara TV Network]**

| Date | Particulars | Period | Location | Amount [Dr] | Amount [Cr] |
|---|---|---|---|---|---|
| 7/17/2008 | Placement Income | 1.4.08 to 30.6.08 | Delhi-NCR | 8,427,000.00 | |
| 7/17/2008 | Placement Income | 1.7.08 to 30.9.08 | Delhi-NCR | 8,427,000.00 | |
| 7/25/2008 | Ch. No. 23976 | | Delhi-NCR | | 4,126,702.00 |
| 7/31/2008 | Ch. No. 23993 | | Delhi-NCR | | 4,118,022.00 |
| 9/30/2008 | Ch. No. 24061 | | Delhi-NCR | | 4,118,022.00 |
| 10/1/2008 | Placement Income | 1.10.08-31.12.08 | Delhi-NCR | 8,427,000.00 | |
| 11/17/2008 | HO | | Delhi-NCR | | 2,196,278.00 |
| 1/1/2009 | Placement Income | 1.1.09-31.3.09 | Delhi-NCR | 8,427,000.00 | |
| 1/30/2009 | Ch. No. 50600 | | Delhi-NCR | | 1,098,139.00 |
| 2/28/2009 | Collection | | Delhi-NCR | | 220,091.00 |
| 2/28/2009 | Collection | | Delhi-NCR | | 605,250.00 |
| 4/20/2009 | Collection | | Delhi-NCR | | 3,382,020.00 |
| 5/16/2009 | Collection | | Delhi-NCR | | 2,443,350.00 |
| 5/16/2009 | Collection | | Delhi-NCR | | 2,443,350.00 |
| | | | | | |
| | | Total | | 33,708,000.00 | 24,751,224.00 |
| | | Balance | | 8,956,776.00 | |

The aforementioned conduct of the Respondent No. 1, in our opinion is a clear indicator of its admission that the Respondent No. 2 was its agent and in any event it had taken over and/or acknowledged/admitted its liability to pay the entire amount stipulated in the memorandum of minutes, as also the invoices.

Submission of Mr. Arora that there was no privity of contract between the petitioner and the Respondent No. 1, in our considered opinion cannot be determined only on the basis of the fact that the Respondent No. 1 was not a party to the MoU, in so far as the question as to whether a concluded contract had come into being or not must be considered having regard to the entirety of the situations.

We have before us three different situations, namely :-

1. No valid contract has been entered into,

2. The Respondent No. 1 is not a party to the contract, and

3. The Respondent No. 2 was not acting as an agent of the Respondent No. 1.

In law, it is not necessary that the parties must always enter into an agreement in writing.

'The Contract Act' also postulates an oral agreement. It also postulates an agreement entered into by and between a 'Principal' through its 'Agent' and another person.

It would, however, be one thing to say that no such agency has been created, but it would be another thing to say that if such an agency had been created, the extent of its authority and as to whether the agent's action, if any, and to what extent would bind it's principal.

We, however, before considering this matter any further, would assume that an agreement in writing which had not been signed by a party to a contract can not be held to be binding on it.

Section 10 of the Indian Contract Act reads as under :-

"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents."

In view of the aforementioned provision of law, there cannot be any doubt or dispute that the terms of the contract should be certain so as to create legal relationship and the parties must be ad idem in regard thereto which would in other words mean that there should be a meeting of minds of the contracting parties.

In the aforementioned view of the matter, not only there has to be an express agreement but the same must also show that the parties have entered into a binding arrangement and the terms thereof must relate to the executed transactions in contradistinction with executory transactions.

Mr. Arora has relied upon a decision of the Supreme Court of India in Star India Limited Vs. Sea TV Network Limited reported in AIR 2007 Supreme Court, page 1538.

In that case the appellant herein had entered into an agreement of distributorship. The question was as to whether the agreement was on a principal to principal basis or the relationship was of principal and agent.

The question as to whether there exists a binding relationship between two parties to an agreement as also the nature thereof would, in our considered opinion, depend on the factual matrix involved in each case. Therein in that behalf no ratio has been laid down.

The Respondent No. 2 herein itself states that it acted as an agent of the Respondent No. 1.

