TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

DATED 27th JULY, 2011

Petition No. 67(C) of 2008

IndusInd Media & Communications Ltd ..... Petitioner

Vs.

City Cable & Ors ..... Respondents

Petition No. 68 (C) of 2008

IndusInd Media & Communications Ltd ..... Petitioner

Vs.

In Cable Communication & Ors ..... Respondents

Petition No. 69 (C) of 2008

IndusInd Media & Communications Ltd ..... Petitioner

Vs.

Sai Ganesh Enterprise & Ors ..... Respondents

Petition No. 87 (C) of 2008

IndusInd Media & Communications Ltd ..... Petitioner

Vs.

Satekrishmani Network & Ors ..... Respondents

Petition No. 95 (C) of 2008

IndusInd Media & Communications Ltd ..... Petitioner

Vs.

Sai Ganesh Enterprises & Ors ..... Respondents

Petition No. 96(C) of 2008

IndusInd Media & Communications Ltd ..... Petitioner

Vs.

City Cable & Ors ..... Respondents

Petition No. 97 (C) of 2008

IndusInd Media & Communications Ltd ..... Petitioner

Vs.

In Cable Communication & Ors ..... Respondents

Petition No. 98 (C) of 2008

IndusInd Media & Communications Ltd ..... Petitioner

Vs.

S.S. Advertising & Ors ..... 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 Petitioners : Mr. Kailash Vasdev, Sr. Advocate
Ms. Kanika Agnihotri, Advocate
Mr. Vaibhav Agnihotri, Advocate
Ms. Shikha Tandon, Advocate

For Respondent No.1 : Mr. Tejveer Singh Bhatia, Advocate
Mr. Sharath Sampath, Advocate

For Respondent No.2 : Mr. Maninder Singh, Advocate

JUDGEMENT

G.D. GAIHA

1. The petitioner, IndusInd Media & Communications Ltd. (hereinafter IMCL), has its principal office at In Centre, 49/50 MIDC, 12th Road, Andheri (East), Mumbai-400 093. The petitioner is a Multi System Operator (MSO) which has been engaged in the business of transmission and retransmission of Free To Air and Pay channels signals and its own content through its vast cable network for a period of over 12 years.

2. This business inter-alia consists of supply of programme packages to various cable operators and direct points of the Petitioner for which the petitioner has established a pan India cable TV network at different locations in 11 cities to cater to its operators and customers.

3. IMC's business operations include receiving signals from Broadcasters of various TV channels, whether such channels are broadcast by satellite or by terrestrial means and includes both free to air and pay TV channels and transmitting the signals to its operators and customers.

4. The petitioner has established central head ends in various cities and has progressively digitalized its network in the main metros by setting up fiber optic trunk lines and provides nodes through which franchisee

operators ensure that the signals reach customers of the petitioner or the petitioner directly supplies to its customers.

5. For this purpose, the Petitioner has set up individual control rooms in each area where it installs equipment to ensure distribution and transmission of the highest quality signal to the end consumer. The petitioner company has built up an impeccable reputation and immense goodwill in the market.

6. The petitioner company now has a wide subscriber base pan India and a major presence in the city of Mumbai and Delhi as well as other cities. For the purposes of ensuring that its signals reach its customers,- the petitioner has established its ground network by laying cables, installing amplifiers, connectors, trunk taps, cable jointers, splitters, attenuator pads, etc since 1995-96.

7. The respondent no. 1 is a distributor appointed by the Petitioner Company in Petition No. 67 (C) of 2008 and also in Petition No.96(C) of 2008. Respondent no. 1 in its capacity as a distributor of the petitioner's network, has been dealing with the petitioner, through its proprietor/representative- Mr. Mehboob Gani. Under the distributorship agreement signed between the parties, the respondent no. 1 is the authorized and sole distributor of the petitioner in the area of Chembur, Mumbai.

8. The respondent no. 2 in petition no. 96 (C)/2008 is SCOD Networking Private Ltd., (hereinafter 'Networking') is a company with an authorized share

capital of Rs. One crore divided into one crore equity shares of Rs. 1/- each. It was a company "conceived and conceptualized" by one Mr. Rajiv Vyas. However, the promoter directors of the company were, inter alia, Mr. Ganesh Naidu and Mr. John win G Manavalan, Mr. Mehboob Gani, are signatory shareholder of the respondent no. 2 company. The shareholders of this company had agreed to carry on the business of Multi System Operator as distributors and providers of tele-communication services directly or through cable operators affiliated to the shareholders and/or the company on a subscription basis.

9. The above said company was incorporated under the provisions of the Companies Act, 1956, on the 1st of September 2006, duly registered with the Registrar of Companies, Maharashtra at Mumbai. The shareholders of the company constitute Group 'A' and Group 'B' shareholders each having a defined role. The first group of shareholders of the company includes inter alia Ganesh Govindraj Naidu and Johnvin George Manavalan, Mr. Mehboob Gani and others.

10. Respondent No. 2 in petition no. 67 (C)/2008 and Respondent no. 3 in petition no. 96 (C)/2008 is SCOD 18 Networking Private Ltd., (hereinafter to be termed as SCOD 18) is an incorporated company under the Companies Act, 1956, on 29.01.2008. The main object of this company is to carry on business as a multi system operator (MSO) amongst other businesses including the business of receiving signals from broadcasters and distribution thereof to the cable operators affiliated to the company directly

or through the authorized distribution agencies of the company. The first promoter, directors of the said company, i.e., SCOD Networking Pvt. Ltd. are Mr. Ganesh Govindraj Naidu and Mr. Johnvin George Manavalan. It is pertinent to note that Mr. Ganesh Govindraj Naidu and Mr. Johnwin George Manavalan are promoter/directors of both-respondent no. 2 & 3 in Petition no. 96 (C)/2008. The Memorandum of Association, Article of Association, copy of shareholders of Respondent No. 2 in both the petitions 67 (C)/2008 and 96 (C)/2008 i.e. SCOD Networking Pvt. Ltd. is annexed in the petition no. 96 (C)/2008 at pages 34 to 86 and is marked as ANNEXURE-PIII(Colly.). The proposed shareholding pattern is placed at page 41 & 43 of this Judgment.

11. The respondent no. 4 in Petition No. 96 (C) of 2008 is You Telecom India Pvt. Ltd. and is stated to be India's "second largest Private broadband Internet Service Provider offering high speed broadband services to residential, ME and Corporate Customers in India." As per its official website, it operates in 11 cities including Mumbai and is "India's only ISO 9001-2000 certified company dedicated to the Broadband business.

12. In Petition No. 68 (C) of 2008 and 97 (C) of 2008 the common petitioner, i.e., IMCL has filed a case against M/s Incable Communication, who is represented through its proprietor Mr. Jeetu Chandigaonkar.

13. In Petition No. 69 (C) of 2008 and 95 (C) of 2008 the common petitioner, i.e., IMCL has filed a petition against M/s Sai Ganesh Enterprises who is represented through its proprietor, Mr. Ganesh Naidu

14. In Petition No.87 (C) of 2008 and 98 (C) of 2008 the common petitioner, i.e., IMCL has filed the case against M/s Satekrishmani Networks and others and M/s S.S. Advertising and others who is represented through its proprietor , Mr. Gaurang Kawakia and Mr. Johnvin Manvala respectively.

Factual Matrix of the case

1. The respondents claim to have signed a distributorship agreement on 30.6.1999 with the petitioner having specific obligations as per the agreement. The petitioner by way of this petition has impugned the illegal termination of the agreement/contract dated 30.6.1999, which is claimed to be valid and has subsisted between the parties till April 2008, by its letter dated 8th April 2008 received on 15.4.2008 and subsequent communication dated 25.4.2008 after filing of petition no. 67 (C)/2008. The petitioner claims to have the agreement in operation for a period of 9 years w.e.f. Jun, 1999 till April, 2008. The main allegation is that the Respondent No. 1. M/s. Citi Cable (Petition no. 67 (C)/2008 and 96 (C)/2008) for the benefit of Respondent No. 3 (SCOD 18 Networking Pvt. Ltd.) and in collusion with Respondent No. 2 SCOD Networking Pvt. Ltd. and Respondent No. 4. You Telecom India Pvt. Ltd. has unilaterally, arbitrarily and illegally terminated

the agreement that had validly subsisted between the parties for a period of nearly 9 years, without observing any steps as stipulated under the TRAI Act and the Interconnect Regulations. It is also claimed by the petitioner that besides terminating the agreement unilaterally, the respondent has damaged the equipment of the petitioner that had been provided to it over a period of 9 years and has illegally switched over to the network of Respondent No. 2 overnight.

2. The respondent No. 1, therefore, has used the entire infrastructure provided solely by the petitioner to transmit the signals of a rival competitor / MSO and this has resulted in a large number of subscribers of the petitioners network without its signals. The petitioners herein are working in different areas, like, Borevelli, Goregaon, Chembur and Bhandoop. The business arrangements with all the respondents is as per the agreement made on 30th June, 1999 between the petitioner and the respondent No.1 herein in this batch of petitions.

3. The salient features which have been brought to our notice of this distributorship agreement are as follows:-

(i) The distributor is acting as a distributor of IMC, i.e, petitioner and is aware of the manner in which the business is carried out by IMC. IMC is the owner and has established central Location/ Head End and /or Node (hereinafter referred to as 'Centre') in or about the area equipped with Equipment(s) necessary for transmitting signals to direct points

and franchisee points, and other assets ancillary or in relation thereto as also cables etc. outside Centre which are necessary or useful in rendering services, which are generally described in Schedule B to this Agreement (hereinafter referred to as 'IMC assets')

(ii) In pursuance of this Agreement, IMC

(a) Has installed IMC Assets more particularly described in Annexure 2 hereto

Presently lying at ……,

(b) Shall ensure that IMC Assets are kept in working condition and are properly operated and maintained so as to provide uninterrupted quality service to the customers ;

(c) Shall carry on business of Cable TV Network, including supply of programme packages to various operators and to customers;

(d) Has provided trunk lines for delivery of TV channel bouquets and technical staff for operating and maintaining IMC Assets at Centre;

(e) Shall insure at its cost IMC Assets for such risks and in such amount as it deems fit;

(f) Shall determine and convey from time to time, norms for accepting local and corporate advertisement for IMC and ;

(g) Shall give instructions and directions from time to time for efficient operation and maintenance of IMC Assets, marketing products and

services provided from time to time by IMC, collection of revenue and such other matters relating to this Agreement so as to create a regular set of satisfied customers, all of which instructions and directions the distributor shall carry out.

(iii) In pursuance of this Agreement, the Distributor shall

(a) assist in proper maintenance of IMC's Assets;

(b) resolve technical, commercial and other complaints, which may be received from the customers and others so as to ensure uninterrupted projection of programmes;

(c) sustain market and cater products and services supplied by IMC from time to time to existing and new customers in the area; and also make consistent and diligent efforts to maintain and increase IMC's market share;

(d) coordinate between IMC and customers so as to create a congenial atmosphere for increasing customer satisfaction and IMC market share;

(e) assist in maintenance of records of IMC Assets and all other materials goods and items brought in at Centre for supplying products and services to customers and to ensure that the same are properly maintained subject to usual wear and tear;

(f) ensure safety and security of IMC Assets;

(g) maintain IMC's corporate and trade logo, marks and trademarks properly at Centre and in course of business on IMC assets and to report any infringement thereof;

(h) maintain channel allocation as may be directed by IMC from time to time and ensure relay and transmission exactly in the form and manner in which it is provided by IMC;

(i) no utilization of bandwith on cable will be authorized or permitted without prior approval of IMC. The distributors will be fully responsible to ensure compliance of the above;

(j) co-operate and ensure efficient and competitive provisions of any other value added services, which may from time to time be introduced by IMC;

(k) advance the interest of IMC in connection with the business envisaged under this Agreement and to act in all manners as is beneficial to such business, protect the interest of IMC and take steps to avoid and counter any actions which are detrimental to such business;

(l) Indemnify IMC for any loss or damages arising out of non-performance or improper performance of the responsibility undertaken by the Distributor;

(m) Not to hold out except as Distributor in terms of this Agreement;

(n) Not commit, undertake or agree in respect to any matter on or behalf of IMC.

(iv) It is agreed and understood that the IMC assets belong solely to the IMC and that there are no assets in relation to this Agreement belonging to the Distributor except as per statement signed by both the parties. IMC shall from time to time decide and determine on IMC assets to be kept at Centre and may from time to time substitute, alter, repair, renovate, remove any or all IMC assets and the Distributor shall ensure that the same is achieved without disrupting the supply of products and services to the customers. The Distributor shall not be entitled to assign or transfer or otherwise deal with this Agreement or any benefits, whether monetary and / or otherwise, arising from this Agreement.

(v) This Agreement may be terminated by IMC, if the Distributor

(a) goes into liquidation or insolvency or makes general compromise or arrangement with its creditors;

(b) ceases to carry on its business;

(c) is in breach of this Agreement;

(d) if the Distributor is informed that for any reason Centre is damaged by natural or other calamity, force or reason and has become impractical to supply the products or the services to the customers;

(e) it becomes illegal or irregular to provide the products or services to the customers due to change in or introduction of regulations in the manner in which is being under this Agreement;

(vi) On termination of this Agreement for any reason whatsoever, IMC shall have the right and be at liberty to remove IMC assets and the Distributor hereby undertakes in this behalf to render necessary assistance to IMC.

The above agreement was entered with the four respondents, i.e, City Cable, In Cable, Sai Ganesh and Satekrishmani. It is alleged that on the night of 12th /13th April, the signals of the petitioner were blacked out or the scroll was showing 'You are now seeing the signals of SCOD-18'.

4. The signals are being transmitted on the Grand Trunk Line through fibre/RG-11 cable and when it reaches to a node, a further distribution is done from the node which reaches to the ultimate subscribers. It is alleged by the petitioner that a notice under Clause 4.2 of the Regulations has been issued on 25th April, 2008 while no notice has been issued as per clause 4.3 of the regulations.

5. The matter was listed for preliminary hearing on 24th April, 2008 in Petition no. 67 (C)/2008. The following orders have been passed by this Tribunal:-

"I have heard the learned counsel for the petitioner and Respondent No.1 at length on the question of interim stay. The

learned counsel for Respondent No.1 has, at the outset, raised a question of maintainability of this petition as according to him Respondent No.1 is not a service provider and is therefore, not subject to jurisdiction of this Tribunal. In response to this argument, learned counsel for petitioner has taken me through certain Regulations besides facts of the case, to show that Respondent No.1 is covered within the meaning of "service provider". At this stage, it is not possible to give a definite view on this aspect especially when respondent has not filed any reply to the petition. Various Rules and Regulations to which my attention has been drawn besides facts on record, need a deeper consideration before the question of maintainability of the petition can be answered.

Coming to whether an interim order is required to be passed, the case of the petitioner is entirely based on Clause 4.2 of the Telecommunication (Broadcasting and Cable Services) Interconnection (Third Amendment) Regulations, 2006 (dated 04.09.2006) as per which a three weeks' notice is mandatory before disconnection of signals. Clause 4.2 of the Regulations is reproduced as under:

"No distributor of TV channels shall disconnect the re-transmission of any TV channel without giving three weeks notice to the broadcaster or multi system operator clearly giving the

reasons for the proposed action."

The case of the petitioner is that this mandatory notice was not given by Respondent No.1 before disconnection of signals supplied by Petitioner and switching on to Respondent No.2. Learned counsel for Respondent No.1 has handed over to me a compilation which contains a purported notice dated 10.03.2008 regarding termination of agreement. The petitioner denies receipt of this letter. In support of this stand it has shown some other letters (copies filed by the respondent) which bear proof of receipt thereof in the office of the petitioner. The argument is that whenever some mail is received in Petitioner's office there is stamp of receipt on the document. Such stamp is missing on copy of letter dated 10.03.2008 produced by Respondent No.1. Moreover, it is submitted that this letter of 10.03.2008 is not a notice as envisaged under Clause 4.2 of the Regulations. According to Respondent No.1, Regulation 4.2 does not get attracted in the facts of the case. Counsel for respondent No.1 has also produced a copy of letter dated 08.04.2008 which can be treated as a notice under Regulation 4.2. According to Petitioner, this was received by the Petitioner on 15.04.2008. The impugned action was taken by Respondent No.1 before expiry of three weeks. Prima facie, I do not agree with the stand of the

respondent in this behalf. There appears to be non-compliance of Regulation 4.2 which renders the impugned action illegal.

Accordingly, I direct Respondent No.1 to reconnect the signals with petitioner's network forthwith."

6. In subsequent order dated 29th April, 2008 issued by this Tribunal, *Mr. Meet Malhotra, Advocate was appointed as the Local Commissioner who will go to Bombay and make a personal inspection of the premises of the Respondent No.1, whereafter he will report as to whether the order of this Tribunal dated 24.4.08 has been implemented or not? These are three connected cases and the Local Commissioner will visit the premises of Respondent No.1 in each case for the purpose ascertaining and reporting the fact about implementation of the order dated 24.4.08. The other two cases are Petition No.68(C) of 2008 and Petition No.69(C) of 2008.*

7. As per the report of the Local Commissioner another order has been passed on 9th May, 2008, which reads as under:-

"The report of the learned Local Commissioner has been received. As per the report, the Respondent No.1 has removed the cable of SCOD 18 and reconnected the cable of the petitioner. However, the grievance of the petitioner is that the signals of the petitioner are not reaching the end consumers. In response to this, the

learned counsel for respondents submits that this is not within the control of Respondent No.1 and, therefore, it cannot ensure that the signals reach the end consumers. In the context of this controversy, it is important to note that prior to the present dispute between the parties there is no complaint from either side that signals were not reaching the end consumers. Therefore, it is clear that Respondent No.1 was supplying signals of the petitioner to the end consumers prior to the present controversy. In the order dated 24.4.08, I have expressed a prima facie view that the action of the respondent was not correct and, therefore, I asked Respondent No.1 to reconnect the signals of the petitioner's network. Reconnection of signals would not mean a mere formality of plugging in something without resultant relay of signals supplied by petitioner to consumers. Reconnection must result in signals supplied by petitioner reaching the ultimate consumers. I direct the Respondent No.1 to ensure that the re-connection of petitioner's signal network as noted by the learned Local Commissioner results in the signals reaching the end consumers.

Mr. Bhasin, learned Senior Counsel for the Respondent No.1 submits that it is not possible for his client to ensure that the end consumers receive signals of the petitioner. As noted already, the above order proceeds keeping in view the fact that before the

present dispute between the parties arose, Respondent No.1 was supplying signals of petitioner's network which were being received by the end consumers. Therefore, this contention of Mr. Bhasin does not persuade me to change my view."

8. The matter got adjourned several times before the hearing could be taken up by the Tribunal and on 27th Feb, 2009, **it was reported by the counsel for the parties that efforts are being made to amicably settle the disputes and the matter got adjourned for 13.4.2009 for directions. It was listed for hearing on 9th July, 2009 and the main issue raised by the respondent No. 1 was the maintainability of this petition. After several adjournments thereafter, on 4th May, 2010, I decided that the preliminary issue for maintainability will have to be considered alongwith other issues.** In response, learned counsel for petitioner stated that oral evidence has to be adduced.

9. The following issues have been framed on 29th June, 2010:-

1. *"Whether the act of the Respondent No.-I in switching off the signals of the network of the Petitioner on the intervening night of 12th-13th April 2008 without any mandatory notice is in violation of Interconnect Regulations and TRAI Act?*

2. *Whether the act of the Respondent No.-I in switching off the signals of the network of the Petitioner on the intervening night of 12th-13th April 2008 is arbitrary, unilateral and violative of the terms of a*

valid and subsisting agreement dated 30th June 1999 entered into between the parties?

3. *Whether the illegal actions of the Respondents amounts to a camouflaged, complete and absolute hostile takeover of the network and subscriber base of the Petitioner?*

4. *Whether the Petitioner is entitled to recover its equipment & machinery lying in the possession of the Respondent No.-I of which Respondent No.-I was only a custodian and ownership lies wholly and solely with the Petitioner?*
5. *Whether owing to the illegal and unilateral actions of the Respondents, the Petitioner suffered loss of business, loss of subscribers, grave financial losses as well as loss of reputation and goodwill?*
6. *Whether the present petition is, on basis of Distribution Agreement dated 20.09.1999, maintainable against Respondent No. 1 before this Hon'ble Tribunal?*
7. *Whether the Respondent No. 1 was acting as a "distributor of TV channels" in terms of TRAI regulations dated 10.12.2004 in its dealings with the Petitioner?*
8. *Whether any equipment was supplied by the Petitioner to the Respondent No. 1? If so, of what amount?*

9. *Whether the present petition is maintainable in view of notices issued by Respondent No. 1 as per law?*

10. *Whether the Petitioner had independent agreements/arrangements with the Local Cable Operators in the area and the present petition is not maintainable in view of their non-impleadment as parties to the petition?*

So far as Petition No. 96(c) of 2009 and other analogous cases are concerned, the following issues are framed :

Additional issue has been framed namely,

A. *Whether the alleged letter of the Respondent No.-I dated 25th April 2008 amounts to a valid 21 days notice as per the Interconnect Regulations?*

B. *Whether the present petition is abuse of process of law ?*

C. *Whether the petition has deliberately suppressed material documents from this Hon'ble Tribunal?*

Apart from the issues framed in Petition No. 67(c) of 2008.

Two weeks' time is granted to the petitioner to file evidence of their witnesses.

Petition No. 87(C) of 2008 and Petition No. 98(C) of 2008

The following issues are framed :

1. *Whether the Respondent No. 4 is a party to the Distribution Agreement dated 20.09.1999 and if so, to what effect?*

2. *Whether the present petition is, on basis of Distribution*

Agreement dated 20.09.1999, maintainable against Respondent No. 4 before this Hon'ble Tribunal?

3. Whether the Respondent No. 4 was acting as a distributor of TV channels in its dealings with the Petitioner?

4. Whether any equipment was supplied by the Petitioner to the Respondent No. 4? If so, of what amount.

5. Whether the present petition is maintainable in view of notices issued by Respondent No. 4 as per law?

6. Whether the Petitioner had independent agreements/arrangements with the Local Cable Operators in the area and the present petition is not maintainable in view of their non-impleadment as parties to the petition?

7. Whether the petition has deliberately suppressed material documents from this Hon'ble Tribunal?

8. Relief.

Additional issues in Petitioner No. 98(c) of 2008

A. Whether the petition is barred by principles of Order II Rule 2 CPC?

B. Whether the petitioner has approached this Hon'ble Tribunal with unclean hands?

Petition No. 96(C) of 2008

Following issues are framed :

1. *Whether the alleged letter of the Respondent No.-I dated 25th April 2008 amounts to a valid 21 days notice as per the Interconnect Regulations?*

2. *Whether the act of the Respondent No.-I in switching off the signals of the network of the Petitioner on the intervening night of 12th-13th April 2008 without any mandatory notice is in violation of Interconnect Regulations and TRAI Act?*

3. *Whether the act of the Respondent No.-I in switching off the signals of the network of the Petitioner on the intervening night of 12th-13th April 2008 is arbitrary, unilateral and violative of the terms of a valid and subsisting agreement dated 30th June 1999 entered into between the parties?*

4. *Whether the actions of Respondent No.-I in transmitting the signals of Respondent No.-II through the network & equipments of the Petitioner is illegal and violative of the Interconnect Regulations as well as the agreement entered into between the parties?"*

Prayers made in Petition Nos. 67 (C) of 2008 and 68 (C) of 2008

a. *Hold the action of the respondent No. 1 in issuing the letter dated 26th April 2008 s illegal, arbitrary and unsustainable in law and strike down the said letter.*

b. *Direct the respondent no. 4, to adhere to the terms and conditions of the agreement that is binding on the parties even as on date.*

c. *Direct that under clause 6 of the agreement dated 20th September 1999, the respondent no. 4 cease and desist from acting as a distributor/network provider to any other MSO/broadcaster.*

d. *Hold the action of the respondent no. 2, in providing signals to the network of the respondent no. 4, knowing that the infrastructure being used for transmission belonged to the petitioner, against the spirit of free and fair competition.*

e. *Award damages in favour of the petitioner on account of the loss sustained by the petitioner to its goodwill and business because of the illegal and arbitrary action of the respondent in switching off the signals of the petitioner's network.*

f.

Prayers made in Petition Nos. 96 (C) of 2008 and 97 (C) of 2008

1. *Hold the action of the respondent no. 1, in issuing the letter dated 25th April 2008 as illegal, arbitrary and unsustainable in law and strike down the said letter,*
2. *Hold the action of respondent no. 2, as illegal and malafide in light of the fact that the respondent no. 2 was the perpetrator of the entire thought process that has lead to this situation;*
3. *Hold the actions of respondent no. 3, arbitrary and malafide in as much as the respondent no. 3 represented to be in capacity to deal with or hand over a network, that infact the network of the petitioner;*
4. *Hold the actions of respondent no. 4, as illegal and in the teeth of the principles of free and fair trade and competition, that are embedded in the Interconnect Regulations;*
5. *Award damages in favour of the petitioner on account of the loss sustained by the petitioner to its goodwill and business because of the illegal and arbitrary action of the respondent in switching off the signals of the petitioner's network.*
6. *Pass any other and further orders that this Hon'ble Tribunal may deem fit and proper in the given circumstances.*

Prayers made in Petition Nos. 87 (C) of 2008 and 98 (C) of 2008

Petition No. 87 (c) of 2008

(i) Hold the action of the respondent No.1 in issuing the letter dated 26th April 2008 as illegal, arbitrary and unsustainable in law and strike down the said letter.

(ii) Direct the respondent No.4, to adhere to the terms and conditions of the agreement that is binding on the parties even as on date.

(iii) Direct that under clause 6 of the agreement dated 20th September 1999, the respondent No.4 cease and desist from acting as a distributor/network provider to any other MSO/broadcaster.

(iv) Hold the action of the respondent No.2, in providing signals to the network of the respondent No.4, knowing that the infrastructure being used for transmission belonged to the petitioner, against the spirit of free and fair competition.

(v) Award damages in favour of the petitioner on account of the loss sustained by the petitioner to its goodwill and business

because of the illegal and arbitrary action of the respondent in switching off the signals of the petitioner's network.

Petition No. 98 (C) of 2008

(i) Hold the action of the respondent No.1 in issuing the letter dated 26th April 2008 as illegal, arbitrary and unsustainable in law and strike down the said letter.

(ii) Hold the action of respondent No.2, as illegal and malafide in light of the fact that the respondent No.2 was the perpetrator of the entire thought process that has lead to this situation.

(iii) Hold the actions of respondent No.3, arbitrary and malafide in as much as the respondent No.3 represented to be in capacity to deal with or hand over a network, that is in fact the network of the petitioner.

(iv) Hold the actions of respondent No.4, as illegal and in the teeth of the principles of free and fair trade and competition, that are embedded in the Interconnect Regulations.

(v) Award damages in favour of the petitioner on account of the loss sustained by the petitioner to its goodwill and business because of the illegal and arbitrary action of the respondent in switching off the signals of the petitioner's network.

(vi) Pass any other and further orders that this Hon'ble Tribunal may deem fit and proper in the given circumstances.

The matter has been finally heard, after the completion of cross-examination of the witnesses on 2.2.2011, 3.2.2011, 4.2.2011, 7.2.2011, 8.2.2011, 9.2.2011, 11.2.2011, 21.2.2011, 22.2.2011, 23.2.2011, 24.2.2011, 25.2.2011, 28.2.2011, 1.3.2011, 3.3.2011, and 7.3.2011 and the orders were reserved on 8.3.2011.

The learned counsel for the petitioner would contend as follows:-

1. The petitioners seeks the restoration of its cable television network which has been illegally taken over by the Respondent No. 1 for the benefit of all the other respondents , for furthering their personal interests at the cost, prejudice and loss to the petitioner.

2. The petitioner has filed the instant petitions to impugn the illegal action of the respondent No. 1 by disconnecting the cable TV signals of the petitioner that were being transmitted on the network of the petitioner, **through equipment solely owned by it**. The petitioner claims that the respondent No. 1 is the custodian of the network and has conspired with other respondents to execute a pre-meditated hijack.

3. The petitioner has countered the stand taken by the respondent number 1 that it is not a service provider and, therefore, it is not amenable to

the jurisdiction of this tribunal. The respondent number 1 is a service provider as per the covenants of the agreement signed between the parties on 30th June 1999, pleadings filed by the respondent number 1, as per the findings of this tribunal in other cases and also as per the definitions under the Telecom Regulatory Authority of India act 1997. In support of its claim, the petitioner has brought to our notice Definitions in Regulations dated 04.9.2006 at 2 (j), 2 (k). 2 (b), 2 (f), 2 (g), and 2 (n). According to distributorship agreement clause 4 the respondent was required to provide the services as mentioned therein.

4. The stand taken by the respondent is inconsistent and contradictory by referring to its order dated 6th July 2009 in the arbitration Petition No. 222 of 2008.

5. M/s. SCOD-18 Networking Pvt. Ltd. is not appearing before this tribunal after July, 2009 and, therefore, adverse inference should be drawn. In this context the following two judgments are brought to our notice.

(1) Iswar Bhai C versus Harihar Behera – (1999) 3 SCC 457.

In this case adverse inference has been drawn since the appellant had abstained from the witness box and had not made any statement on oath in support of his pleading set out in the written statement.

The learned counsel for the respondent would intervene at this stage and say that in the instant case, however, there is no such type of disappearance of the witness and, therefore, this case cannot be

considered to be a precedence on which one could derive any adverse inference in the instant case.

6. The petitioner's claim that as per the agreement dated 3rd December 2006, the respondent No.1 was to have five local channels, and the respondent No.1 had not to pay any franchisee fee to the petitioner for availing the benefits of these five channels. The distributor's direct points were also kept to be free and no subscription amount was to be paid by the respondent No. 1 to the petitioner. Two additional local favourite channels were also allowed to be introduced by the petitioner to the respondent as per the agreement dated the 3rd December 2006.

7. Respondent also issued an invalid notice dated 25th of April 2008 purporting to be a notice under regulation 4.2 and since this notice can only be issued by a service provider and, therefore, the respondent becomes a service provider.

8. Vide orders of this Tribunal in the following matters, the respondent in the instant case has been held to be providing cable TV signals and, therefore, is a service provider.

IMCL versus Hansa cable (petition number 123 (C) of 2009).

IMCL versus Polly cable (petition number 122 (C) of 2008).

IMCL versus Archana cable net (petition number 277 (C) of 2009).

The decisions arrived at by this Tribunal in the above-mentioned three cases have categorized M/s. Siti Cable to be a service provider.

9. The learned counsel for the petitioner would bring to our notice the following judgments to drive the point that the respondents are service providers and are amenable to the jurisdiction of this Tribunal.

(1) Star India Private Limited versus Bharat Sanchar Nigam Ltd.
172 (C) of 2009, Judgment dated 22nd of January 2010.
(2) Hathway Media Private Limited versus spider cable. Petition number 99 (C) of 2009. Judgment delivered on 28th of May 2009.

10. The learned counsel for the petitioner would also bring to our notice that this tribunal has got very wide powers as per the apex court decisions in union of India versus Tata Tele services (Maharashtra) Ltd – (2007) 7 SCC 517, Cellular Operators Association Of India versus union of India (2003) 3 SCC 186, Delhi Science Forum versus union of India 1996 2 SCC 405.

The learned counsel for the petitioner would plead that the act is a complete code in itself. The learned counsel for the petitioner would extend the argument by bringing the word any dispute in the statute to our notice. In this context the decision of the apex court in Lucknow Development Authority versus MK Gupta – AIR 1994 SC 787.. The extract of para 4 of this judgement was specifically brought to our notice, which is reproduced below:-

"The words "any" and "potential" are significant. Both are of wide amplitude. The word "any" dictionary means "one or same or all". In Black's Law Dictionary, it is explained thus, word "any" has a diversity of meaning and may be employed to include "all" or "every" as well as "same" or "one" and its meaning in a given statute depends upon the context and subject matter of the statue. The use of the word' any' in the context it has been used in clause (o), indicates that it has been used in wider sense extending from one to all."

The learned counsel for the petitioner would bring to our notice the following judgments to prove the point that the intention of the parties and not the nomenclature of a document is the deciding factor.

(1) A.K. Saha vs. Nanee printers – AIR 2004 SC 1591.

(2) B K Muni Raju versus State of Karnataka. AIR 2008 SC 1438. (3) Star India (P) Ltd versus SEA TV network – (2007) 4 S CC 656.

(3) Star India (P) Ltd. Vs. SEA TV Network and Anr. (2007) 4SCC 656.

11. The agreement dated 30th June 1999 is a binding on both the parties till 13 April 2008 and, therefore, there is a privity of contract between the parties. Upto June 2004 there is a written contract and after June 2004 till April 2008 there is implied contract on the basis of conduct of parties.

12. The respondent No. 1 does not dispute that it has been receiving commission under the distributorship agreement dated 30 June 1999 but alleges that the petitioner still owes more money to it. The respondent No. 1

does not deny that the ledger entries, but only states that the amounts as mentioned in the agreement has not been paid. The ledger account of the petitioners is not opposed to by the respondent, and on the basis of the conduct of the parties in regard to ledger statement it can only be interpreted to show, that the parties were performing their duties under the agreement even after the year 2004.

13. The learned counsel for petitioner would cite the section 9 of the contract act and also the judgement reported as (1978) 2 SCC 493, Hazi Mohammed Ishaq versus Mohammed Iqbal. **The Hon'ble** judges **have quoted a passage from Chitty on Contracts, twenty ninth edition, Volume I, page 45 para 1-066.**

> ***"Express and Implied contracts - Contracts may be either express or implied. The difference is not one of the legal effect but simply of the way in which the consent of the parties is manifested. Contracts are expressed when their terms are stated in words by parties. They are said to be implied when their terms are not so stated as for example, when a passenger is permitted to board a bus; from the conduct of the parties, the law implies by passenger to pay the fare, and a promise by the operator of the bus to carry him safely to its destination. There may also be an implied contract when parties make an express contract to last for a fixed term, and continue to act as though the contract still bound them after the term has expired. In such a case the court may infer that the parties have***

agreed to renew the express contract for another term. Express and Implied contracts are both contracts in the true sense of the term, for they both arise from the agreement of the parties, though in one case the agreement is manifested in words, and in the other case by conduct, since as we have seen, agreement is not a mental state, but an act, an inference from conduct, it follows that the distinction between express and implied contracts has very little importance, even if it can be said to exist."

14. In this context the following extracts from Pollok and Mulla have been brought to our notice.

"The word 'implied' is sometimes used to indicate contracts where proposal or the acceptance or both are signified not by words but by acts or conduct."

"The act or conduct must be such that it can only give rise to the inference that there must have been an implied offer and an acceptance, if they are not consistent with there being an offer and acceptance, they cannot give rise to tacit or implied contract."

15. Evidence of losses :-

The learned counsel for the petitioner would assert that the whole network belongs to it while the respondent No.1 is the custodian of the same. The respondent No.1 had unrestricted access to and control over the entire network of the petitioner, although the respondent has tried to portray

that all the employees of the company at the head end/nodes belong to the petitioner. It is a fact that all the employees on the date of disconnection of the signals of the petitioner resigned en block. The learned counsel for the petitioner would cite the tribunal order dated the 9th May, 2008 in which the respondent was directed to connect the petitioner signals to its last mile customers. In spite of the order of the tribunal, the petitioner is able to only regain 5% off its network that also after the relaying of the same.

The learned counsel for the petitioner would cited that the local commissioner appointed by this tribunal has categorically reported that when he visited the head end under the control of the respondent number 1, he found a wire similar to that of the petitioner. On enquiry from the representative of the respondent, he was informed that this belongs to the respondent No. 3. The petitioner also claims that in spite of clear orders of the tribunal the signals could not reach up to the subscribers.

16. The learned counsel for the petitioner would further contend that the facts as mentioned above clearly establish that there was a vested interest of all the respondents in these petitions, in SCOD 18 Network, the respondent No.3 [Petition No. 96 (C) of 2008] and, therefore, the respondent No.1 [Petition No. 96 (C) of 2008] has acted in a manner which has helped the respondent No.3 [Petition No. 96 (C) of 2008] to achieve its objective of the taking over of the network of the petitioner.

17. The learned counsel would bring to our notice the Statement of Accounts between the petitioner and the respondent No.1 which shows the transactions in terms of the amount which are claimed to have been made between the two parties.

18. While pleading in the Petition no. 98 (C) of 2008 and 87 (C) of 2008, the additional points raised by the learned counsel for the petitioner, Mr. Kailash Vasdev are as follows:-

(a) The learned counsel for the petitioner would strongly urge before us that the petitioner has paid for the entire equipment and infrastructure which is today being utilized to transmit the signals of a MSO backed by a rival company. A few details of the equipment provided by the petitioner has been annexed and marked as Annexure – P-IX alongwith its attachments in Petition No. 98 (C) of 2008.

19. The learned counsel for the petitioner would submit that since the notice of 26.4.2008 received by the petitioner has been sent under Regulations 4.2, and therefore, the respondent No.4 would become a service provider. There is an admission of the receipt of notice dated 26.4.2008 under Regulations 4.2.

20. Learned counsel for the petitioner would bring to our notice a letter at page 52 in Petition No. 87 (C) of 2008 which is addressed by respondent No.4, i.e, S&S Advertising to the petitioner in which it has been mentioned that the royalty for the month of Jan, 2007 may be adjusted against the

franchisee fee payable by S&S Advertising for the same month. The amount is to be debited from the royalty account established Rs.60,609/- and this letter has been signed by Mr. Rajiv Jani who has signed on behalf of the S&S Advertising. This mention of franchisee fee in this letter brings the respondent in the fold of service provider. The letter reads as follows:-

> *"31st January,2007.*
>
> *To*
> *Col. Gorcy*
> *AVP*
> *Indusind Media Communications Ltd. Mumbai.*
>
> *Ref:- Royalty for January 7007.*
>
> *This is to request you to kindly adjust the franchisee fee payable by our company for the month of January 2007 against the royalty due to us. The amount to be debited from our royalty account would be Rs. 60,699 /- (Rupees Sixty Thousand Six Hundred & Nine Only).*
>
> *Thanking You,*
>
> *Yours truly,*
>
> *For S.S. Advertising Pvt Ltd.*
>
> *(Rajiv Jani)"*

The learned counsel for the petitioner would contend that the above letter is a clear proof of the fact that the respondent was getting royalty and has asked for adjustment of the same against the franchisee fee.

21. Learned counsel for petitioner would also bring to our notice some of the letters written by subscribers of Ghat Kopar (W) Bombay which show that there is no signals from 12th April, 2008 to its STBs and also some of the channels of the cable operators are being denied to it. The subscriber has requested for restoration facilities at the earliest. This is just to prove the contention that the signals have been disconnected and not restored. **The learned counsel for respondent would intervene to add that the subscribers have however never been called as witnesses to prove their contention.**

22. At page 10, para 31 of Petition No. 98 (C) of 2008 – the petitioner has alleged that actions have been initiated by the respondent No.2 in collusion with respondent No.1 and executed by Respondent No.3 for the benefit of others who are rival competitors of the petitioner and whose intention is to harm the goodwill and reputation of the petitioner and reduce its market presence and subscriber base. The petitioner has paid for the entire equipment and infrastructure that is today being utilized to transmit the signals of a MSO backed by a rival company. A few details of the equipment provided by the petitioner have been annexed herewith and marked as Annexure P-IX in Petition No. 98 (C) of 2008.

23. The learned counsel for the petitioner would bring before us page 351, para 5 in rejoinder by the petitioner in Petition No.98 (C) of 2008, in response to the reply filed on behalf of the respondent No.1. It has been mentioned

that the petitioner has reiterated its claim that the respondent No.1 is well aware that petitioner has annexed a detailed and an exhaustive list of equipment that it has purchased over a period of 12 years as per annexure-P-IX to the petition. The claim of the petitioner is that in the last 12 years, the equipment is in the possession of the respondent No.1. The petitioner only has staked its claim on the network of its own and not for the network of the cable operators and it has further asked the respondent No.1 that it has without any authorization of the petitioner had handed over the network of the cable operators to You Telecom, who is the Respondent No.4.

24. The petitioner has further contended that it has laid down the network beyond the headend and all the network, therefore, belongs to them. **The learned counsel, Mr. Maninder Singh intervenes at this stage and submits that owing the complete network even beyond headend is a contradictory stand taken by the petitioner's learned senior counsel since in the beginning of proceedings Mrs. Kanika Agnihotri, the learned counsel has firmly urged before us that the petitioner's network is only upto the node.**

25. In its rejoinder, learned counsel, Mr. Kailash Vasdev for petitioner would contend that SCOD-18 appeared in these proceedings only upto 9th July, 2009 and beyond that date it has not appeared while the officers of the said company are still present in the court room and are listening the various arguments It is also a proven fact on record that the SCOD-18 has got the Board of directors with the respondents who are involved in this particular

case. The SCOD – 18 wanted to have a subscriber base and, therefore, they were in dire need of acquiring the cable operators and the shutting of the signals of the petitioner's company on 12/13.4.2008 was not merely from the point of view of disconnecting the signals but was from the point of view of taking over the complete network.