Once it is held that the Respondent No. 2 was an agent of the Respondent No. 1 which fact is required to be determined keeping in view the conduct of the parties as also the materials which have been brought on record, the presumptive evidence, as also the adverse inference, if any, which is required to be drawn, must be considered for determination of the question. It would depend on the fact situation involved in each case.

The Respondent No. 2 was admittedly entrusted with the job of holding negotiations with the MSOs for the purpose of placement of its channels. It did so on behalf of the Respondent No. 1 purported to be in terms of the 'Distributorship Agreement'. The matter might have been different, if the Respondent No. 1 which having regard to the provisions contained in Section 106 of the Indian Evidence Act, being in possession of special knowledge, could

have brought on sufficient materials on record to show that the transactions between the respondents inter se were on a 'principal to principal' basis. For the said purpose :-

a) The distributorship agreement should have been placed on record.

b) The Respondent No. 1 should have proved its case that it has paid unto the respondent No 2, the entire amount of consideration or at least to the extent it had completed its part of the contract.

c) It was not necessary for it to intervene when allegations were made in regard to non-payment of its dues by the petitioner to contend that it was incorrect that the amount payable to it had not been made over to the Respondent No. 2, which necessarily implies that the payments were to be made by the Respondent No. 1 to the Respondent No. 2 for each of the MSOs separately.

d) The Respondent No. 2 also while refuting the said allegations assured the MSOs that they would be paid their dues if the Respondent No. 1 made the payments due to them.

e) The Respondent No. 2 has even made an appeal to the MSOs that the placement of the channels of the Respondent No. 1 may be carried out. If the Respondent No. 2 was not an agent ordinarily it could not have represented the Respondent No. 1 even in relation thereto.

The Respondents evidently are bound by their respective conduct.

The Respondent No. 1 has made admissions and/or acknowledgements within the meaning of the provisions of Section 23 of the Indian Evidence Act, Vis-à-vis Section 58 thereof and Section 18 of the Indian Limitation Act, 1963 when it sent its statement of account showing an admitted dues of Rs. 88,86,700/-.

The explanation offered by the Respondent No. 1 that it did so keeping in view the fact that a new contract had been entered into for the last quarter of the financial year does not appeal to us, as even by its own account the said sum of Rs. 88,86,700 could not have been the dues of the petitioner for the last quarter as some payments had already been made to it.

There was no reason as to why the distributorship agreement was not placed on record. The Respondent No.1 being in the custody thereof, non-production of such a vital document would deserve drawing of an adverse inference against it.

In Gopal Krishnaji Ketkar v. Mohamed Haji Latif reported in AIR 1968 SC 1413, the Supreme Court of India has categorically opined :

> "Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof."

[See also Kamakshi Builders v. Ambedkar Educational Society, (2007) 12 SCC 27 and Atyam Veerraju v. Pechetti Venkanna,(1966) 1 SCR 831].

The above decisions have been followed by this tribunal in Petition No.145(C) of 2009, Mona Cable Network v. ESPN Software India Private Ltd. decided on 20th November, 2009

Mr. Arora has placed strong reliance upon a decision of the Supreme Court of India in Vimlesh Kumari Kulshrestha Vs. Sambhajirao reported in 2008(5)SCC 58 wherein the Apex Court has held that the agreement for sale being uncertain could not have been given effect to. The factual matrix involved therein, being different, the said decision must be held to have no application in the instant case as herein neither the agreement entered into by and between the parties are uncertain or are not capable of being enforced.

Both the respondents No. 1 and 2, it will bear repeatition to state are bound by their own conduct.

It is true that no reliable material has been placed on record to show that there had been any meeting between the representatives of the Respondent No. 1 and the petitioner prior to the meetings between the representatives of petitioner and Respondent No.2.

There is also nothing on record to establish as has been contended by the petitioner that immediately before the minutes of the meetings were drawn up, the representatives of the Respondent No. 1 left. Similarly, we cannot accept that Mr. Atul Sarraf, representative of the Respondent No. 2 was given the said MoU for signature when he was about to leave for Mumbai and he had signed the same in a hurry without reading the same. The aforementioned contention raised by the said witness, we have no doubt in our mind, was an afterthought.

Our attention has been drawn to a letter of the Respondent No. 2 addressed to the petitioner being dated 27th July, 2008.