26. Petition No. 76 (C) of 2008 which has been filed by the petitioner has been withdrawn and page C of Petition 87 (C) of 2008 indicates the Memo of parties which consists of the following respondents:-

S.No.	Name of the Party	Respondents
1.	M/s Satekrishmani Network	Respondent No.1
2.	SCOD 18 Networking Pvt. Ltd	Respondent No.2
3.	Telecom Regulatory Authority of India	Respondent No.3
4.	S & S Advertising Pvt. Ltd.	Respondent No.4

Respondent No.1 has transferred his business to Respondent No. 4, i.e, S & S Advertising Pvt. Ltd. in the year 2003 while respondent No.1 denies the same and the statement of accounts at page 49-51 of 87 (C) of 2008 clearly show that S&S Advertising finds a mention at some entries like the one on 31.3.2008 for Rs.54,357/-, on 1.4.2006 for a sum of Rs.2.00lakhs, on 18.2.2008 for sum of Rs.82,962/-, entry dated 15.2.2006 for a sum of Rs.5,90,972/- in the name of M/s Satekrishmani and on 9.2.2006 for sum of Rs.2.00lakhs in the name of S&S Advertising as a service tax billed ADJ as

distributors commission and a similar entry in the name of S&S Advertising on 31.12.2005. The learned counsel for the petitioner would contend that these are audited accounts and, therefore, these accounts must be taken as a conclusive proof for an indication that S&S Advertising has stepped into the shoes of Satekrishmani and, therefore, would assume all the responsibility of Satekrishmani as per the MOU.

27. The learned counsel for the petitioner would wind up on the last date of hearing, i.e., on 8.3.2011 by submitting that:-

(i) SCOD 18 had been charged with a specific allegation while it has not appeared after 9th July orders made by this Tribunal. YOU telecom is also on record and all the respondent's in these petitions are directors on the Board of SCOD 18. SCOD 18, therefore, with the help of these directors placed in the distribution companies had tried to take away the network of the petitioner and the objective was not only of the switching over but also was to take over the complete network of the petitioner.

(ii) We are the limited company and our accounts are audited and from the extracts of the same audited accounts, we have produced the statement of accounts which reflects payments being made to the respondent and the several payments starting from 9.11.2005 to 31.3.2008 at page 49 of petition No. 87 is Rs. 60,609.00/- on 10.3.2008 and Rs.60,609.00/- on 04.02.2008.

28. In regard to the computation of the damages the learned counsel for the petitioner has cited the following case:-

Mcdermott International Inc. versus Burn standard Co Ltd. (2006) 11 SCC 181.

This case is normally dealing with, as to how the damages are to be calculated. **The learned counsel for the respondent, Mr. Maninder Singh would contend that in the present case the respondents have raised the issue that the demanded damages have been raised at the stage of evidence and that too the quantification of the same has been done without any proper classification, period of claim month-wise or even year-wise as well as cable operator-wise and is not having any nexus to the various issues raised in the petition and, therefore, cannot be given any cognizance to award any damage while the petitioner should be charged to produce such false claims on affidavit.**

29. The learned counsel for the petitioner would bring to our notice the Article of Association of SCOD Networking Pvt. Ltd are also placed in the petition and it is brought to our notice that the two respondents are mentioned at page 86 in Petition No.96 (C) of 2008 as a shareholders of this company and the details of the proposed shareholding by these partners are mentioned below:-

Name, address, description and occupation of subscribers	Number of equity shares taken by each subscriber	Signature of subscribers	Signatures of the witness with Name, address and occupation

Johnwin Manavalan- A 11/44, Sidharth Nagar, Goregaon (W) Mumbai – 400062.	Rs.2,50,000/- (Rupees Two Lakh Fifty Thousand Only)	Sd/-	Gahan, S/o Dr. Girindra Kumar, 201, Prabha Vinayak, New Prabha Devi Road, Prabha Devi, Mumbai
Ganesh G. Naidu Naidu House Shimpali Village Burivalli (W) – 92 S/o Shri Govindraj	Rs.2,50,000/- (Rupees Two Lakh Fifty Thousand Only) **Total:** **Rs.5,00,000/-**	Sd/-	Gahan, S/o Dr. Girindra Kumar, 201, Prabha Vinayak, New Prabha Devi Road, Prabha Devi, Mumbai. (Advocate cannot witness for both)

There is an implicit relationship of the respondent No.1 herein with the respondent No.3, which has caused these actions against the petitioner in respect of its network. A letter dated 9.8.2007 addressed to Mr. Rajiv Vyas and Mr. Ganesh Naidu, is a letter of intent which is also placed in the petition in which it has been confirmed that the respondent No.4, i.e, M/s You Telecom India Pvt. Ltd has shown interest in regard to equity investment acting through one or more of its affiliates in SCOD Networking (Pvt.) Ltd. The You Telecom India Pvt. Ltd is a subsidiary of Citygroup Venture Capital International Growth Partnership Mauritius Ltd. (CVCIGPML) through all holding company in Mauritius.

30. The learned counsel would further contend that as per the Memorandum of Association of SCOD-18 Networking Pvt. Ltd which has also

been placed alongwith the petition and which shows that the following two persons who are also the distributor of the petitioner have expressed their desire to agree to take the number of shares in the capital of the company:-

Name, address, description and occupation of subscribers	Number of equity shares taken by each subscriber	Signature of subscribers	Signatures of the witness with Name, address and occupation
Ganesh G. Naidu S/o Shri Govindraj Naidu Naidu House Shimpali Village Borivalli (W) Mumbai – 92 Business	Rs.5,000/- (Rupees Five Thousand Only)	Sd/-	Krishna Nayab, S/O Baburaya Nayak B-1, Riddhi Sidathi, Borivali Mumbai – 92 (chartered accountant)
Johnwin Manavalan- S/o M.L. George, A 11/44, Sidharth Nagar, Goregaon (W) Mumbai – 400062. Business	Rs.5,000/- (Rupees Five Thousand Only) Total: 10,000/-	Sd/-	Krishna Nayab, S/O Baburaya Nayak B-1, Riddhi Sidathi, Borivali Mumbai – 92 (chartered accountant).

Mumbai Dated, 29th day of January, 2008 at page 35 in Petition No. 87 (C) of 2008.

The learned counsel for the respondent, on the other hand, would contend as follows:-

1. After the efflux of time from the date the earlier agreement expired, the respondent is merely a collection agent and, therefore, the agreement of 1999 will not bind the respondent. The respondent has further signed an

agreement on 3rd December 2006 with the petitioner for the CAS area, which is quite distinct and cannot be related to the agreement for Non CAS area, signed on 30.6.1999 and stood expired in 2004.

2. In the context of earlier decided case of the petitioner where Siti Cable has been termed as service provider, the learned counsel for the respondent would cite the case decided by the apex court (AIR 2004 Supreme Court 1591) between A K Saha versus Nanee printers and others. The Supreme Court has held.

> ***"Before coming to the arguments, we may point out that in cases where courts are required to consider the nature of transactions and the status of parties thereto, one cannot go by mere nomenclatures such as, license, licensee, licensor, license fee et cetera. In order to ascertain the substance of the transaction, we have to ascertain the purpose and the substance of the agreement. In such cases, intention of the parties is the deciding factor. In order to ascertain the intention, we have to examine the surrounding circumstances including the conduct of the parties."***

3. The respondent clearly differentiates the agreement dated 3.12.2006 to be for the CAS area and not for the Non CAS area and has tried to call it as an attempt on the part of the petitioner to mix up the agreement of 3rd December 2006 with the 30th June, 1999 agreement.

4. The learned counsel for the respondent, Mr. Bhatia in Petition No. 97 (C) of 2008 and 87 (C) of 2008 brought to our notice the cross-examination of Mr. Santosh Bapusaheb Tawde, Indian Inhabitant of Mumbai who has filed the evidence by way of affidavit on behalf of the petitioner, the relevant portion of the cross-examination is as follows:-

> *"I am taking signals from In Cable since 1996.*
>
> *The signals of In Cable were disconnected on 13th April, 2008. These signals were re-connected on 20th April, 2008.*
>
> *From 13th April to 20th April, 2008, I was receiving signals from SCOD 18."*

The learned counsel would drive the point that the above evidence by way of cross examination shows that the signals of the petitioner were re-connected on 20.4.2008 and the same were continuing till the date of deposition by the above witness. The only intervening period in which the signals of SCOD 18 were provided was 13th April to 20th April, 2008. He would like to submit that this is the conclusive proof that signals of the petitioner are still connected and were only intervened for a period of about one week, i.e, from 13th April to 20th April, 2008.

There is no other proof required to show that signals of the petitioner were re-connected, after this conclusive statement by the witness during the cross-examination.

5. The learned counsel for the respondent, Mr. Navin Chawla, in Petition No. 97 (c) of 2008 submits that the present petition filed by the petitioner is not maintainable in as much as the petitioner has earlier already filed another petition before this Tribunal raising same issue. He would submit that the petitioner by filing this petition, is trying to bridge the gap in the earlier petition filed by it and also trying to present a new case against the respondent.

Mr. Maninder Singh, the learned counsel on behalf of the respondent in Petition No. 96 (C) of 2008 would submit that the present petition has been filed against the answering respondent who is distributor/agent/intermediary of the petitioner and was a collection agent of the petitioner. The answering respondent is not a service provider and, therefore, the petition is not maintainable.

6. The learned counsel for respondent in Petition No. 67 (C) of 2008 would fairly submit that the clause 13 of the distributorship Agreement envisages that the agreement was valid for a period of five years from 1st April, 1999 and was to be renewed 90 days before the expiration. In the present case admittedly there was no renewal of the Agreement. After expiration of the agreement, an ad-hoc arrangement was in place between the parties and therefore, reliance on the petitioner on Agreement dated 30.6.1999 is fallacious and incorrect.

7. The cable operators who were independently taking signals directly from the petitioner under a separate and independent subscription/affiliate agreement and on whose collection the answering respondent was entitled to a commission, have always complained about the quality of signals of the petitioner being not upto the mark and cases of ad-hoc and incorrect billing on the cable operators.

8. The fact that these cable operators had a privity of contract directly with the petitioner and that they had terminated their agreement was concealed by the petitioner before this Tribunal at the time of filing the present petition. It was only when the arguments for interim relief were heard on 19.5.2008 and the counsel of answering respondent pointed out these facts; then only the counsel for the petitioner was constrained to admit receipt of these termination letters from the cable operators. The extract of the Order passed on 19.5.2008 in Petition No. 96 (C) of 2008 is as follows:-

> *"The learned counsel for respondent No.1 had also stated that the LCOs have issued notices of termination which have been received by the petitioner as far back as on 17.4.2008 which fact has been suppressed by the petitioner and for that reason also the signals are perhaps not reaching the end consumers. In reply the learned counsel for petitioner submits that some of the LCOs have issued notice which is being received by the petitioner but the petitioner is disputing the same."*

9. The learned counsel for respondent would further submit that the respondent has offered to the petitioner that he is free to identify his equipment and is free to take it away, however the petitioner has not taken any steps in that direction. The offer has been made and has been recorded in our Order dated 19.5.2008, which is as follows:-

> *"The Learned counsel for respondent has further offered that the petitioner is free to identify their material / equipment at the locations / centres and are free to take it away.*
>
> *In these circumstances, I am not inclined to pass any interim order at this stage."*

10. In spite of not having any written agreement with the petitioner after the initial agreement of 5 years, the respondent as a matter of abundant caution sent a notice terminating its arrangement with the petitioner on 10.3.2008 in Petition No. 67 (C) of 2008 at page 103. The petitioner in response to this notice sent a letter dated 16.4.2008 in Petition No. 67 (C) of 2008 at page No. 105 to the respondent wherein asking it to continue distribution of its signals in the area of the answering respondent. This has also been immediately replied to vide letter dated 18.4.2008 (Page No. 107 of Petition No. 67 (C) of 2008) stating that the answering respondent had terminated the arrangement with the petitioner on 10.3.2008 and, therefore, it has no interest to continue the distributorship of the petitioner as on date.

11. The learned counsel for the respondent would submit that there is no privity of contract with the petitioner and the relationship is oral after the expiration of the initial 5 years of agreement w.e.f the year 1999 onwards.

12. The learned counsel would also bring to our notice that the petition No. 70 (C) of 2008 was filed before this Tribunal against Satekrishmani and the same was withdrawn with liberty to file another petition.

13. In compliance of the orders dated 24.4.2008 passed by this Tribunal in Petition No. 67 (C) of 2008 titled as IMCL, i.e, **the petitioner Vs. M/s City Cable, i.e, respondent No. 1 has written to IMCL on 25.4.2008, expressing that it had entered into a Distributorship Agency Agreement with the petitioner on 30th June, 1999 and it is to act as a agent for IMCL, the petitioner inter-alia, for providing services only as per Memorandum of Understanding.**

14. The relevant extracts of this letter have been brought to our notice in detail by the learned counsel for the respondent which are as follows:-

(i) The relationship between petitioner and the distributor is not like MSO and a cable operator and the distributorship agency agreement is not a subscription agreement which is required to be executed either between the broadcaster and MSO or between MSO and cable operator to re-transmit the signals to a subscriber. It is also clarified as following:-

(ii) "Under any subscription agreement for receiving the signals for re-transmission of the subscribers, the subscription amount is required to be paid by the cable operator to the MSO and/or by the MSO to the Broadcaster, as the case may be. Any such subscription agreement has to necessarily incorporate therein the number of subscribers and rate/month per subscriber for re-transmission of each channel/bouquet of channels. Further, any payment by an MSO to its distribution agency/agent, intermediary is neither provided nor envisaged under any subscription- agreement. In other words, the cable operator never receives any consideration/payment from the MSO for the re-transmission of TV signals received by cable operators from the MSO. No such payment by the MSO to any cable operator/distributor of TV channels, ever arises, if the relationship is for re-transmission of signals to subscribers. However, the obligation to make requisite payment by the MSO to its distribution agency/agent/intermediary arises when the relationship is of a distribution agency/agent, intermediary. It is the belief of and understanding of M/s City Cable that under the distributorship agreement it had been acting only as a distribution agency/agents intermediary of M/s IMCL. "

(iii) As regards the duration of this agreement dated 30th June, 1999, the following has been brought to our notice and has been mentioned in the said communications:-

"This distribution agency agreement dated 30th June, 1999 was for a term of 5 years with the option of having a renewal for another period of 5 years. The term of 5 years started from 30th July, 1999 has come to an end on 29th June, 2004. The option for renewal of the Distribution agency agreement for another term of 5 years requires an execution of agreement between the parties, however no such agreement for renewal had ever taken place by and between the parties."

(iv) The position regarding the relationship has also been clarified in the following paras:-

"In the recent past, M/s City Cable has received numerous complaints from cable operators receiving signals from IMCL. This had an effect also been causing serious prejudice to M/s City Cable in relating to its activities as a distribution agency/agent, intermediary of IMCL thereby creating a situation for M/s City Cable to exit from the distributorship agency arrangement continuing between the parties and where the written agreement has come to an end on 29.6.2004. M/s City Cable is not obliged to issue any notice for exiting from distributorship agency agreement. However, with its bonafide attitude and relationship for a long period with IMCL, it had issued formal notice informing its decision to the IMCL from exiting Distributor Agency Agreement with IMCL."

(v) The respondent No. 1 has further clarified by mentioning that as per the TRAI Act, there is a complete freedom to cable operator to move from one MSO to other for strengthening and augmenting the business interest on a mutual basis since the respondent No.1 is not a service provider as per the TRAI regulations, other stipulations/obligations cast upon a service provider under TRAI regulation do not come into play when an entity is acting an agent/intermediary of a broadcaster/MSO and not as a service provider. **"As such M/s city Cable is of the belief and understanding that it is not a service provider and the stipulation incorporated in Regulation 4.2 of the TRAI Regulations for issuance of a notice with minimum period of 21 days before disconnecting any TV channels does not get invoked in the case of M/s City Cable exiting from its arrangement as a Distribution Agency with IMCL."**

(vi) In compliance of the orders dated 24.4.2008, the respondent No.1, i.e, M/s City Cable in petition No. 96 (C) of 2008, the petitioner was requested to visit the premises of respondent No.1 on 26.4.2008 at 1100 hrs for re-connection of the signals of the petitioner. The partner Mr. Mehboob Gani in M/s City Cable has issued notice under Clause 4.2 for disconnecting the signals to be provided by the petitioner vide the aforementioned letter dated 25.4.2008 [Pages 188 to pages 194 of Petition No. 67 (C) of 2008] and the same has been impugned by the petitioner.

15. The Answering Respondent is not a service provider and the dispute, if any, between the petitioner and the answering respondent does not fall

within the ambit of section 14 of the TRAI Act, 1997. **None of the clauses of the distributorship Agreement contemplate any responsibility upon the answering respondent to transmit/re-transmit the signals of the petitioner to the cable operators/consumers.** Hence the answering respondent, is therefore, acting purely as a Commission Agent/Intermediary as defined in the Interconnect Regulations framed by the TRAI. Answering respondent is not a service provider, as the basic element of the subscription fee payable by it and the basis of a subscriber base, has not been furnished by petitioner and the Distributorship Agreement between the parties is not a subscription agreement and does not contemplate any such relationship also.

16. The present petition is also liable to be dismissed on ground of suppression of facts that are material for a proper and final adjudication of the petition. It is established practice that a litigant, who approaches the Court, is bound to produce all the documents executed by him which are relevant to the litigation and if he withholds a vital document he will be guilty of playing fraud on the court as well as on the opposite party. The petitioner has concealed the following facts:-

(a) Reliance of the petitioner on Agreement dated 30.6.1999 is incorrect as the same has expired and was not renewed before the expiration of date, i.e, within 90 days.

(b) A notice of terminating its arrangement with the petitioner was sent by the respondent and in reply the petitioner sent a letter dated 16.4.2008 asking the answering respondent to continue distribution of its signals in its area. The ultimate decision rested with cable operators for re-transmitting the signals of petitioner or Respondent No.2. It is also incorrect to say that the answering respondent is using equipment and infrastructure of petitioner. The answering respondent is only acting as a distributor of internet connectivity offered by various ISP and for this purpose uses its own infrastructure to provide service to various customers/operators.

(c) In compliance with the orders of this Tribunal, Answering respondent got the reconnection of the signals of the petitioner done and requested the petitioner for his presence at that particular time.

(d) The petitioner has neither challenged the public notice published in the newspapers on 26.4.2008 [Page 200 of Petition No. 67 (C) of 2008] nor has made any prayer in this regard.

17. Learned counsel, Mr. Maninder Singh, who appeared on behalf of the respondent in Petition No. 96 & 67 (C) of 2008 would urge before us:-

(i) The decision of the Apex court in the case of DRAUPADI DEVI AND OTHERS Vs. Union of India and Others, (2004) 11 SCC 425, decided as follows:-

"Not only is there no pleading on the issue, but we find that there is no evidence, whatsoever, led in by the plaintiff on this alternative relief claimed. All the witnesses examined by the plaintiff were with reference to the title of the plaintiff. Not a single of the plaintiff's witnesses has said a word about this alternative claim for damages in the sum of Rs.4 lakhs. Apart therefrom, when the third defendant was examined, not a single question seems to have been addressed to him in cross-examination with regard to this alternative claim of damages in the sum of Rs.4 lakhs."

The learned counsel would plead before us that in Petition No. 96 (C) of 2008 Item 5 in the prayer clause, there is neither any pleading nor evidence thereafter and the prayer is not supported by any pleading and is without any evidence and, therefore, this prayer is not sustainable. The prayer at Serial No. 5 is as follows:-

" Award damages in favour of the petitioner on account of the loss sustained by the petitioner to its goodwill and business because of the illegal and arbitrary action of the respondent in switching off the signals of the petitioner's network."

(ii) The learned counsel for the respondent would very vehemently urge that the Respondent is not a service provider. As per the regulations, the respondent is an agent and a distributor and not distributor of the TV channels as defined in the regulations. The definition of the distributor of a

TV channels and the agent or intermediary was brought to our notice as per the Telecommunication (Broadcasting & Cable Services) Interconnection Regulations 2004.

> *"Agent or Intermediary means any person including an individual, group of persons, public or body corporate, firm or any organization or body authorized by a broadcaster/MSO to make available TV channels to a distributor of a TV channels, means any person, including an individual, group of persons, public or body corporate, firm or any organization or body authorized by a broadcaster/MSO to make available TV channels to a distributor of a TV channels, means any person including an individual, group of persons, public or body corporate, firm or any organization or body re-transmitting TV channels through electromagnetic waves through cable or through space intended to be received either directly or indirectly but is not limited to a cable operator, direct to home operator, MSO, head ends in the sky operator."*

18. The main emphasis of the arguments of learned counsel for the respondent is that the role of the respondent as per MOU is that of an agent, which makes available the TV channels to a distributor of TV channels and is not in any way directly distributing/retransmitting these TV channels as is required by the distributor of TV channels to come within the umbrella of service provider. The learned counsel for the respondent, further mentions that in case he succeeds on the grounds of the initial objection that the

respondent is not a service provider, it will not be necessary to go into the merit of the case at all. In this context, the learned counsel, Mr. Maninder Singh for the respondent would bring to our notice that in the distributorship agreement signed on 30th June, 1999; the Clause 2(i) clearly stipulates that the petitioner is the owner and has established Central location/head ends and/or Node (herein after referred to as a Centre) in or about the area equipped with equipments necessary for transmitting signals to direct points and to franchisee point and other assets ancilliary or in relation thereto as also cables etc outside the centre which are necessary or useful in rendering services which are generally distributed in Schedule B of this agreement (herein referred to as IMCL asset)

Schedule B- Details of premises owned/leased by petitioner wherein the equipments of IMCL are installed/to be installed as defined in Clause 2 (1). The clause 2 (2) of the distribution agreement which indicates the details of the activities in which the distributor shall be involved and the Schedule A. The Schedule A mentions that the distributor shall render service as envisaged in MoU in the area mentioned in Schedule A hereto. Schedule A indicates as follows:-

(i) localities (ii) Map of the area; (iii) Identification of points; (iv) Cable map indicating franchisees and direct points. Here also it is clear from the Schedule A that all the franchisees belong to the petitioner and all the direct points also belong to the petitioner and there was no involvement of the distributor either as a franchisee or also in owning direct point. **The learned**

counsel for the respondent would urge before us that the word 'Our' which is mentioned in the Schedule A is a categorical admission in the MoU by petitioner that the direct points as well as franchisee who were either getting re-transmitted signals directly from the petitioner or were re-transmitting the signals of the petitioner, belonged to the petitioner itself and not to the respondent at all.

19. The learned counsel would also vehemently argue that there is no subscription agreement which has been signed with the respondent and there is no subscription amount which is being charged by the petitioner form the respondent so that it looks like to be an agreement between the distributor of TV channels and a MSO. In this context the clause 6 and 13 of the distributorship agreement at running pages 27 & 28, is brought to our notice which makes the relationship between the petitioner and respondent quite clear.

"Clause 6 at page 26 [in Petition No. 67 (C) of 2008]: The distributor shall not associate directly or indirectly in any manner with any Multisystem operator or cable operator or be associated with any such person for business similar to the business envisaged under This Agreement during the currency of this agreement and renewal thereof three years thereafter in the area and in the place contiguous to the area as defined in the agreement."

"Clause 13 at page 27 [in Petition No. 67 (C) of 2008]: This agreement shall be valid for a period of five years from 1st April, 1999 and shall, 90 days before expiration, be renewed for a further period of five years at a time and will remain in force and will be valid until termination in terms of this agreement."

20. The learned counsel would submit that from the clause 6, it is clear that distributor is proscribed to associate itself with business or business of re-transmitting of the TV signals or even having remotest connection with any of the distributor of the TV signals or MSO till the validity of this agreement, and, therefore, to call the distributor as distributor of TV signals is absolutely untenable and respondent cannot be termed as a service provider by any stretch of imagination.

In this context, learned counsel for the respondent has also brought to our notice the details of cross-examination of Mr. Satheesh Kumar, who is Senior Vice President, Finance in the Petitioner's company:-

Ques: 14 at page 539 B"

"Q: Do you know Mr. Johny Raphael?
Ans: Yes."

"23rd May, 2006
To; All distributors
CC: AM/RM/MM/SD/VRD/ACG
Fm: Johny Raphael, Legal Consultatnt

Sub: Renewal of distributor's Agreement

As you are aware, our existing Distributorship Agreement has expired, it is therefore, necessary to execute a fresh agreement.

The said agreement is enclosed for your signature and initials on each page and your witness signing on last page.

Kind regards,

Sd/-

Johny Raphael"

21. The learned counsel for respondent would further contend that this letter from Johny Raphael is the document dated 23.5.2006, in which the petitioner has offered for the renewal of the distributorship agreement. Mr. Johny Raphael is the Legal Consultant in the petitioner's company and it is an admission on its part on behalf of the petitioner that the erstwhile agreement of 1999 has already expired.

22. The learned counsel for the respondent would urge before us that this new offer on 23rd May 2006 is for signing of MOU for CAS area and the same cannot be mixed with the earlier MOU which is admitted to have expired and was for Non-CAS area. In the CAS area MOU signed on 3.12.2006 between the petitioner and respondents herein, it is mentioned in Clause 6, 7 and 8 that the current 5 local channels will be retained by the distributor, and the revenue for FTA carriage fees in CAS areas to be shared with distributor at 20 % and the same will be decided after three months. The Collection system shall be the same as on today, e.g. the operator collects monthly from customer and gives it to distributor and distributor gives it to the company.

23. This MoU of December, 2006 has been signed by all the four respondents, Mr. Ganesh Naidu, Mr. Gaurang Kanakia and Mr. Jeetu Gadugon and Mr. Johnwin who are the respondents in the four petitions filed by the petitioner and subsequently supplemented by additional petitions filed by the petitioner. This is submitted by the learned counsel for respondent.

24. It is this MoU, which is being relied upon by petitioner as having allegedly replaced the distributorship agreement of 1999. The learned counsel for respondent would further submit that this MoU, is not an extension of the earlier MoU which was signed on 30.6.1999, because it is completely for a different purpose as well as for a different class of network, vis-à-vis the MoU of 1999 which was purely for analog system network. The original agreement of the year 1999 signed on 30th June, 1999 has already expired in the year 2004. The respondent herein is purely collection agent and has nothing to do for re-transmitting the signals to the subscribers.

25. The learned counsel for the respondent vehemently pleaded that relationship with the petitioner should be strictly viewed on the basis of its MOU dated 1999 and its related terms & conditions and also from the point of view that there is no extension of this distributorship agreement so far, after its expiry. This also clearly indicates that the functions which were to be carried out by the respondent No. 1 is that of a pure distributor and not related to the re-transmission of the signals of the petitioner.

26. On 10.3.2008 [Pages 103-104 of Petition No. 67 (C) of 2008] because of the problems being faced by the respondent's notice for termination of distributorship agreement arrangement has been given to the petitioner. Letter of notice of termination of distributorship agreement dated 10.3.2008 is set out below. One month time has been given in this notice for terminating the relationship.

Dated: 10.3.2008
IMCL
In Centre 49/50
MIDC, 12th Road, Andheri (E)
Mumbai- 40 0093.
Sub: Notice for termination of Distributorship Arrangement.
Dear Sir,

This is with reference to our various meetings wherein we have brought to your notice that we are constantly receiving the complaints from the operators and subscribers for poor quality of signals from your end. It is surprising that despite addressing the said issues at all the levels you have not initiated any appropriate corrective measures to supply better quality of signals to operators/subscribers.

Further we have also received complaints from a large number of operators about your illegal demand of outstanding/arrears through incorrect and wrong invoices/statement of accounts and also that you have stopped transmitting the signals of various sports and regional channels.

It is surprising that you are billing such operator at your whims and fancies and without taking us into confidence.

Under such circumstances, we have left with no option but to terminate the arrangement existing between the parties. We hereby give you one-month notice for termination of our arrangement. You are requested to settle our account and clear our dues and arrears.

Yours sincerely
City Cable
Sd/-
Mehboob Gani
(Partner)

The learned counsel for respondent would contend that in response to the letter as above, the petitioner has replied as follows:-

"Dated: 16th April, 2008

To

Mr. Mehboob Sayed Gani, Rajan Rane and Dinesh Bhandarkar
City Cable, Shop No.11
Tilak Nagar, Cehmbur
Mumbai – 400 089.

Mr. Mehboob Gani
City Cable

Jeetu ghanigaonkar
Mumbai

Ganesh Naidu
Mumbai

John Win
Mumbai

We have to address you as under:-

You all, the above named have been appointed distributors of by the company, under a signed distributorship Agreement which continuing under which one of you primary duties was to ensure uninterrupted transmission/retransmission of signals provided by In cablenet of authorized Pay TV and Free to Air television channels through cable operators to consumers.

One of the terms of this agreement, inter-alia, states that you shall not associate directly or indirectly, in any manner with any MSO or cable operator or with any such persons for business similar to the business envisaged under the currency of the agreement signed. It has come to our notice that you have disassociated from the signals, being supplied by us to the customers, thereby creating a lot of confusion and harassment to our customers without any prior information or valid reason. This is a flagrant breach of your obligation under the agreement.

It has also come to the notice of the company that in total violation of one of your duties under the agreement, you have failed to ensure uninterrupted transmission of signals provided by Incable net of television channels through cable operators to consumers. Your act is in total violation of the agreement you have with the company and in law. By this failure, you have violate public interest as the subscribers are deprived of Quality signals provided by Incablenet.

You are hereby called upon, through this notice to maintain the continuity of the signals provided by the company, in your designated area and as contained in the agreement immediately and forthwith without any delay.
Any failure to discharge your duties in the designated area and forth losses caused to the company would be entirely at your risk and consequences and we would be constrained to initiate such legal proceedings and explore such avenues as are legally available to us.

IMCL
Johny Raphael
Legal Cell"

In response to the above letter of 16.4.2008, the respondent has replied vide letter dated 18th April, 2008 which is reproduced as follows:-

"Dated: 18th April, 2008

IMCL

Mumbai- 40 0093.

Sub: Your letter dated 16.4.2008

Dear Sir,

We are in receipt of your communication dated 16.4.2008 wherein you have made bald and reckless allegation upon us. We express our disappointment in the manner you have made baseless allegations against us and resume the right to initiate appropriate action against you.

At the outset we deny the contents of your communications unless specifically admitted herein. It is vehemently denied that we have any agreement with you network.

Before commencing upon the content of your communication, we would like to inform you that we have sent our communication/notice dated 10.3.2008 and has given you one month notice for the termination of the arrangement existing between the parties. In view of our aforesaid communication, the arrangement existing between the parties stands terminated.

We have requested you in our said communication to settle our accounts and accordingly release the... payment due and payable upon you. However, till date you have not made any payment to us.

It is surprising that in your communication you have referred distributorship agreement. It is denied that there exist any such agreements between the parties.

We would like to reiterate that it was due to various complaints received from the operators and subscribers with regard to quality of signals and also incorrect demand of outstanding, we have sent you the notice of termination of our agreement, hence we are not bound to supply your signals to operators/consumers.

It is not out of context to mention at this juncture that even the operators to whom signals were supplied from your network were fed up with your services as they have also issued notices to us for disconnection of your signals from their networks for the reasons mentioned above. This has put to an end to the harassment caused to the subscribers/consumers.

It is categorically stated that in view of the termination of our arrangement, we are not bound to retransmit your signals. We have made restless endeavor to supply better quality of signal to the consumers so that our consumers may not be affected out of any such disconnection/poor supply of signals.

We hereby call upon you withdraw your communication dated 16th April, 2008 and refrain yourself initiating any action against us. Needless to say, any action, if initiated by you against us, shall be protected at your risks, cost and consequences.

Yours sincerely,

City Cable

Sd/-

Mehboob Gani

(Partner)"

27. The learned counsel for respondent, Mr. Maninder Singh would submit that even as on 16th April 2008, the petitioner is alleging to have the relationship of distributorship agreement with the respondent while the relationship already stands terminated vide letter dated 10.3.2008. Whether a notice of one month given by the Respondent on 10.3.2008 is required in this type of relationship is another pertinent point raised by the learned counsel of the respondent in his argument. The learned counsel would urge before us that there is no provision as per the regulation for issuing such a notice if the relationship is as per the MOU of 1999 for giving one month's notice in case distributor has to terminate its relationship with the petitioner since the respondent is not a service provider. The service provider as a cable operator in the capacity and in performing the functions of retransmission of signals of MSO has to give definite notice of 21 days as per regulations 4.3 however, as a distributor, i.e., as a commission agent, who has not signed any subscription agreement for taking signals and is also not retransmitting the signals of MSO and who is only receiving commission for collection of the subscription charges from the franchisees for the MSO, there is no statutory requirement for giving notice. **This was vehemently contended by the learned counsel for the respondent.**

28. The learned counsel for respondent would contend that respondent in its communication dated 18.4.2008 in response to letter dated 16.4.2008 from petitioner has clarified that the relationship no longer exists since the year 2004.

29. In Petition No. 67(C) of 2008 vide its letter dated 25.4.2008 the petitioner has clarified its role and relationship with petitioner vide its letter dated 25.4.2008 while responding to the status of compliance of this Tribunals order dated 24.4.2008. In this letter the respondent has also brought out the salient features of the MOU. The contents of these letter have already been brought out from page 49 to 51. However for completeness of the correspondence between the petitioner and respondent, the same is being reproduced below:-

"Dated 25.4.2008
IMCL
In Centre 49/50
MIDC, 12th Road
Andheri, East
Mumbai- 400 093.

Without Prejudice

Re: Petition No. 67 (C) of 2008 titled IMCL Vs. City Cable and Ors.
Sub: Compliance of the order dated 24th April 2008, passed by Hon'ble TDSAT.

Dear Sir,

M/s City Cable had entered into a distribution agency agreement with IMCL on 30th June, 1999. Under this agreement, M/s City Cable had to act as an agent for IMCL, interalia for providing services such as:-

1. *Assist in proper maintenance of IMC's assets.*
2. *Resolve Technical, Commercial and other complaints, which may be received from the customers and others so as to ensure uninterrupted projection of programmes.*
3. *Sustain market and cater products and services supplied by IMC from time to time to existing and new customers in the area and also make consistent and diligent effort to maintain and increase IMC's market share.*

4. *Co-ordinate between IMC and customers so as to create congenial atmosphere for increasing customer satisfaction and IMC market share etc…….*

It was the basic feature/theme in the grant of the distributorship that City Cable shall collect/assist in collection of IMC's billed amount.

In consideration of providing the above mentioned services under the distribution agency agreement dated 30th June 1999, IMCL had to pay City Cable commission as per the agreed rates from time to time.

It is significant to note that such a distribution agency agreement between IMCL and City Cable was not a "Subscription Agreement" required to be executed either between the broadcaster and an MSO or between an MSO and a cable operator et for re-transmission of signals to the subscribers.

Under any "Subscription Agreement" for receiving the signals for re-transmission to subscribers, the consideration is required to be paid by the cable operator to the MSO and/or by the MSO to the broadcaster, as the case may be. Any such Subscription Agreement has to necessarily incorporate therein the number of subscribers and the rate per month per subscriber for re-transmission of each, channel/bouquet of channels. Further, any payment by an MSO to its distribution agency/agent, intermediary is neither provided for, nor envisaged under any subscription Agreement. In other words, the cable operator never receives any payment from an MSO for the re-transmission of TV signals received by the cable operator from the MSO. No such payment by the MSO to any cable operator/distributor of TV channels, ever arises if the

relationship is for re-transmission of signals to the subscribers. However, the obligation to make requisite payments by the MSO to its distribution agency/agent, intermediary arises when the relationship is of a distribution agency/agent, intermediary. It is the belief and understanding of respondent that under the distribution agreement, it had been acting only as a distribution agency/agent, intermediary of petitioner.

This distribution agency agreement dated 30th June, 1999 was for a term of 5 years with the option of having a renewal for another period of 5 years and the term of 5 years of the said agreement starting from 30th June, 1999 came to an end on 29th June, 2004. The option for the renewal of the Distribution agency agreement for another term of 5 years had required an execution of an agreement between the parties; however, no such agreement for renewal had over taken place between the parties.

In the recent past, M/s City Cable had received numerous complaints from the cable operators/subscribers receiving signals of Petitioner which was causing serious prejudice to the M/s City Cable in relation to its activities as a distribution agency thereby creating a situation for M/s City Cable to exit from the distributorship agency arrangement continuing between the parties and where the written agreement had come to an end on 29th June 2004, M/s City Cable was not obliged to issue any notice for exiting from the distribution agency agreement after this stage. However, with its bonafide attitude and

having a relationship for a long period with the IMCL, it had issued a formal notice informing its decision to the IMCL from exiting from the distribution agency, arrangement with IMCL.

It is the belief and understanding of M/s City Cable that for the services being provided by it under the agreement dated 30th June, 1999, it was only acting as an agent of IMCL and was not a service provider within the meaning of TRAI regulation dated 10.12.2004 as amended on 4.9.2006.

It has been clearly provided and envisaged in the Regulatory regime in the field of broadcasting, introduced under the TRAI Act, 1997, as amended on 2000, that there is a complete freedom available to the cable operators to move from one MSO to the other for strengthening and augmenting there business interests.

With the growth in the industry and advancement of competition in the sphere, the movement of Cable operators from one MSO to the other is becoming a matter of natural routine and has been suitably dealt with and provided for also in the regulatory regime. With appearance of more and more MSO's in the broadcasting industry, such movement has become more regular and usual.

Since M/s City Cable is not a service provider as per TRAI regulations, other stipulations/obligations cast upon a service provider under TRAI regulation do not come into play when an entity is acting an agent/intermediary of a broadcaster/MSO and not as a service provider. As such M/s City Cable is of the belief and understanding that it is not a service provider and the stipulation incorporated in Regulation 4.2 of the TRAI regulations for issuance of a notice with minimum period of 21 days before disconnecting any TV channels does not get invoked in the case of M/s City Cable exiting from its arrangement as a Distribution Agency with IMCL.

The franchisees of IMCL, having subscription agreements/arrangements with IMCL and who were receiving the signals of cable TV services from IMCL for its re-transmission to the subscribers have independently opted out of their Franchisees Arrangements with IMCL.

However, IMCL on M/s City Cable terminating its Distribution Agency agreement with IMCL and Franchisees of IMCL, exiting out of their subscription arrangement with IMCL has approached Hon'ble TDSAT seeking reconnecting of the signals etc filed a petition before the Hon'ble TDSAT against M/s City Cable. An order has been passed by the Hon'ble TDSAT on 24.4.2008, interalia after recording the contentions on behalf of the parties for final adjudications, directing M/s City Cable to reconnect the signals with IMCL Network forthwith. The order has already been brought out at para 5 of page 13 onwards in this judgment while describing the factual matrix of the case.

Without prejudice to the rights and contention of M/s City Cable before the Hon'ble TDSAT and in compliance with the order dated 24.4.2008 M/s IMCL is requested to visit the premises of M/s City Cable on 26.4.2008 at 11 am for the reconnection of the signals of IMCL at 701, Krushal Commercial Complex, above Shopper's Shop, M.G. Road, Chembur, Mumbai-400 089.

Without prejudice to the above this may also be treated as a notice under clause 4.2 of the interconnection Regulation as amended till date.

Yours sincerely
For City Cable

Mehboob Gani
(Partner)"

30. The learned counsel for respondent would further bring to our notice that the Petition No. 67 (C) of 2008 has been filed on 21.4.2008 while the M.A. No. 51 of 2008 at page 66 of Volume I of the petition has been filed on 2.5.2008. The prayer which has been made in this M.A. is to clarify the order dated 29th April, 2008 and direct the Local Commissioner to clarify the actual facts on the ground, with regard to implementation of the order dated 24.4.2008 and ensure that the signals of the petitioner's network are reaching its customers.

This application has been dismissed by our order dated 5.5.2008 and on 9.5.2008 we passed another order saying that connections must result in signals supplied by the petitioner reaching the ultimate consumers and directions were also issued to Respondent No.1 to ensure that re-connection of the petitioner signal network as noted by the learned Commissioner results in the signals reaching the end consumers, however it has not been brought to the notice of this Tribunal at that stage that Respondent No.1 has exited the distributorship agreement and has given a notice under 4.2 regulation on 25.4.2008 itself. This is a concealment of facts and orders have been obtained from this Tribunal by the petitioner in a fraudulent manner.