Mr. Atul Sarraf in his cross examination, however, accepted that Mr. Alok Govil and Mr. Harish Reddy had contacted him for carrying on the Sahara carriage deal. He, however, when confronted with the question as to whether prior to June, 2008, there had been talks between Sahara and Hathway for placement and carriage, he conveniently stated that he was not aware of the same. He answered in the same vein when another question was put to him as to whether there was any carriage placement agreement between Sahara and Hathway for the year 2007-2008.

He did not stop there. He even went to the extent of saying that out of the amount of Rs. 3 crores, payments were to be made for two different types of placement of channel, namely Rs. 2 crores for digital network and Rs. 1 crore for the five analogue head ends, which was not its case in any of the correspondences.

Mr. Atul Saraf by all standards has made every attempt to improve the case of the Respondent No.2.

Each one of the parties before us had relied on the Memorandum of Understanding. The terms stated therein are absolutely clear and unambiguous. As the Respondent No. 2 has not filed its reply, it was not entitled to raise any defence.

It was permitted to cross examine the witnesses of the petitioner only to demolish the case of the petitioner and not to prove its own defence.

Any evidence, as is well known, would be wholly inadmissible if the same has not been pleaded.

The aforementioned letter dated 28.7.2008 has not been legally brought on record. Mr. Saraf had even gone to the extent of denying that Sahara Channels had been running on the networks of the petitioner at the designated frequency from April, 2008 to July, 2008.

If that be so, it is beyond anybody's guess as to why issuance of the invoices were not protested against and/or on payments were made in part. Even the Respondent No. 1 did not dispute thereabout. Mr. Saraf, accepts that the payments were being made on the strength of the Minutes of the Meetings as also on the basis of the alleged assurances. Who gave any assurance and/or the nature thereof is difficult to comprehend, having not been disclosed.

We may notice that even the purported letter dated 27th July, 2008, is said to have been delivered on 29th July, 2009.

According to him, the year 2009 is a mistake. However, keeping in view the fact that the petitioner denies the receipt thereof; it was required to be proved by examining the person concerned from the courier company or otherwise.

He even did not file any corrected copy of the letter of the courier company. Even a corrigendum was not issued. We, therefore, are of the opinion that ex-facie the said letter dated 27th July, 2008, apart from being inadmissible in evidence, it's genuineness is open to question.

It is relevant to notice that Mr. Ramesh Kundu appearing on behalf of the Respondent No. 1 admitted that Sahara did not write any letter saying that it only wanted its placement agreement on the analogue mode nor did it state so in its letter to the Respondent No. 2. The said witness expressed his ignorance as to the amount payable to the Respondent No. 2 for three quarters, namely from 1.4.2008 to 31.12.2008 and the actual amount which is said to have been paid.

When his attention was drawn to a letter of the Respondent No. 2 that payments had not been made by Sahara, he could not say whether the statements were correct or not.

To a great extent, a new case is sought to be made out that payment for the period 1.1.2009 to 31.3.2009 was made to the petitioner under a separate agreement but when questioned further, he accepted that payments were made without agreement and on the basis of the long relations of the operators.

He even went to the extent of betraying his ignorance as to whether any invoice for the said period has been issued. He was not even aware that such payments were made both for digital or analogue mode of transmission.

It is interesting to notice that to a question as to when the Respondent No. 2 was appointed as the agent or the distributor of the Respondent No. 1, he answered the same in a vague term, stating. "sometimes in May, 2008," but the appointment was made effective from 1st April.

If the Respondent No. 2 was appointed with a retrospective effect, there there had to be some reasons therefor, namely, the MSOs were placing their channels continuously without any break which included the period 1st April till the actual agreements were entered into, the same must be held to be sufficient for holding that it was done so as to enable the parties hereto to give retrospective effect to the agreement in question.

If that be so, some payments were to be made to the petitioner or the Respondent No. 2 for the period from 1.4.2008 till the MoU was signed by the Respondent No. 1, as it has not been proved that it had made the entire payment to the Respondent No. 2 as stipulated in the distributionship agreement. Mr. Kundu although stated that he had a copy of the MoU, despite being called upon to do so did not produce the same. He furthermore, accepted that there was a placement agreement with the petitioner for the period 2007-2008 which expired on 31.3.2008.