31. The learned counsel for the respondent on the strength of the letter dated 26.4.2008 addressed by the respondent to the petitioner and signed by the respondent, Mr. Mehboob Ghani, has very strongly and vehemently

pleaded that the respondent is not a service provider as per the definition given in clause 2 (b) of the regulation, which reads as follows:-

"Agent or intermediary" means any person including an individual group of persons, public or body corporate firm or any organization or body authorized by a broadcaster/MSO to make available TV channel to a distributor of TV channels.

32. The learned counsel for respondent would bring to our notice the clause 4 (m) and 4 (n) of the distributorship agreement which indicate that distributor has no hold except as distributor in terms of this agreement and cannot commit, undertake or agree in respect of any matter on or behalf of the petitioner. This is a categorical prohibition for the distributor to act in the capacity of a distributor of TV signals as per the agency agreement.

The definition which has been given in the regulations 2 (b) was also compared in the context of the section 182 of the Indian Contract Act, 1872 which is as follows:-

182."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'.

33. The learned counsel for the respondent would further argue that the agent, therefore, can act as a principal and the same relationship is existing between the petitioner and the respondent within the four corners of the

Distributorship Agreement. The Regulation 2 (j) which is specifically defining the distribution of TV channel is altogether a completely different category and the function of a distributor of TV channel in this category is for retransmitting the TV channels through electro- magnetic waves through cable or through space, intended to be received directly or indirectly. The respondent also does not come near to this definition from the activity in which it is involved as per the distributorship agreement. In this case as the agent, it is virtually an alter-ego of the principal that also to the extent permitted by Distributorship Agreement.

34. The main contention of the learned counsel for respondent is that respondent did not fall in the category in 2(b) at all except for the first part of it to make available TV channels) and not as an actual distributor of the TV channels [as per second part of 2(b)] by retransmitting signals in the form of electromagnetic waves.

35. The learned counsel for the respondent would submit that as per Clause 2 of the **MOU which has been signed on 3.12.2006 for CAS area** between the petitioner and the respondent, the petitioner is the owner of the network and the petitioner has agreed to pay Rs. 5/- on each box on rental or outright sale to the area distributor under CAS for a period of six months starting from 1st January, 2007. In regard to the revenue from the pay channels which the MSO gets to the tune of 30% is also to be shared between the petitioner and the respondent and this will be decided after three months after commencement of the agreement. It is also mentioned in

the MOU that out of the total revenue from the petitioner's direct points the distributor shall have 5% revenue. It is also agreed upon as per the MOU that: -

- Additional local favorite channels (two numbers) can be introduced/inserted with CAS to be viewed through the STB (Set Top Boxes). **The learned counsel for respondent would contend that this provision is again to share the revenue with distributor for tempting the respondent to increase the number of subscribers by marketing and bringing more operational area within the fold of the petition.**
- The expenses for regularizing these two additional channels is to be borne by the distributor.
- The current 5 channels (local) will be retained by the distributor.
- Revenue from free to air carriage fee in the CAS area is to be shared with the distributor @ 20%, however the same will be decided after three months.
- The collection system shall be the same as existing today for example, operator collects monthly from customers and gives it to the distributor and the distributor gives it to the company.
- A separate tripartite agreement shall be executed between the company's distributors and the operators.
- The distributor's direct points should be free as it is okay at the present status (will be reviewed subject to performance).

The learned counsel for the respondent would contend that except from the direct points of the distributor the complete network is owned by the petitioner and the relationship is such that even for direct points no

subscription amount is to be paid to the MSO by the respondent and this again is a revenue source for the distributor for alluring him to increase more business for the petitioner. The learned counsel for the respondent would urge that this also does not bring the respondent within the fold of a service provider.

36. The learned senior counsel for the respondent Mr. Maninder Singh would bring to our notice the Petition No. 172 of 2009 decided by this Tribunal on 22nd of January 2010 between Star India Private Limited versus Bharat Sanchar Nigam Ltd. Various judgments which have been referred to in this judgment are brought to our notice. Reliance has been placed on M/S Tirupati Tele Services versus reader Zee Turner limited in petition number 147 (C) of 2008 decided on August 2008.

> *"The petitioner is merely a collecting agent for the respondent. The learned counsel for petitioner has drawn our attention to an agreement, copy where of has been filed on record. The agreement is titled as the Dealership Agreement. Firstly, the agreement is not signed on behalf of the respondent. The learned counsel for the respondent submits that the respondent does not have any agreement with the petitioner even for the dealership. The learned counsel further submits that wherever respondent has validly executed dealership agreement the dealer collects payments from cable operators/multisystem operators and not from subscribers."*

Therefore, the respondent was not required to do anything more.

Secondly, the portion to which our attention has been drawn in the said agreement does not make out a case that the respondent is a service provider. The respondent on its showing is not under business of transmission or retransmission of signals. It is only collecting money on account of subscription fee from the subscriber from the signals supplied by the respondent. A reference to the prayers contained in this petition also show that the controversy raised in the present petition is in the nature of a civil dispute. Accordingly this petition is not maintainable and must be disposed of. The petitioner will be free to pursue its remedy in accordance with law elsewhere.'

The learned counsel for respondent, Mr. Maninder Singh would place reliance on the judgment of this Tribunal in CH entertainment versus Connect Broadband Services Ltd. in Petition No. 98 (C) of 2007 order dated 8th May 2007, wherein it has been held as under:-

Order

"At the outset, learned senior counsel for the respondent has raised an objection that the nature of dispute raised by the petitioner in this petition does not fall within the ambit of the Telecom regulatory authority of India Act and, therefore, this Tribunal has no jurisdiction to deal with this matter. The broad facts necessary to deal with this issue are that the petitioner sold its entire network to the respondent for a consideration. Two agreements were executed between the parties. One of the agreements is regarding the sale of network while the other is

distributorship agreement. The agreements are not being disputed by either party. As per Clause 2.3.2 of the distributorship agreement, the petitioner has to provide all possible support to the respondent in getting the local cable operators listed in Schedule – I of the agreement to enter into direct connection and commercial agreement with the respondent. This clause further provides that the petitioner "shall also make best efforts to help the first party enroll other local cable operators in the operating territory in order to expand the total number of subscribers to be covered under the project. In the background of this Clause it has been stated in the affidavit dated 5th May 2007 filed by the respondent before us that all the 41 local cable operators who were mentioned in Schedule – I of the agreement have shifted from petitioner to the respondent. They have signed franchisee agreements directly with the respondent. Thus all the erstwhile LCOs of the petitioner have become direct franchisees under the respondent. The petitioner, however, does not accept this."

Mr. Singh would contend that in the worse case, even if we arrive at a conclusion that both the parties are service providers and if any dispute arises between these two parties to the agreement, simply because they are service providers by themselves, would not clothe this tribunal with jurisdiction, <u>if in terms of the agreement; one is not a service provider</u>. Since the respondent by virtue of the terms of agreement of the year 1999 is not a service provider and, therefore, the Section 14 of the Act would not be attracted.

37. The leaned counsel for the respondent would vehemently deny the contention of the petitioner that there is a composite agreement between the parties in this particular case. At this stage he would like to bring to our notice the judgment in **Star India Pvt. Ltd. Vs. Sea TV Network Ltd. and Anr. (2007) 4SCC 656**:- In this case at Para 9, the Apex Court has observed:-

> ***"Before concluding we may once again reiterate that Appellate Tribunal in the present case has correctly interpreted the scheme of Interconnection Regulation. However, in case of functional overlap, we are of the view that in every matter the Tribunal would examine the written contracts between the parties and ascertain the actual prejudice/discrimination and not decide the matter on conceptual basis. In the present case we insisted on the appellants for producing the written agreements with which clarity has emerged. But for examination of such contract it would not be proper to decide the matters per se basis."***

The learned counsel for respondent would contend that in this case after going through the distributorship agreement of June, 1999 and then for CAS area on 3.12.2006 there is no overlap in functions and the functions of retransmitting signals in the network of the petitioner or to its franchisees does not exist at all and, therefore, the respondent can not by any stretch of imagination be classified as a service provider.

38. The learned counsel would further bring to our notice the extracts of the cross examination of evidence in Petition No. 67 (C) of 2008 at page no. 828 (J) of Mr. Madhav Dattaraya Betgiri to affirm its contention that the network, its operation, was with the petitioner in totality. The ignorance of witness of vital information reflects that the signals of SCOD-18 continuing is not sustained. The issuance of any material to the respondent No.1 is also not sustained.

Cross-Examination of Mr.Madhav Dattaraya Betgiri, General Manager (Operations) in Petitioner's company by Mr.Navin Chawla, Advocate.

"I have not filled the paragraph numbers at page 596 of my affidavit, but I have seen and confirmed all the details of my affidavit and annexures, which are submitted herein.

I had not personally gone for the purpose of attestation of the affidavit.

The copy being carried by me, though attested, does not bear the paragraph numbers in the verification portion and they are blank.

The contents of my affidavit are based on official records and my personal knowledge."

"Only the relevant information in relation to this case has been filed on record.

There will be other documents related to the respondents, however, not filed on record.

Before joining the Petitioner Company, I was and am still having cable TV business in the district of Sangli (Maharashtra).

In April, 2008 I was acting as the Operational Incharge for Mumbai Cable TV business of the Petitioner.

As Operational Incharge, I was responsible for giving better quality service to my own customers and indirect customers i.e. operators and develop the business in my area.

About 178 persons were working with me in discharge of my functions.

They were also responsible for the above said functions.

These people used to ensure that the quality of signals reaches the end customers.

In April 2008, the petitioner company had 18 Headend all across Mumbai. It had only one main control room at Andheri and to cater to local demands of the customers, sub-control rooms at these 18 locations. Only free to air channels or encrypted channels and local video channels were added from these 18 locations.

Petitioner had its own staff at these 18 locations.

These sub-control rooms had one Operational Incharge and one Technical Incharge. These were employees of the Petitioner Company.

I was reporting to Mr. Nagesh Chhabria, President (Operation) of the Petitioner Company. He is still working for the petitioner.

After I joined the duty I met the respondent No.1.

Respondent No.1 is not the collection agent for the Petitioner but is the distributor. He used to identify the local cable operators and be a via-media between the petitioner and LCOs.

In some parts of Mumbai, Petitioner Company had franchise agreement directly with the LCOs in consultation with the distributors.

Q. Whether in the Borivali, Bhandup, Chembur and Goregaon areas of Mumbai, the petitioner company had direct franchise agreement with the LCOs?

A. I do not know.

The petitioner company maintains a line diagram of the cable network. This would show where all the equipments of the petitioner are installed.

The petitioner company does maintain a list of LCOs as also the direct subscribers. The petitioner company also maintains a record of the equipments purchased by them. This is also in form of invoices, vouchers for payment, delivery challans etc.

The equipments are supplied in the field on the instructions of the distributor.

The Stores Department of the company releases the equipments.

The Stores Department will supply equipments only if there is a written instruction.

No written instruction from the respondent No.1 has been filed on record of the present case, however, I can produce the same.

It is incorrect to suggest that they have not been produced on record because there is no such document in existence.

Attention of the witness is drawn to pages 503-530.

These are non-returnable gate passes/material issue notes. These bear the signatures of the persons who are taking the delivery of the equipments. The signatures appearing in all these documents are of the employees of our company.

Attention of the witness is drawn to pages 472-502.

Q. Is this list compiled on the basis of some other documents?

A. This is the list compiled on the basis of all documents maintained at the company in various Departments.

Q. Who compiled this list?

A. This list is prepared by combined efforts of Finance/Store/Technical Departments of the company. I have not personally compiled.

Attention of the witness is drawn to pages 503-530.

Q. Can you inform the TDSAT where exactly the equipments mentioned in these documents were installed?

A. The equipments issued to the four Headend as stated above, are placed in the control room at these Headend and on the network ***which is laid down to give service to our direct and indirect customers.***

Attention of the witness is drawn to page 506.

Q. Please inform the location where these equipments were installed?

A. Page 506 contains following materials information :

All the equipments mentioned in this delivery challan must have been used in giving ***service to my indirect customers (Operators) in Goregaon.***

I have not personally gone to check if these equipments were installed. ***The petitioner company has separate Technical Department, which assures the installations.***

At Borivali, we had got 18 employees, at Chembur 22, at Goregaon 4, at Bhandup 10 direct employees of the Company in April, 2008.

Vol. Except one all the employees resigned on 12.4.2008.

I am not aware if this fact has been mentioned in these proceedings before.

It is correct to state that if a LCO changes his MSO, the signals received by the end customers of that LCO will start getting the signals of the new MSO.

Some of the LCOs of the petitioner company did send letters stating that they are no longer interested in receiving signals from the petitioner company. These letters were sent after they had migrated to the other MSO.

Attention of the witness is drawn to para 3 of his affidavit.

The company does not have any primary points in Goregaon, which were served from the Headend in question.

I came to know of the happenings of 12-13th April, 2008 in the morning of 13.4.2008. I rushed to all these four headends. I went inside the headends at Borivali and Chembur and was not allowed at Bhandup and Goregaon.

I have not specifically mentioned in my affidavit the fact of not being allowed to enter the headends at Bhandup and Goregaon.

The petitioner company made a complaint in local Police Stations of all these four areas for the illegal actions done by distributor about my company's business.

I am not aware whether a copy of the Police complaint has been filed on record of the present case, however, I am carrying the same.

Even till today our company's signals have not yet resumed in 95% of areas.

Q. What according to you would be the percentage of subscribers of these four areas when compared to whole of Mumbai?

A. Company has more than 25,000 indirect declared subscribers (Operators declaration) and 12,000 direct subscribers in these areas. Roughly, 35% of our universe at Mumbai. These are the figures of 2008.

I am not aware of the pay outs to the broadcasters.

Vol. This is taken care by Finance Department.

Q. Do the LCOs have their own network in these areas?

A. Yes. All LCOs in these areas are having their own cable network catering services to their end customers, they get cable signals from our control room.

Q. Does the network from the control room to the end customer belong to the LCOs?

A. From control room to first input location of the LCO network belongs to petitioner company i.e. all the equipments required to provide those signals to LCOs and customers are provided and owned by the petitioner company.

Q. Is there any document on record to show that the petitioner company relayed the network in the areas in question after April, 2008?

A. I am not aware.

Vol. Abstract of the investment done for development in that area is available with me and I can submit herewith.

It is incorrect to suggest that the network is being used still today to supply the signals of the petitioner company.

Vol. Company is using the same network from main control room at Andheri to a separate newly formed headend in these areas, and new equipments and machineries laid down at new headend location and on the network in that area to cater present five percent subscribers in that area.

Attention of the witness is drawn to para 13 of his affidavit.

In the affidavit, there is a typing mistake. In Bhandup, the distributor is Mr. Jitender Gadigaonkar and in Goregaon, the distributors are Mr. John Win Manavalan and Mr. Gaurang Kanakia.

It is incorrect to suggest that the list annexed to my affidavit is not correct."

39. The learned counsel for the respondent would further contend that from the evidence as above it can be easily inferred that the petitioner is having cable operators and direct subscribers and about 178 persons working in the operations group for maintaining the 18 head ends to ensure the quality of signals reaching to the end customers. One person in each

location is an operational in-charge and one person is the technical in-charge. The job of the respondent was only to identify the local cable operators for the purpose of enhancing the business of the petitioner. It is also submitted by the learned counsel for the respondent that no line diagram has been submitted for the petitioner's network and the petitioner itself maintains the list of the local cable operators. The items which have been purchased by the petitioner are for their own staff. It is clearly admitted by the witness that the items have been issued to the persons who are taking delivery of the equipment and the signatures appearing in all these documents are of the employees of petitioner's company and the list of the items has been prepared by the combined efforts of the finance/store/technical departments of the company. At this stage attention of the witness has been drawn to page no. 684 to 719 in Petition No. 67 (C) of 2008. These documents are indicating the equipments like (a few items have been picked up):-

1. Amplifiers hybrid – 9 numbers
2. Pin Connectors
3. Nodes
4. RG-11 Cable
5. Splitters
6. 14" Color TV – Onida
7. Broadband meter
8. Power supply
9. Batteries etc.

The learned counsel would contend that all these items are for the upkeep of the network of the petitioner and have been issued to its own technical and operational staff for the purpose of maintaining its own network. The respondent has no role to play in this regard.

40. The respondent's counsel would vehemently submit that no equipments have been issued to respondent and the claim of the learned counsel for the petitioner is baseless and is just somehow or the other attempt is being made by the respondent to justify it in the category of service provider by projecting it to be involved in the retransmission of signals. It is also distinctly contended by the learned counsel for the respondent that the respondent does not control anything as far as the network is concerned because as per the version of the operational in-charge of petitioner, it has been categorically admitted that the staff of the petitioner is maintaining and operating the complete network for retransmitting and transmitting the signals and maintaining the good quality of signals.

The learned counsel for the respondent would further bring to our notice (Page No. 400 Para 2B in Petition No. 96 (C) of 2008) which indicates that most of the cable operators have rejoined them. This is the part of the statement of the rejoinder filed in Petition No. 96 (C) of 2008.

The learned counsel for the respondent would further bring to our notice, the details of the cross examination of Mr. Sanjeev Ahuja who is the head of the Legal Deptt. of the petitioner's company.

"Q. Was the distributor agreement dated 30.6.1999 renewed between the parties by way of written documents?

A. No.

Vol. The parties continued to act on the agreement of 30.6.1999.

Q. Is there any written record of this continuation?

A. Yes. They continued to take signals from company and distribute them to customers both direct and through LCOs. They continued to receive Commission on the collection made by them and they continued to maintain the Headend which was set up by the company.

The written record is in the form of Commission received that I am aware of.

I am not aware whether any payment proof for the Commission has been filed on record of this case.

Q. Would it therefore be correct to say that your previous statement is based on what you have been told by others?

A. <u>Yes, based on information that I have received</u>.

Q. Who gave you this information?

A. Operations, Finance. However, I do not remember the names of the persons, who gave this information.

Q. Was this information given to you in the form of writing or oral?

A. I do not remember whether it was given in writing, but I was certainly informed orally.

Q. Did you also visit the areas in question, which are involved in this batch of petitions?

A. No.

Q. You have in your statement today mentioned that the respondent was taking signals from the petitioner and distributing to customers both direct and through LCOs. What is the basis of this statement?

A. The basis of above statement is the information received by me.

Q. Is it a part of the record of this petition or of the company?

A. I am not aware.

Q. Who is maintaining the Headend today and as in April, 2008 for the Petitioner Company?

A. I am not aware of the individual.

Q. Was the Headend in April 2008 maintained by the Petitioner Company?

A. Yes. It was maintained by the Company.

Q. Are you aware in what manner signals from the Petitioner Company reached the LCOs or direct subscribers of the Petitioner Company in March, 2008 and May, 2008?

A. I am not aware of it.

Q. Is it correct that the LCOs in the area in question had their own Headend and infrastructure in April, 2008?

A. I am not aware of it.

The learned counsel for respondent would contend that the witness has categorically confirmed that all the information, he possessed was based upon, what has been told to him by others or otherwise he does not know about it. He also admits that the head ends are maintained by the petitioner's own personnel.

41. The learned counsel for the respondent, Mr. Maninder Singh would plead the case from the point of view of order 2 rule 2. The suit should include the whole claim. The plaintiffs claim should be complete which it is entitled to make in respect of the cause of action. It is however not prohibited that the plaintiff may give up any portion of his claim in order to bring the suit within the jurisdiction of any court. Where the plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. Similarly **if the plaintiff is entitled to more than one relief in respect of the same cause of action, it may sue for all or any of such beliefs, but if he omits, except with the leave of the court, to sue for all such relief, he shall not afterwards sue for any relief so omitted**. An illustration has been given in the bare act which says that if A leases the house to B at an yearly rent of Rs. 1200, and in case the lease amount for the years 1995, 1996 and 1997 is due and unpaid, A sues B in 1998 only for the rent for 1996, A shall not afterwards sue B for the rent due for 1995 or 1997. **In this context the learned counsel for the respondent has brought to our notice the decision in (2007) 11 Supreme Court cases 75 between S Nazeer Ahmad and State Bank of Mysore and Others, para 9; The Apex Court observed as follows:-**

"Now, we come to the merit of the contention of the appellant that the present suit is hit by order 2 rule 2 of the code of civil procedure, in view of the fact that the plaintiff omitted to claim relief based on the

mortgage, in the earlier suit. Obviously the burden to establish this plea was on the appellant. The appellant has not even cared to produce the plaint in the earlier suit to show what exactly was the cause of action put in suit by the bank in that suit. That the production of pleadings is a must is clear from the decisions of this Court in Gurbux Singh versus Bhooralal and Bengal Water Proof Limited versus Bombay Waterproof Manufacturing Company. From the present plaint, especially their 10 to 12 thereof, it is seen that the bank had earlier sued for recovery of the loan with interest thereon as a money suit. No relief was claimed for recovery of the money on the foot of the equitable mortgage. In that suit, the bank appears to have attempted in execution, to bring the mortgaged properties to sale. The appellant had objected that the suit not being on the mortgage, the mortgaged properties could not be sold in execution without an attachment. The objection was upheld. The bank was, therefore, sueing in enforcement of the mortgage by deposit of title deeds by the appellate."

A Constitution bench of this court has explained the scope of the plea based on Order 2 Rule 2 of the Code of Civil Procedure in Gurbux Singh versus Bhooralal. It will be useful to quote from the head note of the decision, which is mentioned below; (SCR head note pages 831 to 832).

"Held (i) A plea under Order 2 Rule 2 of the Code based is the existence of a former pleading cannot be entertained when pleading on which it rest, has not

been produced. It is for this reason that a plea of a bar under Order 2 Rule 2 of Code can be established only if the defendant files in the evidence the pleadings in the previous suit and thereby proves to the court the identity of the cause of action in the two suits. In other words a plea under Order 2 Rule 2 of the Code Of Civil Procedures cannot be made out except on proof of the plaint in the previous suit the filing of which is said to create the bar. Without placing before the court the plaint in which those facts were alleged, the defendant cannot invite the court to speculate or infer by a process of deduction that those facts might be with reference to the reliefs which were then claimed. On the facts of this case it has to be held that the plea of a bar under Order2 Rule 2 of the Code of Civil Procedures should not have been entertained at all by the trial court because the pleadings in civil suit No.28 of 1950, were not filed by the appellant in support of this plea.

(ii) In order that a plea of a bar under Order 2 Rule 2 (3) of the Code of Civil Procedure should succeed the defendant who raises the plea must make out:- (a) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (b) that in respect of that cause of action the plaintiff was entitled to more than one relief; (c) that being thus entitled to more than one relief the plaintiff, without leave obtained from the court, omitted to sue for the relief for which the second suit had been filed."

42. The learned counsel, Mr. Maninder Singh would very strongly urge before us that in an instant case in the first petition No.87 (C) of 2008 filed for the same cause, there is no quantification of damage and there is no prayer related ot it. In the second petition No. 98 (C) of 2008 the additional prayer has been made for damage and finally during the stage of evidence affidavits, the quantification of damage has been done and, therefore, the case exactly fits into the straight jacket of the requirement of Order 2 Rule 2 since the relief sought in terms of damage without leave of the court in the second petition for the same cause, is prohibited and cannot be allowed.

43. The learned counsel for the respondent would plead that contentions of the petitioner are same except for the addition of the details of loss incurred by the petitioner, which has been placed at pages 456, 458 of the petition and substantiated at page 626 F the petition number 98 (C) of 2008 except otherwise the petition is more or less the repetition of petition number 87 (C) of 2008. At page 456, in a tabular form list of material issued from the start up to 31 March 2008 in terms of money has been shown without showing any details of the equipment. At page 457, loss has been shown on account of the total number of points lost which were existing in the six areas of operation (the areas of operation which are limited to only four in these petitions while six areas are shown in respect of the points of the petitioners where a notional loss has been calculated up to March 2008 and subsequently extrapolated upto June 2010 without giving any reason.

The learned counsel Mr. Maninder Singh would submit that the case of damage is well covered under Order 2 Rule 2 and should be dismissed and the petitioner's approach must be deprecated in the strongest terms to raise such frivolous and baseless claim in its second version of the petition.

44. The learned counsel for the respondent would further contend as follows:-

Para 1 of the Petition No. 87 (C) of 2008 was read out to us by the learned counsel for the respondent:-

"The petitioner assails the unilateral, arbitrary and illegal termination of a valid and subsisting agreement, being a distributorship Agreement existing between the parties till date. During the course of business, over a period of years, the respondent No.1 after entering into an agreement with the petitioner on 20th September 1999 had transferred the said business to respondent No.4. The petitioner has been doing business under the covenants of the agreement dated 20th September 1999, with the respondent No.4 since….. The agreement was subsisting all the way since 1999 up till as recently as 12th – 13th April, 2008."

It can be seen that at the place where it has been mentioned that petitioner has been doing business under the covenant of the agreements dated 20.9.1999 with respondent No.4 since……(has been left unfilled). This shows that no definite stand has been taken by the petitioner in regard to date from which the petitioner is doing the business with respondent No.4,

i.e, S&S Advertising. This point has been emphasized by the learned counsel for the respondent indicating that the petitioner is not sure about the date of commencement of its relationship with the respondent No.4.

45. Another letter is addressed by Dr. Tulsi Mukherjee to Mr. Sanjay Kammat in regard to unethical termination by Ashish Cable Network, Vasi. However, the learned counsel for respondent would contend that Ashish Cable is not included in these petitions as respondent and this particular complaint cannot be taken as a complaint in the area of dispute. A separate Petition No. 91 (C) of 2008 has been filed by the petitioner for this case which is not in the batch of these petitions. This shows the inconsistency of the approach of the petitioner.

46. Reservations has also been expressed that relationship between the petitioner and respondent No.4 does not require any notice as per the regulations 4.2. However, without prejudice to its contentions, the notice is being issued as per the Interconnection Regulations and, therefore, this does not lead to a conclusion that respondent is a service provider.

47. The learned counsel for the respondent, Mr. Bhatia would add that in petition No. 98 (C) of 2008, at page 'D', is a Memo of parties and S.&S Advertising is respondent NO.1 while Johnwin appears at serial No3 representing the respondent No.3 i.e SCOD-18. It is submitted that the stand taken by the respondent No.3 is the same as that of the respondent No.1. However, no affidavit has been filed in this regard.

48. The learned counsel for respondent in its sur-rejoinder would contend that at annexure P-IX which indicates the material issued to four headend from start till 31.3.2008 does not indicate any details of the equipment while the detailed list is at page 136 to 166 in Petition No. 98 (C) of 2008. **The petitioner has improved its case by giving the details of the equipment Petition No.98 (C) of 2008, vis-à-vis the Petition No. 87 (C) of 2008. Efforts have been made to quantify the equipment and in this attempt also the petitioner has miserably failed because it has not been able to identify that who has issued the equipment and to whom it has been issued.**

49. **Learned counsel for the respondent No.1 would contend that the petitioner has not identified any material while claiming that the whole of Bombay network belongs to the petitioner.** The claim of the petitioner, is, therefore, completely arbitrary and is not based on any facts and supportive line diagram, actual identified equipment in each locations.

50. The learned counsel for respondent would further contend that in case, petitioner had any intention to be honest, it would have identified the equipment and would have sent a list of them, emphatically asking for its equipment to be returned back immediately. The learned counsel has brought to our notice the evidence affidavit of Madhav Betgiri, General Manager (Operations) at page 464 para 3 of Petition No. 98 (C) of 2008.

"I state that my company had a subscriber base of 12,000 primary points and 180 LCO's in the areas of Bhandup, Goregaon, Chembur and Borivalli till April 2008. I state that based on my knowledge of the business and that of the records of the company maintained by it, in its usual course of business, the business in the said four areas was conducted through the area distributors. I state that I have been informed that way back in 1995-1996, these distributors were appointed for carrying out the business of the company in these areas as during that time the business was growing rapidly. I state that I am aware based on the records of the company and on my personal knowledge and interaction with these distributors that they were responsible for smooth transmission and re-transmission of the signals of my company addressing consumer complaints and helping the company in collection of revenues. I state that I am aware that the distributors had complete access to and control over the equipment of the company installed for the purposes of transmission and re-transmission of the signals of my company. **I state that the entire equipment utilized to transmit the signals of my company were assets of my company**. A list of equipment purchased and installed by my company in the said four areas is annexed herewith and exhibited as Exhibit – PIV/I."

This part of the evidence affidavit establishes that distributors were appointed by the petitioner for assisting the petitioner to conduct its business in the areas mentioned herein and complete assets belonged to the petitioner.

51. The learned counsel for respondent would contend that in this para, it is clear admission at a very responsible level in the petitioner's company that entire equipment utilized to transmit the signals of petitioner's company were assets of Petitioner's company and the distributors were responsible mainly for handling the issues of addressing consumer complaints and helping the company in collection of revenues and only for this purpose the distributor has an access to and control over the equipment of the company installed for the purpose of transmission and re-transmission of the signals of the petitioner. It can be seen from the above that the distributor's function was a peripheral function of assisting in transmission and re-transmission of signals while the distributor was not at any stage involved in the actual re-transmission of the signals through electromagnetic waves up to the subscriber so that it can come within the ambit of the distribution of TV channels as per regulations.

52. It is also brought to our notice by learned counsel for the respondent No. 1 that verification part in this particular affidavit has not been filled up by a responsible officer like General Manager, Operations in company of the petitioner to say as to which of the paras of this Affidavit is true to his personal knowledge a (derived from official records and which paras are believed to be true on the basis of legal advice. **The learned counsel for the respondent would contend that this shows that the affidavits have been doctored by the petitioner's company from the point of view of setting up of the case of the petitioner without really going into the actual**

truth of the matter. The portion of the cross examination of Mr. Madhav Dattaraya Betgiri which is placed at pages 76 to 81 of this judgment has been brought to our notice.

53. The learned counsel for the respondent would bring to our notice that Petition No. 87 (C) of 2008 filed on 5.5.2008 and the Petition No. 98 (C) of 2008 is filed on 15.5.2008. There is a difference at page 10, para 31 at Petition No. 98 (C). It has been mentioned that the respondent No. 2 in collusion with respondent No.1 executed by respondent No.3, the change over for the benefit of others who were rival competitor of the petitioner and whose intention was to harm the good-will and reputation of the petitioner and reduce its market presence and subscriber base. As a matter of fact, this indicates that respondent No.2, i.e, SCOD 18 through the same Mr. Naidu and John Win in collusion with S.S. Advertising again through Johnwin has executed the disconnection of signals of the petitioner by SCOD-18 networking Pvt. Ltd. again through Mr. John Win. This is just an effort to blame the single person in different capacities and to rope in other respondents with different names.

In Petition No.98 (C) of 2008 an additional prayer has been made for granting damages and the same does not find place in Petition No. 87 (C) of 2008. The issue of damage has been brought out for the first time at this stage only.

54. The learned counsel would further contend that in the reply to the contentions of the petitioner at page 195 of the Petition No. 98 (C) of 2008, it is clearly indicated by the respondent that no equipment has been taken from the petitioner and at page 196 of Petition No. 98 (C) of 2008, the categorical statement is that petitioner does not have any receipt showing that answering respondent has received such equipment nor does it show that this equipment was used in any place other than the petitioner's own network. The learned counsel would submit that it must be appreciated that the answering respondent has not received any equipment from the petitioner on any occasion. It is also brought to our notice that the petitioner by the process of this petition wants to stifle the competition by not allowing the cable operators to shift to other MSO, who are affiliated to it, which is against the basic spirit of regulations.

55. The learned counsel for the respondent has vehemently opposed the contention of the petitioner by making a bald statement that it owns a complete network and related equipment that covers the length and breadth of Mumbai by which it has served thousands of subscribers both direct and indirect for the past 13 years in the area of Goregaon and same network has been used now by respondent No. 1 for the benefit of respondent No. 3 and respondent No. 4.

At para 5 of page 351 of Petition 98 (c) of 2008 again a bald statement has been made by the petitioner that complete list of equipment that has been purchased and installed by the petitioner for the last 12 years is in the

possession of the respondent No. 1 and the petitioner has never staked its claim of equipment that does belong to it. **The learned counsel for respondent would urge before us that at no stage any proof or witness has been produced in support of this contention.** It is also alleged by the petitioner that the respondent No.1 has sought to handover the equipment of local cable operators without their authorization to You Telecom without itself (i.e. Respondent No. 1) having any ownership rights.

The word ownership right has been emphasized by the learned counsel for respondent and he has tried to give finality to its arguments by saying that ownership of the equipment is of the petitioner and the respondent did not own any equipment at all. It is also mentioned in the same para by the petitioner that it has laid down network only up to the headend and not further. While the equipment of the petitioner spreads much beyond the headend as has been admitted in evidence affidavit of General Manager (Operations) as extracted herein at page 97 and 98, para 49 of this judgment.

56. The learned counsel for the respondent would further submit that the complete operation and maintenance of the equipment is within the scope of the petitioner. The petitioner owns complete equipment as such up to the node from where further distribution to the cable operators has taken place. This part of network is also indisputably, within the ownership of the petitioner. **The learned counsel for respondent would further bring to**

our notice, page 229 of Petition No. 87 (C) of 2008 at para d and e, which reads as follows:-

(d) The petitioner in view of long standing relationship with the local cable operators has been in constant touch with the operators. Some of these cable operators have rejoined the network of the petitioner and signed fresh subscription agreements.

(e) While efforts continue to renew the agreements with the remaining operators who had given notice, in cases where the operators are not willing to rejoin, the petitioner is *in* the process of taking appropriate legal action to protect its interest against those cable operators who have not restored to the network of the petitioner. Most of these cable operators have huge outstanding that they owe to the petitioner.

As per these two admissions in the rejoinder it is clear that some of the cable operators have re-joined the network of the petitioner and signed fresh agreements and in case some of the cable operators have not joined the petitioner, the petitioner is in process of taking appropriate legal action to protect its interest against these cable operators.

57. The learned counsel for the respondent on the other hand, would again bring to our notice the evidence of Mr. Madhav Dattaraya Betgiri, GM (Operations), at pages 463 to pages 469 of Petition No. 98 (C) of 2008.

58. The main argument which the learned counsel for the respondent would urge before us is that the GM (Operations) in its affidavit mentions that:- " I have been informed." " I am not aware" . (At 591 J, K, L, N of petition No. 98 (C) of 2008, the extracts have been brought out in the cross examination herein before). The last question as answered by the witness indicates that there is a typing mistake. In Bhandup the distributor is Mr. Jitendra godigaonker and in Goregaon the distributors are Mr. John Win Manavalan, and Mr. Gaurang Kanakia. The learned counsel would contend that this is the most casual way the operations in-charge is aware of the facts and, therefore his cross examination as a witness specifically in support of the claims of petitioner arguments of the learned counsel for the petitioner should not be given any credence.

59. In the affidavit it is mentioned that the petitioner has about 12000 direct connections, while at page 591 M same witnesses admits that it has more than 25000 indirect declared subscribers (Operators declaration) and 12000 direct subscribers in these areas, which is roughly, 35 % of the total universe at Mumbai. This is again a serious contradiction since in Goregaon no direct points were admitted earlier while these direct points are 12000 in

number approximately. The claims, therefore, made by petitioner are false, frivolous and baseless.

60. There are three affidavits which have been filed from two cable operators and two from subscribers of the cable operators which are on record. No witness has been summoned who has filed these affidavits and, therefore, I cannot give any credence to the submission made in these affidavits.

The learned counsel for the respondent finally summed up his arguments by saying that:-

(a) I am not bound by 1999 agreement and I also do not take over the right and obligations of Satekrishmani.

(b) I am only a collecting agent being a distributor and I was not in the control of the network because of the complete network being managed by the persons of the petitioner and at no point in the network I was in a position to hijack the signals of the petitioner and introduce the signals of SCOD-18. The GM (Operations) in its cross examination had already admitted that each cable operator had its own network and in no way I can take over the network of local cable operators.

61. In the absence of any line diagram of the petitioner's network, it is not possible to depend upon the wild allegation of the petitioner that his entire network has been hijacked for transmitting the signals of the other MSO.

62. There is no quantification of the damages as such the damage has no basis for being awarded in favour of the petitioner.

63. Shri Navin Chawla, the learned counsel for the respondent in Petition No 87 (C) & 98 (C) of 2008 brings to our notice the purported ledger statement w.e.f 9th November, 2005 (Page No. 339 of Evidence Folder of Petitioner NO. 87 (C) of 2008) till 31st March, 2008 (Page No. 339) two entries one of 9th February, 2006 in which R-4 appears and on 11th November, 2005 one entry in the name of S&S Advertising Pvt. Ltd. while another entry of 31st December, 2005 again in the name of S&S Advertising Pvt. Ltd. through Mr. Johnwin. To comment upon these entries, the learned counsel would bring to our notice the cross examination of Mr. S. Satheesh Kumar at page no. 626A of Petition No. 98 (C) of 2008."

"Cross-Examination of Mr. S. Satheesh Kumar by Mr. Tejveer Singh Bhatia ,

Advocate

Q: What did you join the petitioner as?

A: I joined the company as Vice President (Finance).

Q: What was your role in the petitioner company as Vice President (Finance)?

A: Managing the accounts and finance of the company. This included maintenance of books of accounts, matters relating to taxation, banking matters.

Q: Were you involved in dealing with cable operators?

A: No.

Q: Therefore, will it be correct to say that you have no knowledge of the operation at the ground level?

A: Yes.

Attention of the witness is drawn to para 2 of the affidavit.

Q: Was agreement referred to in the paragraph signed by you?

A: No.

Q: How are you aware of this agreement?

A: I have seen the document.

Q: Are you aware of the transactions between the parties under this document?

A: Yes.

Q: Are you aware who has signed the said agreement on behalf of the petitioner?

A: Yes. Mr. R.T. Hingorani.

Q: When did you see the agreement for the first time?

A: I do not remember.

Q: Is it correct that you saw the agreement for the first time for the purpose of this proceedings?

A: I can't say.

Q: Who has signed the agreement on behalf of Mr. Gaurang Kanakia the respondent?

A: I do not know.

Q: What were the terms of the agreement?

A: If I remember correctly, it was for five years.

Q: Was there any renewal of the agreement dated 30.9.1999?

A: I am not aware.

Q: Do you know Mr. Johny Raphael?

A: Yes.

Q: Do you know Mr. V.B. Sharma?

A: If you are referring to my Finance counterpart in Delhi, Yes, I know Mr. V.B. Sharma, who is Dy. General Manager (Finance) of the petitioner in Delhi.

Q: Will it be correct to say that he is reporting to you?

A: Functionally he reports to me and administratively he reports to President (North).

Q: Does reporting to you also include sending communications bearing his signature?

(Objected to by the petitioner's counsel as out of scope of affidavit)

A: I do not understand the question.

The counsel for the M/s. S.S. Advertising submitted a copy of cross examination record of MR. V.B. Sharma, Dy. General Manager (Finance) of the Petitioner Company in Petition No. 124 (C) of 2009. Objected to by the petitioner's counsel.

The respondent's counsel is advised to file an application seeking for a copy of the records of Petition No. 124 (C) 2009.

Upon an oral request being made by the counsel for the respondent, original files of the Petition No. 124 (C) of 2009 have been summoned from the Registry.

Attention of the witness is drawn to page 139 of the Evidence Folder which is cross examination of Mr. V.B. Sharma dated 10.3.2010.

Objected to by the counsel for the petitioner as the same is prohibited under the Evidence Act as the witness is capable of being produced in Court.

Q: Are these signatures of MR. V.B. Sharma?

A: Looks like his.

Attention of the witness is drawn to page 140 where it is recorded "it is correct to suggest that we have direct agreement with Franchise".

"It is also correct that all franchise has to make direct payment to us."

"Respondent No. 2 was distributor of the petitioner".

"Respondent No. 2 was made party only for the purpose of verification."

Q: Are the statements made by Mr. V.B. Sharma correct?

A: I am not aware of the facts of this case or the circumstances under which these statements were made.

Q: Are you aware of Public Notice dated 26.4.2008 issued by the respondent to the petitioner?

A: I am not aware as I have not seen the paper.

Q: Are you aware as to how the equipment is installed by the petitioner in its network?

A: I am aware of the process of issue of material but not of the details of installation.

Q: What is the process of issue of material?

A: On receipt of an indent from the concerned distributor, the need for the material is verified by the technical team in coordination with the operations team. Material issue note is subsequently prepared on the basis of the indent received from the distributor and material dispatched to the concerned head-end of the distributor.

Q: Does the company have a written policy regarding above?

A:I am not aware.

Q: I put it to you that the indent comes from the headend manager and not from the distributor?

A: It is incorrect.

It is incorrect to suggest that the M/s. S.S. Advertising was only a collection agent of the petitioner.

I am not aware if the M/s. S.S. Advertising disconnected the service only after giving notice as per TRAI Regulations.

It is incorrect to suggest that no amount is payable by the M/s. S.S. Advertising to the petitioner company.