It is of some significance to notice that this witness has also expressed its ignorance as to whether any talks and negotiations have been going on for appointing the Respondent No. 2 as the distributor of the respondent or agent for the year 2010-2011. It would also be of some significance to place on record that according to the said witness, the amount due to the Respondent No. 2 has been paid and thus there was no dispute between them inter se. If that be so, the question of the Respondent No.1 to make any payment whatsoever to the petitioner for the period in question did not and could not arise.

The Respondent No. 2 itself has put a suggestion to him that it had regularly been informing the Respondent No. 1 about all the agreements which the Respondent No. 2 has entered into with the MSOs on its behalf.

We, in the facts and circumstances of this case, think that the suggestion given to be said witness should be accepted to be correct, as otherwise how else the Respondant No. 1, being the 'Principal', would be knowing the terms and conditions of the agreements entered into by and between the Respondent No. 2 and the MSOs, whether on its behalf or otherwise as ultimate beneficiaries thereof was itself.

The Respondent No. 2 contends that it is not a Multi Service Operator as it had not been carrying out the business of dissemination of any TV channels.

We may in this connection notice the definition of 'broadcaster' as contained in Regulation 2 (e) of the Regulations.

It reads thus :-

> "'broadcaster' means any person including an individual, group of persons, public or body corporate, firm or any organisation or body who/ which is providing broadcasting service and includes his/her authorised distribution agencies;"

We have noticed heretobefore the definition of 'broadcasting services'.

The definition of broadcaster is an inclusive definition. It includes the broadcaster's authorised distribution agencies. Such 'Distribution Agencies' stricto-sensu may not be the 'distributor' of a TV channels within the meaning of the said term as contained in the Regulation but once it is held that the Respondent No. 2 was an 'agent' of the Respondent No. 1, the provisions of 'Contract Act' shall come into play.

An agency, having regard to the provisions contained in Section 182 of the 'Contract Act' is founded upon a contract whether express or implied.

In certain trades, the word 'agent' is often used without any reference to the law of 'Principal' and 'Agent'. The determination of such a question may sometimes be difficult but in this case, ex-facie such a case has been

made out.

The petitioner therefore, was entitled to sue both the principal and the agent, as admittedly the Respondent No. 1 had denied its liability. Even, the Respondent No. 2 has denied its liability. Whether either or both of them would be liable was required to be determined.

Mr. Navin Chawla, however, would urge that having regard to the provisions containd in Section 230 of the Indian Contract Act, it was obligatory on the part of the Respondent No. 1 to prove the contract.

If the Respondent No. 2 contends that it was not bound by the contract, it could have also produced the distributorship agreement, but it failed and/or neglected to do so. We, therefore, are of the opinion that such a question cannot be permitted to be raised by the Respondent No. 2.

Reliance has been placed by Mr. Chawla on Midland Overseas v. M.V. `CMBT Tana` & Ors reported in AIR 1999 Bom 401

However, in the instant case, having regard to the fact that none of the respondent had produced the distributorship agreement, it is not possible for us to arrive at one conclusion or the other as to the extent of the authority of the Respondent No. 2.

For the reasons aforementioned we are of the opinion that the respondents cannot be permitted to contend that they had been dealing on principal to principal basis or neither of them is personally liable to make any payment to the petitioner.

Mr. Arora has relied upon a decision in Hansa Vision Pvt. Ltd. vs. Dabur (India) Limited and Ors. reported in 168 (2010) DLT 562.

In this case, the petitioner has alternatively submitted that even under Section 70 of the Indian Contract Act, the Respondent No. 1 would be liable to pay.

Having regard to the fact that we have heretobefore held that there has been a subsisting contract between parties and the relationship between Respondent No. 1 and the Respondent No. 2 was of a 'Principal' and 'Agent', we need not go into the aforementioned question.

We have noticed heretobefore that Mr. Arora has raised strong objection with regard to framing of 'Issues No. 3 and 4' inter alia on the premise that the same was beyond the pleadings of the petitioner and in any event rejoinder to the reply does not amount to a pleading.

Apart from the fact that the said issues were raised in the presence of the counsel of the parties, we are of the opinion that even if the same are recast no substantial difference would be caused thereby.

For the purpose of considering as to whether the respondents are responsible whether jointly and severally to pay the 'carriage fee and placement charges' for the period 1.4.2008 to 31.3.2009, wherefor issue No. 2 has been framed, these issues were required to be gone into. Even otherwise 'Issue No. 5 and 6' clearly refer thereto.