It is incorrect to suggest that the petitioner had no direct point in the area of M/s. S.S. Advertising.

Cross examination of the witness by Mr. Tejveer Singh Bhatia, Advocate

It is incorrect to suggest that the computation given herein above is wrong.

The above computation does not form part of my affidavit by way of evidence.

Volunteers: It form part of my affidavit by way of evidence but the computation is not attached".

The learned counsel Mr. Navin Chawla would contend that as per the admission of the Finance Head, all payments by the franchisees have to be made directly to the petitioner. Respondent No.2 is the distributor and was made party for the purpose of verification as per the witness. The learned counsel for the Respondent would also like to bring to our notice the deposition of Mr. V B Sharma in Petition No. 124 (C) of 2009. (This has been permitted by us in the court).

Mr. V.B. Sharma while deposing in Petition No.124 (C) of 2009 has admitted as follows:-

(i) Collection at Bombay used to be made through Head end Managers.

(ii) It is correct to suggest that we have direct agreements with the franchisees.

(iii) It is also correct that all franchisees have to make direct payment to us.

(iv) I am not aware that whether the petitioner has filed an application before this Tribunal being Petition No.68 (C) of 2008 stating that Citi Cable had not been supplying the signals to the consumers and other cable operators.

(v) It is not correct to suggest that there was no privity of contract between the petitioner and the respondent.

(vi) It is incorrect to suggest that the petitioner has collected the entire payment through In Cable (who is one of the respondents in this batch of petitions being Petition No. 68 (C) of 2008).

The learned counsel would urge before us that just by few entries in a statement of accounts which are not proved, to arrive at any conclusion of relationship between petitioner and respondent shall be most irrational and incorrect because the cross examination of the Finance Head does not establish any contention expressed by the learned counsel for the petitioner by referring to the purported Statement of Accounts.

64. Mr. Naveen Chawla, the learned counsel for the respondent No.1, i.e., M/s Satekrishmani Netowrk and others would further like to bring to our notice the statements made in the affidavit of evidence by Mr. S. Satheesh Kumar (at page 334) which is as follows.

"I state that petitioner company had signed agreement dated 30th June 1999 with respondent No.1 for the purpose of maintaining the headend of petitioner company as well as manage and assist in transmission of signals to various direct and indirect customers. I state that as per agreed terms the respondent No. 1 – Mr. Gaurang Kanakia of M/S Satekrishmani, was paid a commission on the basis of monthly collection from the designated area of Goregaon. I state that the commission has been paid to the respondent No. 1/adjusted towards his account till March 2008 before the illegal switch off of signals committed by the respondents. A copy of account statement evidencing the above is annexed as exhibit PW III/I. I state that respondent No. 1 would apart from maintaining channel allocation and retransmitting signals, would also collect subscription fee from various customers and deposit the same in designated bank account or hand over to petitioner company

I state that grave financial loss has been and is being caused to petitioner company as petitioner company, even today, is paying subscription fee for these areas to the broadcasters, though petitioner company is unable to recover the same.

I state that the estimated damages and loss of business opportunity cost to petitioner company has been computed to be about Rs. 225 crores till 30 June 2010 owing to following reasons.

(a) loss of direct point revenue.

(b) loss of local cable operator revenue.

(c) loss of annual carriage revenue.

(d) loss of annual advertisement revenue reputation.

(e) fixed assets installed.

(f) set-top box installed.

A copy of necessary documents are annexed and exhibited as exhibit PW III/II (Colly)".

65. The learned counsel for the respondent would contend that there is no quantification of the damage except some very vague reasons have been mentioned during cross-examination by the Head of Finance, Department of Petitioner's company. Such a vague claim of damage is absolutely frivolous, baseless and not sustainable in law, for grant of any damage and, therefore, the claim of the petitioner needs to be dismissed.

66. The learned counsel for the respondent brought to our notice the evidence affidavit filed by Mr. Satheesh Kumar, working as Vice President in

Finance department of the petitioner's company filed in Petition No. 87 (C) of 2008. In this affidavit, in para 2 it is stated as follows:-

> *"I state that the business of M/s Satekrishmani was taken over by S.S. Advertising arrayed as Respondent No. 1 in the instant petition. I state that I am aware from the records and facts from the field that Mr. Johnwin Manavalan was acting on behalf of Respondent No.1 in the area of Goregaon and was dealing with the petitioner company. I state that Respondent No.1-S.S. Advertising was paid a commission on the basis of monthly collection from the designated area of Goregaon. I state that the commission has been paid to respondent No.1/adjusted towards his account till March 2008 before the illegal switch-off of signals committed by the respondents. I state that respondent No.1 would apart from maintaining channel allocation and re-transmitting signals, would also collect subscription fee from various customers and deposit the same in designated bank account or hand over to the petitioner company."*

The learned counsel for the respondent vehemently argued that there is a clear cut contradiction in the evidence affidavit filed in Petition No. 87 (C) of 2008 vis-à-vis Petition No. 98 (c) of 2008. Since in para 2 of 87 (C) of 2008, the name of Mr. Gaurang Kanakia of M/s Satekrishmani is mentioned as Respondent No.1 and is said to have been paid a commission on the basis of monthly collection from the designated area of Goregaon while in evidence

affidavit in Petition No. 98 (C) of 2008 it is mentioned that M/s S.S. Advertising was paid a commission on the basis of monthly collection from the designated area of Goregaon. This contradiction does not allow any statement made by the witness who is a very senior officer in the Finance Department of the petitioner's company to be proved as per Section 34 of the Indian Evidence Act. The learned counsel would bring to our notice the Section 34 of the Indian Evidence Act because of the contradictory statement by the witness proving the document itself. This even does not require any comments or denial by the respondent. The section 34 which is stated below:-

> *"34. (Entries in books of account including those maintained in an electronic form) when relevant.- Entries in books of accounts including those maintained in an electronic form, regularly kept in the course of business, are relevant whenever they refer to a matter into which the court has to inquire but such statements shall not alone be sufficient evidence to charge any person with liability.*
>
> *Illustration: A sues B for Rs.1,000 and shows entries in his account books showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient, without other evidence, to prove the debt."*

The entries made in the ledger in the seventh column, shown by the learned counsel for the petitioner as a conclusive proof is, therefore, not sustainable in Law as per the Section 34 of Indian Evidence Act. In the ledger accounts in the 7th column, some document has been mentioned and this document is not clear from the description which has been shown therein. Even the petitioner's counsel was not clear about it.

67. The deposition of Mr. Satheesh Kumar working as Vice President (Finance) in the petitioner's company (page 626 C of Petition No. 98 (C) of 2008) has been brought to our notice in this contex:--

"Q: Is it correct that the M/s. S.S. Advertising has discontinued all its relationship with your company in April, 2008?

A: I am not aware.

Q: Is it correct that operators have direct agreement with your company?

A: I am not aware.

Q: Did you take any action against the cable operators who were in the area of the respondent?

A: It is beyond my scope of employment.

Q: is it correct that the M/s. S.S. Advertising is not a distributor of TV Channels?

A: I am not aware.

It is incorrect to suggest that no loss has been caused to the petitioner company due to actions of M/s. S.S. Advertising.

It is incorrect to suggest that the statement made in para 4 of my affidavit are false.

The learned counsel for the respondent would submit that Vice President (Finance) is not aware of anything.

Q: I put to you that you have got down-gradation from any of the broadcasters for the area of Mumbai after April, 2008?

A: It is a sweeping statement. Can you please be more specific with reference to specific broadcaster.

Q: Have you got down-gradation from any of the broadcasters in Mumbai after April, 2008?

A: Please be specific.

Q: Have you got down-gradation from Star Den in Mumbai after April, 2008?

A: I am not aware of any specific down-gradation from Star Den with reference to this period.

Q: But you are aware that Star Den has given down-gradation for Mumbai after April, 2008?

A: I am not aware.

Q: Did the petitioner company get any down-gradation from Zee Turner after April, 2008?

A: I can't answer this sweeping question. If you have specific data, you can confront me.

Q: Did the petitioner company get any down-gradation from MSM after April, 2008?

A:I cant answer this question. This is dealt with by the operations team.

It is incorrect to suggest that statement of account exhibited as PW-III/I is incorrect.

It is incorrect to suggest that statement of account exhibited as PW-III/II are false and incorrect.

It is incorrect to suggest that the petitioner did not give any equipment or material to the respondent.

Q: I put it to you that the indent comes from the headend manager and not from the distributor?

A: It is incorrect.

It is incorrect to suggest that the M/s. S.S. Advertising was only a collection agent of the petitioner.

I am not aware if the M/s. S.S. Advertising disconnected the service only after giving notice as per TRAI Regulations.

Attention of the witness is drawn to para 4 of the affidavit.

It is correct to say that the petitioner is claiming an amount of Rs. 225 Crores by way of damages based on computation made by the petitioner company. I am carrying the computation with me.

Re-examination of the witness by Mr. Kailash Vasdev, Senior Advocate

Q: On what basis have you computed the damages on behalf of the petitioner?

(Objected by the counsel for the M/s. S.S. Advertising as there being no ambiguity in the answers given by the witness this question can not be permitted as the witness is now trying to improve on his evidence which was never stated by the witness before).

A: There has been a loss of subscription revenue both direct and operator subscription along with placement charges between April, 2008 and June, 2010. further equipments laid out in the various head-ends have also not been retrieved. The computation for all the head-ends is as follows:

(i)	*Loss from operator subscription revenue*	*-*	*Rs. 21.67 Crores*
(ii)	*Loss from direct subscription revenue*	*-*	*Rs. 5.99 Crores*
(iii)	*Loss from Placement Charges*	*-*	*Rs. 191.32 Crores*
(iv)	*Loss of Equipments*	*-*	*Rs. 7.35 Crores*
	Total	*-*	*Rs. 226.33 Crores*

(Rounded of to Rs. 225 Crores)"

The learned counsel for the respondent, Mr. Navin Chawla would strongly urge before us that from the last part of the evidence, it is clear that company is claiming only Rs.225 crores while it has arrived at a total amount of Rs. 226.33 crores and, therefore, an amount of Rs. One crore thirty three lakhs does not appear to carry any significant meaning for the petitioner's company. The rounding off computation thereto from Rs. 226.33 crores to Rs.225 crores is merely excise to arrive at the magic figure of Rs.225 crores which has been claimed as damages and this computation which has been mentioned in the cross-examination does not find any place in the evidence affidavit of the petitioner's witness.

68. Learned counsel for the respondent would submit that the petitioner has got a very casual approach for claiming the damages and there is no analysis of these damages in exact terms under different headings as mentioned in the above cross examination. The other part of the cross examination also suggests that the franchisees are also making direct payment to the petitioners without going through the distributor and the witness is not even aware of the notice which has been given on 26.4.2008 by the respondent for disassociating itself with the petitioner. The witness is also not aware of the fact whether any action has been taken against the cable operators. He is also not aware of the fact whether respondent is merely a distributor and not a distributor of TV channels. Being a Finance man, it is expected that he will be aware of the amount which has been given to the various broadcasters and because of the alleged hiving off/hijacking of

the network of the petitioner by the respondent No.1 in connivance with respondent No. 2, 3 & 4, how much reduction has to be sought from the broadcasters. There is no quantification of any damage and the senior Vice President of the Company is having no idea of it. The learned counsel, Mr. Chawla would contend that even for a meagre number of subscribers shifting to other MSO, down-gradation is asked for by MSO's and there is a satisfying supporting calculations for the same, while in this case a very unusual situation exists that the finance persons have not asked for down-gradation from broadcaster.

69. As regards the allegation that the network of the petitioner has been used for the purpose of providing the internet services, the petitioner as filed in its reply in Petition No. 87 (C) of 2008 has submitted, that the plea of the petitioner claiming infrastructure and equipment as its own is falsified by the fact that the answering respondent is acting as a distributor of internet connectivity offered by various internet service provider and is also using its said infrastructure for providing such connectivity to its customers/operators and has independent contracts with them without any involvement of the petitioner, who incidentally also provides internet service but the answering respondent has no such relationship with it. Bills raised by internet companies against the respondent are also enclosed alongwith the reply to prove that the internet services is completely different segment of service which is neither linked with petitioner nor has got any relationship with the distributorship agreement between the petitioner and the

respondent. This service is also not prohibited to be carried out by respondent as per 1999 MOU.

70. The learned counsel for the respondent would contend that in Petition No. 98 (C) of 2008 one prayer has been added, i.e., hold the action of respondent No.1 in issuing the letter dated 26.4.2008 as illegal, arbitrary and unsustainable in law.

Prayer in Petition No. 98 (C) of 2008 at (ii) is a new prayer added.

No quantification of damages has been done in prayer at pages 17 & 18 of Petition No. 98 (C) of 2008, while this damage has been prayed to be granted at serial (v) (page 18).

71. No equipment has been taken from the petitioner is evident from the pleadings made in the reply by respondent No.1 at page 195 of 98 (C) of 2008 (in the middle of para 2).

" *It is submitted that as far as back as 19.5.2008 the answering respondent had offered the petitioner to identify the equipment that belong to the petitioner and to take the same away however till date the petitioner has rightly not come forward to identify its equipment as there is no equipment belonging to the petitioner. It is denied that the answering respondent has hijacked equipment of the petitioner as alleged by the petitioner or otherwise. It is denied that the answering respondent has damaged any equipment or machinery of the petitioner as alleged by the petitioner or otherwise. It is submitted that the contents of para 31 are misconceived, incorrect and are*

denied. It is denied that the answering respondent has colluded with anyone as alleged by the petitioner and denied that any action of the answering respondent has caused any harm to the goodwill and reputation of the petitioner. It is submitted that the list of equipments filed by the petitioner does not have any receipt showing that the answering respondent has received such equipment nor does it show that this equipment was placed. It is needed to be mentioned that answering respondent had not received any equipment from the petitioner at any occasion."

72. Learned counsel for the respondent would contend that all the details given in the evidence affidavit as well as the contents of the cross-examination suggest that the case set up by the petitioner is not based on any facts and figures but it is false, frivolous and baseless.

73. Learned counsel for the respondent would further contend that there was no element of direct subscriber in Petition No. 87 (C) of 2008 while in Petition No. 98 (C) of 2008 the direct subscribers are also added and in case there are direct subscribers, the petitioner would have been dealing with the direct subscribers and that the network portion is still belonging to the petitioner and has not been taken over by anyone.

74. The next question which arises for consideration is in regard to the fact that whether the rights and obligations of M/s Satekrishmani are taken over by M/s S.S. Advertising. The learned counsel would contend the following points:-

(i) I was only a collection agent. I was not in control of network in any way and the employees of the petitioner are in complete control of the network from the technical as well as operational point of view and they were located in all strategic locations. This has already been established through the cross examination of General Manager (Operations) of petitioner's company.

(ii) If the admission of the petitioner is taken to be correct that they were in control of the network up to the node than the signals of the petitioner were undoubtedly available up to the node.

(iii) The General Manager, Operations admits that network beyond the node belong to the cable operator and this actually amounts to saying that I have taken over the network of the cable operator which is factually incorrect and baseless and, therefore, impossible to act.

(iv) The petitioner has not produced any line diagram of the network and as only spelled as a statement and none of the witnesses on behalf of the petitioner could mention that which parts of the network belong to the petitioner and who are the operators, who are receiving the signals of the petitioner. Even after the alleged takeover of the network, the purported damage claimed by the petitioner is absolutely baseless, arbitrary, frivolous and is a theoretical figure not supported by any split of the various components of the damages. The amount of damage has been rounded off by taking away One crore thirty three lakhs, which shows the most casual and

callous approach of the petitioner for making a claim of a damage of such a huge amount against the respondents and also foregoing a substantial amount without any decree.

75. The learned counsel for the respondent would bring to our notice that in its reply, the respondent, S&S Advertising Pvt. Ltd. at page 69 of petition No. 87 (C) of 2008 has categorically mentioned as follows:-

(a) That the respondent No. 4 was not a party to the distribution agreement dated 20.9.1999 on which the petitioner is wrongly placing the reliance.

(b) That the cable operators, who were independently taking signals directly from petitioner under a separate and independent subscription/affiliate agreement and on whose collection the answering respondent was entitled to a commission, have been complaining to the petitioner directly and also through the answering respondent that the quality of signals of the petitioner is not up to the mark and also there have been cases of ad-hoc and incorrect billing on the cable operators. Some of the cable operators had independently written to the petitioner that they are not interested in taking signal feed form the petitioner and accordingly had terminated their commercial relationship with the petitioner vide their letter dated 8.4.2008 duly received by the petitioner on 17.4.2008. The fact that these cable operators had a privity of contract directly with the petitioner and that they had terminated their agreement was concealed by the petitioner from the

TDSAT at the time of filing the present petition. It was only when the petition was argued for interim relief on 19.5.2008 and the counsel for answering respondent pointed out these facts that this Tribunal put it to petitioner and the counsel for the petitioner was constrained to admit receipt of these termination letters from Cable operators.

(c) That the ultimate decision to re-transmit the signals rested with the cable operators and they were free to decide as to whether they would retransmit the signals of the petitioner or respondent No.2 the claim of the petitioner that the answering respondent is using the infrastructure and equipment of the petitioner in order to retransmit the signals of the respondent No.2, is clearly an afterthought and is even otherwise factually incorrect as the infrastructure and equipment being used by the answering respondent belongs to either petitioner or independent cable operators and the petitioner has no stake or investment in the same. It is for this reason that the petitioner in the present petition has not annexed any list of equipment/infrastructure. It is submitted that even in the present petition, the petitioner has miserably failed to file the original purchase slip of the alleged equipments and the petitioner has not even filed any detail of equipment which has been filed in other petitions filed by it.

The main contention of the respondent No.4 is that it is purely and simply a commission agent.

76. The learned counsel for the respondent No.4 would contend that at page 82 of the reply affidavit of Respondent No.4 the following statement has been made:-

> *"It is reiterated that the answering respondent was only acting as a collection agent of the petitioner. Even as per the distribution agreement between the petitioner and the answering respondent, the petitioner had to have a separate/independent subscription agreement with the cable operators. It is further submitted that the answering respondent had been receiving complaints of various subscribers/operators that the signals of In cable were blurred and not clear and also some of the important channels like Neo Sports and various local channels were not available on In cable. It is denied that the answering respondent had ever switched off signal of petitioner on the network of the petitioner as alleged by the petitioner or otherwise. Again, as per the arrangement between the petitioner and the answering respondent there was no obligation on the part of answering respondent to supply signals of TV channels to any consumer/cable operator. It is denied that the respondent No.4 switched off the signals of the petitioner or switched on the signals of SCOD-18."*

Conclusions:-

1. The three cases which have been cited by the petitioner, i.e., Petition No.122 (C) of 2009, 123 (C) of 2008 and 277 (C) of 2009 have been decided by this Tribunal. The petitioner in all these cases is the same as the petitioner in the instant cases while the respondents are cable operators. The distributor in these cases is M/s Siti cable and we have decided that the signals are being provided to the cable operator by the distributor and the payments are also being made to the distributor and not to the petitioner. The relationship of the cable operators is, therefore, restricted only upto the distributor and not with the petitioner. The claim of the petitioner against the cable operators for supply of signals has been turned down on this basis. **If we consider the judgment in totality we find that the facts of these cases are different than the facts of these petitions and, therefore, we cannot take cognizance of decision being taken in our judgment in these cases. The petitioner in these cases has vehemently pleaded that the signals are being provided by it, while in the instant batch of petition, it is casting this responsibility on the distributor. The change in stand on the part of the petitioner however creates a serious doubt about its intentions of holding the respondent at fault. A little difference in facts of one case from the other or the additional facts may result in different conclusion based on fact.** The petitioner in the cases quoted above has cried hoarse and has given every possible logic to prove that the signals are being provided by the petitioner and not by the

distributor, but our findings were contrary to the expectations of the petitioner. The reason was that, by no means, the petitioner could establish any relationship with the respondent. In the present petitions, the same petitioner is trying its level best to establish that the signals are being transmitted/re-transmitted by the distributor and not by itself. This 180° phase shift in the stand taken by the petitioner, is just to ensure that the distributor is coming within the umbrella of a service provider in the instant cases and, therefore, it shall come within the purview of the Section 14 of the Telecom Regulatory Authority of India Act, 1997 as amended in the year 2000.

2. From the distributorship agreement it becomes evident that the distributor is the eyes and ears of the petitioner and does the overall supervision and follow up of the directions issued by the petitioner in respect of petitioner's network, but it does not have any authority to commit, undertake, or agree in respect of any matter on a behalf of the IMC. The promotion of business of the petitioner, protect its interest, indemnify IMC for any loss or damage arising out of the non-performance or improper performance of the responsibilities undertaken by the distributor, sustain market, cater products and services supplied by IMC for time to time to existing and new customers from time to time, resolve technical and commercial complaints so as to ensure uninterrupted projection of programmes and create a satisfied customer base, insure the IMC assets,

carry on business of cable TV network, including supply of programme packages to various operators/customers, etc. are the main function of distributor as the agreement. The crucial touchstone for being distributor of TV channel under the regulation for being a service provider, i.e., the activities of transmission of signals by using its own equipment is missing, in the distributorship agreement. The definition of a distributor of a TV channel as per clause 2 (j) i.e, any persons including an individual, group of persons, public or body corporate, firm or any organization or body re-transmitting TV channels through electromagnetic waves through cable or through space intended to be received by general public directly or indirectly is not satisfied. The person may include, but is not limited to a cable operator, direct to home operator, multi system operator, head ends in the sky operator.

3. The Regulations also do not proscribe any distributor not to indulge itself in the Multi System operator business as a shareholder in another company as promotor director as providers of telecommunication services directly or through cable operators' affiliated to shareholders and/or the company. The SCOD Networking Pvt. Ltd. in which the respondents are promoter Directors in the SCOD company and this company has come into being on 1st September, 2006. There is of course a clause in the MoU which reads as follows:-

"Distributor shall not associate directly or indirectly in any manner with any multisystem operator or cable operator or be associated with any such persons for business similar to the business envisaged under this agreement and renewal thereof three years thereafter in the area and in the place contiguous to the area defined in the agreement."

If the petitioner would have taken up this stand and would have pleaded the case while maintaining that the MoU is in operation even as on 1.9.2006 when SCOD company came into being, the case of the petitioner would have been different. I find that after 1.9.2006, the petitioner has not taken up this issue with the respondent at any point in time raising the issue that as per the agreement of 1999, the respondent cannot be on the Board of Directors of other MSO's. A company like that of a MSO as petitioner could have easily taken up the case with respondent under the above prohibiting clause as mentioned above not to be on the board of Director of the rival MSO. This also reflects that MoU of 1999 was not in force after June, 2004 and the same could not be renewed and was continuing in a limited capacity like a lame duck and as a marriage of convenience for both the parties. The petitioner could not forcefully tell the respondent not to indulge in this company and there is nothing to show it on record and, therefore, the petitioner has no other option but to take this plea after alleged disconnection which does not seem to be a valid excuse.

4. The distributorship agreement also clearly indicates that all the assets, i.e., network belongs to the petitioner and petitioner is the owner of it besides that the network has been established for transmitting of signals to direct points as well as to its franchisee points fed by the petitioner itself. The network consists of a central location headend or/and node cables etc which are unavoidable and necessary for rendering services.

5. There is no evidence of the resignation being offered by all the employees of petitioner on 12th/13th of April 2008 which is the impugned date of taking over of the networks by the respondent. The Commissioner has also based his observation on the strength of the information received from some representative of the respondent who has never been summoned as a witness to prove this contention.

6. On one side, the petitioner claims that the agreement dated June 1999 is binding between the parties up to 12 April 2008, while on the other hand it also claims that another agreement has been signed on 3 December 2006 by virtue of which certain privileges of introduction of some of the channels has been given as well as the direct points of the respondent in CAS area have been made free to receive signals of the petitioner that means that there is no subscription amount required to be paid by the respondent to the petitioner in the capacity of receiver of signals for the purpose of its direct subscribers. The agreement dated 30th June, 1999 has come to an end on

29.6.2004 and has not been renewed in writing thereafter. The petitioner seems to take advantage of the previous agreement for certain pleas raised by it and for certain benefits from the agreement dated 3.12.2006 for CAS area on a selective basis to its advantage, which has nothing to do with the Non-CAS area.

7. There is no record which has been placed with the petition about the employees en mass resigning from the petitioner's company and shifting to the respondent No.2. There are also no record regarding the loss of the number of cable operators as well as the recovery of those cable operators who have joined back the network of the petitioner and the statement is a vague statement without any proof on record to substantiate the same.

8. The witness of the petitioner has admitted that the signals of the petitioner were re-connected after about a week and from that day onwards, the signals of the petitioner are only being provided to its subscribers. This also proves that the contentions of the petitioner that the petitioner has lost its network to its rival is not valid.

9. When witness of the petitioner was confronted with the questions as to how these equipments have been used, he made it clear that the same have

been issued and utilized by the four head ends as stated above, and are placed in the control room at these head ends and in the network which is laid down to give service to the petitioner's direct points and indirect customers. This statement has clear and categoric admission of the proof that the direct points i.e. the points which are being fed by the cable operators/franchisee of the petitioner and the petitioner's claim that after the nodes the network does not belong to it is not in consonance with the opinion of its General Manager (Operations), Mr. Madhav Dattaraya Betgiri during cross examination.

10. The amount of average billing per month has been multiplied by the total number of months to arrive at losses while interestingly the area of Vashi for which a separate Petition No. 91 (C) of 2009 again in Aashish Cable Network (India) Pvt. Ltd., Mumbai has been filed for recovery against the cable operator is also included while calculating the notional loss which is not appropriate and cannot be supported in this batch of petitions.

11. The witness is Operations head and is surprisingly not aware of the pay outs to the broadcasters. The same question was asked from the Finance representative of the petitioner, and it was informed by him that the same shall be available from the operation Man who inturn has shifted the responsibility on to the finance man. **I, therefore, cannot conclude**

whether any down-gradation has been sought for and given by the broadcasters to the petitioner on account of the reduction in the number of subscribers after alleged takeover of the network by the rival MSO. This casts a shadow of doubt about the loss of the subscribers/cable operators after the taking over by the rival MSO and, therefore, any damage sought for by the petitioner on account of the takeover of the network is not established.

12. All the local cable operators who are the franchisee of the petitioner were supplying signals/re-transmitting signals of the petitioner through their own network after hooking on to the petitioner's trunk line carrying the signals of the petitioner. This was the statement made by the petitioner up to the stage of filing the Petition No. 87(C) of 2008 and after that in Petition No. 98 (C) of 2008 it has added the element of direct point also while in the Affidavit, the GM (Operations) indicates that there is no direct point while he contradicts himself by saying that direct point are approximately 12000 in the Goregaon area. There is no proof of billing to the direct points and no supporting documents has been placed on record by the petitioner. This also does not prove the case of the petitioner.

13. The complete network can be classified in three categories.

(i) The first category is the trunk network of the petitioner which runs to the complete area of operation of the petitioner and covers all the four areas as mentioned in the various petitions, i.e, in all the connected matters, herein.

(ii) The second part of network is emanating from the nodes in different locations and is that of the franchises, i.e, cable operators who are taking signals from the petitioner's network.

(iii) The third part of network is again emanating from the nodes of petitioner while it is going to their sub-control rooms and finally going to the direct subscribers of the petitioner.

It is submitted by the learned counsel for the respondent that in all these three categories of the network, it is not categorically confirmed by the petitioner as to which part of the network has been taken over by the respondent as alleged by the petitioner. **From the analysis of the above facts which have emerged, I am not in a position to conclude that the petiitoner's network has been taken over by the rival MSO and the further repercussions of such a take over as pleaded by the petitioner, therefore, do not get established.**

14. The cross-examination of the portion at page 828 L in Petition No. 67 (C) of 2008 clearly indicates that the stores department of the petitioner used to issue the equipment on written instructions while there has not been a

single written instructions filed by the petitioner from the respondent on record of the present case to show that respondent has ever received any equipment from the petitioner.

15. **The net damage has been indicated at a later stage while the same has not been spelled in detail under various heads to make an analysis on the basis of loss of network/loss of subscribers.** The damages have also been calculated up to 30 June 2010 while respondent himself claims that the signals were disconnected on 12th/13th April 2008. No MSO after disconnection on such a mass scale would continue to pay to broadcaster the same sum as is being paid before disconnection. Such a vague claim of damage not also projected upto the evidence stage and only being told by the witness during the examination-in-chief after the cross examination goes to shows the gravity of the demand for damages and is, therefore, not admissible as per Evidence Act. At running page 626F of Petition No. 98 (C) of 2008, the evidence of the witness of the petitioners on the re-examination in chief has been brought out in a very casual manner without showing any details and also rounding it off to a figure of 225 crores, while giving up the claim of Rs.1.33 crores just like that.

The petitioner has tried to sustain its case while its own witness has very poorly stated about it during evidence stage as well as during cross examination. Since there is no year wise or month wise breakup of the total

damage there is no possibility to calculate even on pro-rata bases the damage caused up to June 2010).

16. The company has preferred to forego a hefty sum of Rs.1.33 crores in the process of rounding off and this shows that how seriously and accurately the damage claim has been made by the petitioner.

17. No component of loss on account of making payment to broadcaster has been brought out while in the evidence affidavit Shri S. Satheesh Kumar, Senior Vice President, Finance of petitioner's company has claimed grave financial loss to the tune of Rs.191.32 crores which has occurred because of placement fees of the signals of the broadcasters without realizing the same from the franchisees.

18. Regarding down-gradation, it cannot be said that whether any down-gradation was asked for and that whether any down-gradation was given by broadcasters. The witness of petitioner is non-committal and completely uncertain about it, however it is a normal practice in the industry that any reduction of subscribers is immediately asked for, from the broadcasters and such an upheaval, which has been pleaded by the petitioner in its subscriber base, the petitioner cannot go without asking for down-gradation from the

broadcasters. The major component of claim of the grave financial loss, in evidence affidavit of its witness is placement charges, which is the direct outcome of asking for down-gradation and virtually the witness is not aware of it at all, upto the stage of cross examination. This shows that the damages asked for are not based upon any firm ground and, therefore, cannot be sustained.

19. The word retransmitting which has been used in various statements has to be interpreted in the light of the fact that in case the transmission is done by a franchisee or a cable operator he collects the subscription charges from its subscribers and out of these subscription charges, he pays a certain agreed and negotiated amount to the multisystem operator. The meaning of retransmission in this particular statement is merely to suggest that the respondent is assisting in retransmission of the signals of the petitioner by virtue of maintaining overall environment, by retaining the franchisee as well as by supervising the networks to function in a proper manner so that the signals reach to the ultimate subscribers in good shape, but is not retransmitting signals of its own.

20. There are certain important facts which have not been brought out by the petitioner at the time of filing of this petition amounts to concealment of facts:-

(i) Reliance has been placed by the petitioner on agreement dated 30th June 1999, however, the expiry of this agreement in 2004 and the fact that this agreement could not be renewed has not been brought out by the petitioner.

(ii) A notice of terminating its arrangement with the petitioner was sent by the respondent and in reply the petitioner sent a letter dated 16.4.2008 from the answering respondent to continue distribution of its signals in its area has not been brought out by the petitioner. The ultimate decision of transmitting the signal of the petitioner rested with the cable operators. The cable operators were at liberty to transmit the signals either of the petitioner or of the respondent No.2 and therefore, respondent No.1 does not come into picture. The answering respondent has issued a public notice in the newspaper dated 26.4.2008 which has not been challenged by the petitioner. The answering respondent has got the signals of the petitioner re-connected and requested the petitioner's presence at that particular time so as to ensure that the petitioner is assured of the reconnection of its signals for further re-transmission.

These facts are very vital for deciding the issues in this particular batch of petitions which have not been revealed by the petitioner while filing these petitions.

21. **Agreement which was regulating the relationship between the parties.**

(i) It is a fact that the agreement which has been signed in June, 1999 for a period of 5 years has expired in the year 2004. This agreement has not been renewed and a request has been made to the respondent that another agreement may be signed which was signed somewhere in December, 2006. This request has culminated into signing of another agreement of 3rd December, 2006 which was for the CAS area. As such there appears to be no agreement from June, 2004 for the Non-CAS area till April, 2008 when the signals of the petitioner to the network were disconnected. The attempt by the petitioner to prove that the relationship has continued and there is implied agreement between the two parties is not possible to be established for the Non-CAS area beyond the year 2004 exactly as per the terms of MoU of Jan, 1999. The reliance of the petitioner on the agreement of June, 1999, till April, 2008 and in between signing another agreement in December, 2006 for the CAS area and relying on the same appears to be as sailing in two boats simultaneously just to somehow or the other establish the relationship with the respondent. I am, therefore, of the opinion that there is neither any agreement for the Non-CAS area nor any implied relationship for the Non-CAS area after June 2002, except for a residual type of relationship merely for the purpose of collection of the subscription amount from the subscribers of the petitioner on getting some commission for this act, by the respondent. This relationship completely absolves the respondent from any other function which forms the part of the June, 1999 agreement except for being a commission agent as a distributor. The respondent is, therefore, not a

service provider from the point of view of any subsisting agreement between the respondent and the petitioner and, therefore, from the contractual agreement point of view he cannot be termed as a service provider.

(ii) The relationship as such even with the support of the agreement of June, 1999 is not that of a service provider from the point of view of the fact that there is no subscription agreement between the petitioner and the respondent and the petitioner is paying only the commission to the respondent for collecting the subscription amount from the franchisees of the petitioner. The petitioner has tried to draw the inference from the fact that the respondent has given a notice in terms of the Regulations 4.2 and therefore, it becomes a service provider is not tenable because this notice is also without prejudice to the rights and contentions of the respondent and has been given by the respondent without being sure whether such a notice is at all required for terminating the distributorship agreement in a relationship of this nature. The petitioner's attempt to classify the respondent as a service provider from the point of view the agreement signed by it with the respondent for the CAS area in the month of December, 2006 has also miserably failed. The mere fact mentioned in the agreement that the respondent will be at liberty to show some of the local channels on the network of the CAS area and also will be able to feed his own subscribers without paying any subscription amount to the petitioner with some other additional benefits does not place the respondent in the category of a service provider from the point of view of transmitting or re-transmitting of the

signals through electromagnetic waves as envisaged in the definition of the service provider. All the privileges which have been shown to have been given as per this agreement in the CAS area are meant for alluring the respondent to give more business to the petitioner and to bring more subscribers and cable operators within its fold to enhance its business prospects and I can term these benefits to be a part of the consideration to be given as a distributor to the respondent in addition to the commission on the collection made by it.

(iii) I, therefore, come to a conclusion that respondent is not a service provider from the point of view of the Regulations and is merely a distributor collecting subscription amounts form the franchisees and the direct subscribers, on which it is being paid an amount as commission.

22. **Damages claimed by the petitioner**

(i) I find that there is no quantification of damages which has been shown by the petitioner and whatever limited attempt has been made by filing a subsequent petition is neither quantifiable nor based on any sound logic. The loss of network as envisaged in the petition is also not discretely mentioned and there appears to be no dislocation to the subscribers who are directly being fed by the petitioner in every area. As regards the franchisees, there is a possibility that some of them have left network of the petitioner and have joined the rival MSOs which appears to be not a very unusual phenomenon in the cable industry and also not proscribed by any regulation.

(ii) The petitioner has raised separate claims against these respondents and in case respondents have not agreed to make the payments for those claims, the petitioner has filed cases in various forum including, TDSAT for recovery of the outstanding amount.

(iii) The disconnection of the network of the petitioner as envisaged by the Commissioner appointed by this Tribunal also does not appear to be a continuing phenomenon as the signals appear to have been restored after some interruption for a small period of time. One of the witnesses, Mr. Santosh Bapu Tawade has categorically affirmed that after one week signals of the petitioner were restored and signals are continuing till date. This also does not go to prove, that the complete network has been taken over by the rival MSO as claimed by the petitioner.

(iv) As far as damages are concerned, they are not supported on the principle of Order 2 Rule 2 of the Code of Civil Procedure and, are therefore, dismissed.

The petitioner has not been able to mention the exact number, addresses and locations of the cable operators who have not been getting signals from its network, therefore, the loss of the subscriber base is not possible to be estimated in case the same has happened on account of the alleged taking over of network of the petitioner.

The petitioner has also claimed that the complete equipment was solely owned by it and the respondent No.1 is only a custodian of the network and not the owner of the network.

In the MoU the word "our" has been used in Schedule A annexed with MoU of June, 1999 which is a categorical admission on behalf of the petitioner that direct as well as franchisees who were either getting re-transmitted signals directly from the petitioner or were re-transmitting the signals of the petitioner, belonged to the petitioner itself and not to the respondent at all. The network, therefore, completely belongs to the petitioner and no part of it was owned by the respondents.

The petitioner has improved its case by giving the details of the equipment in Petition No. 98 (C) of 2008 at P/X from page 138 to 168 vis-à-vis in Petition No. 87 (C) of 2008 and the efforts have also been made to quantify the equipment however, when the respondent offered to the petitioner that the petitioner can identify any material which belonged to it while claiming to own the whole of Bombay network, the petitioner has failed to do so and has not even produced a supportive line diagram and actual identification of the equipment in each location. The senior officers as witness of the petitioner have also categorically admitted that the material has been issued only to the representatives of the petitioner and not to the respondent at any stage and there is not a single invoice which has been produced for which receipt of the material has been shown in the name of the respondent or its representative.

In that view of the matter, it will not be possible to conclude that the loss of the complete network in regard to the equipment and the various material used in the last 12 years can be attributed to be in the name of the respondents.

In the affidavit evidence filed by the General Manager (Operations) it has been admitted as follows:-

"I state that the entire equipment utilized to transmit the signals of my company were assets of my company."

The network was also completely managed by a large number of senior personnel of the petitioner, and therefore, there was no possibility of the network to be handled by the distributor at any stage. I cannot, therefore, infer any loss of network to be on account of the distributor. The claim of the petitioner that the officers have en mass resigned from the petitioner's company and joined the rival company, is also not proved at any stage and it is only a mere statement which has been made. Not a single officer has been produced by the petitioner who can affirm that all the officers of the petitioner's company resigned on the night of 12th and 13th April, 2008 and joined the rival group.

I, therefore, finally conclude as follows:-

(i) The respondent is not a service provider as far as the terms and conditions of the June, 1999 MoU for the Non-CAS area is concerned.

(ii) The respondent was not obligated to give any notice for disassociating itself from the relationship with the petitioner as per Regulations.

(iii) The CAS area agreement which has come into force on 3rd December, 2006 is only after the expiry of the Non-CAS agreement in June, 2004. There is no relationship between these two agreements. The relationship whatsoever existed between the petitioner and the respondent vide June 1999 agreement, was only to the extent of the respondent acting as a collection agent for the petitioner in Non-CAS area after June 2004 and upto April 2008 and I cannot term it be an extension of agreement of 30th June, 1999 beyond five years period.

(iv) The petition as such cannot be maintained because the respondent is not a service provider. The maintainability issue has been heard alongwith the main case and at no stage we have said during the hearing that we will decide the issue of maintainability before we go into the merit of this case during continuous hearing for a period of 17 days. In my opinion, therefore since the maintainability issue has been decided by me in this judgment, it will be justified that I give my observations in regard to the various other issues which have been framed at the initial stage of hearing.

My observations on the other issues are as follows:-

a) The switching over of the signals on the night of 12th / 13th April, 2008 cannot be attributed on account of respondents.

b) The respondent's are not service provider, and therefore, there was no necessity of any mandatory notice which is required to be issued. In this view of the matter, there was no violation of the Interconnect Regulations and the TRAI Act.

c) There appears to be some shift of the franchisee to the rival MSO which is a normal practice in the cable industry and cannot be viewed as a hostile takeover of the network of the petitioner.

d) The petitioner's complete network was being maintained and managed by its own personnel and, therefore, the responsibility of the network as an owner, lies with the petitioner itself and distributor cannot be blamed for it.

e) There was no equipment which has been supplied to the respondent which could be proved from the pleadings and the cross-examination of the witnesses.

f) The letter dated 25.4.2008 is a notice which is not required as per the regulations. No notice was also required as per the MoU for terminating the relationship, however as a precautionary measure the respondent has given due notice on 25.4.2008 and has also given a public notice dated 26.4.2008 without prejudice to its rights and contention.

g) Respondent No.4 in Petition No. 96 (C) of 2008 is not a party to the distribution agreement and, therefore, he cannot be associated with the responsibilities of the distributor, i.e., respondent No.1.

h) The claim of damage is concocted, frivolous, not supported by any proof/document and therefore baseless and petitioner has miserably failed to prove any direct loss/damage. The claim of damage is, therefore, dismissed.

i) While filing the petition, there are several important facts which have been concealed by the petitioner and such a tendency on the part of petitioner should be deprecated.

The petition is dismissed. No order as to costs.

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(G.D. Gaiha)
Member

HKC/