Furthermore, whether in a given situation a party would be entitled to a decree claimed for or a part thereof having regard to the provision of Order VII Rule 7 of the Code of Civil Procedure could be determined in the light of Section 70 of the Indian Contract Act, as the said provision may be invoked having regard to the factual determination thereof by the court concerned.

In that view of the matter, we are of the opinion that it is not material whether the petitioner has raised the said plea in the petition or in its rejoinder.

Reliance has been placed on a decision of ours in Indusind Media and Communication Limited Vs. Poly Cable being Petition No. 122 (C) of 2009, wherein it was held :-

> "The onus to prove that the amount claimed for and/or a part of it had been owing and due from the respective respondent herein in terms of Section 101 and Section 102 of the Indian Evidence Act was on the petitioner but it had failed to discharge the same.

It is on the aforementioned premise the point relating to privity of contract between the parties assumes some significance. As a matter of fact the statements made by the witnesses examined on behalf of the respondent that they have been making all payments to the distributor, has not been put to cross examination. Thus, the aforementioned statements stand unrebutted. Even otherwise Mr. Sharma was not a competent witness to rebut the said statement in that behalf.

Moreover, having regard to our findings aforementioned that the petitioner has failed to prove that there existed a privity of contract and having regard to the nature of evidence adduced by the petitioner and furthermore in view of the fact that the petitioner has filed a petition against the distributor of the company separately, rather than impleading it in these cases, in our opinion these petitions should be dismissed and this cannot be allowed on the ground of the alleged admission on the part of the respondents as the petitioner must be held to have failed to prove its claims."

There is no quarrel with the proposition of law laid down therein but it is also a well settled principle of law that a little difference in facts and/or an additional fact may lead to a different conclusion.

The law of precedent, which attracts the aforementioned principle, is absolutely clear.

Reliance has also placed on Mohd. Latif Choudhry v. Smt. Amritkala Baveja and Anr., AIR 1959 MP 309. In paragraph 8 of the said decision it has been held as under :-

> "….. even if the agreement purports to appoint M/s. Azad Film Distributors as exclusive agents, describes them as "agents" and speaks of the terms of agreement as "agency arrangements" and of remuneration payable by the producers M/s. D. S. Films to the distributor M/s. Azad Film Distributors as 'commission'. But the true relationship created by the agreement cannot be determined merely on the description given therein of the distributors or of the remuneration payable to them by the producer.
>
> That can be only determined by a consideration of all the terms and conditions of the agreement and if on such a consideration it is found that the person described as agent is to act on his own behalf and not on behalf of the other party to the agreement, then notwithstanding the description of the person as agent it must be held that the relation between the parties is as between principal and principal."

In that case, difficulty arose keeping in view the contract between the parties as to whether the respondent therein was an agent of the petitioner therein. As the decision itself shows that the question can be determined only upon consideration of all the terms and conditions of the agreement. It will bear repetition to state that even in this case no agreement has been produced.

Reliance has also been placed by Mr. Arora on Aries Advertising Bureau v. C.T. Devaraj (dead) by LRs. , AIR 1995 SC 2251 but in that case the principle of Section 70 of the Indian Contract Act was not attracted. The ratio

laid down therein was in the factual matrix is not involved in this case.

Similar is the position of the decision of Supreme Court of India in Food Corporation of India and Ors. v. Vikas Majdoor Kamdar Sahkari Mandli Ltd. reported in JT2007(12)SC517,.

We fail to understand as to why reliance has been placed on Shivnandan Sharma v. Punjab National Bank Ltd., (1955) 1 SCR 142, where the question, which arose for consideration was as to whether the appellant therein was a servant or an independent contractor.

Such a question does not arise herein.

For the reasons aforementioned, the claim of the petitioner must be held to be maintainable. It is declared that the respondents are liable to the petitioner jointly and severally for the amount claimed for.

The Petition is allowed.

The petitioner claims itself entitled to interest for the amount due @ 18% per annum.

However, we are of the opinion that the interest of justice would be sub-served if the pendent lite and future interest is granted at the rate of 12% per annum.

The respondents shall pay bear the cost of the petitioner in equal proportions. Advocate's fee assessed at Rs. 1,00,000/-.

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

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

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

\/**mks**\/