

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

DATED 8TH JULY, 2011

PETITION No. 188 (C) of 2010

Nirman & Associates Pvt. Ltd.	...	Petitioner
Versus		
Star Den Media Services Pvt. Ltd. & 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 Petitioner	:	Mr. Navin Chawla, Advocate Mr. Yoginder Handoo, Advocate
For Respondent No.1	:	Mr. A.S. Chadha, Sr. Advocate Ms. Kunal Sinha, Advocate Mr. Gaurav Juneja, Advocate Mr. Arjun Natarajan, Advocate
For Respondent Nos. 2 & 4	:	Mr. Saikrishna Rajagopal, Advocate Mr. Nitin Sharma, Advocate
For Respondent No.3	:	Ms. Kanika Agnihotri, Advocate Mr. Vaibhav Agnihotri, Advocate

JUDGEMENT

S.B. SINHA

Introduction

The Petitioner is a Multi Service Operator. The first respondent is a content aggregator. The Second respondent is an authorized distributor of the first respondent in the State of Assam.

The third respondent, Assam Cable Communications, is a Multi Service Operator and admittedly operates throughout the State of Assam and some North-Eastern States. The Respondent No.4 is one of the directors in Respondent No.2 Company and is said to be closely associated with the first respondent.

Background Facts

2. This case has a chequered history.

The petitioner filed an original petition before this Tribunal, which was marked as Petition No. 157 (C) of 2009 wherein, inter-alia, the following reliefs were prayed for :-

“(a) pass appropriate orders/directions directing the respondent to forthwith to provide decoders of respondent’s TV channels to the petitioner on equitable, reasonable and non-discriminatory terms and conditions;

(b) *direct the respondent to execute a subscription agreement with the petitioner on the subscriber base of 1800 subscribers.”*

3. An interim order was passed therein by this Tribunal on or about 18.09.2009, which is to the following effect:-

“The petitioner will make the deposit of Rs.12 lakhs by a Demand Draft as a lump-sum amount, by 22.09.2009 with the respondent. This amount of deposit will be reviewed after subscriber base is determined on the basis of joint survey. Subscription per month will also be decided on the basis of the report of joint survey. The signals will be provided to the petitioner deposits the above amount with the respondent.”

4. The said Petition was disposed of, directing:-

“22. *We have noticed heretobefore that the number of subscribers found in the survey was 4664 but indisputably the same had been carried out only in respect of 17 operators.*

The petitioner has accepted that it has about 4606 subscribers. Having regard to the fact that originally the subscriber base is determined on a negotiated basis, we as at present advised, are of the opinion that interest of justice shall be subserved if the subscriber base is kept at 3000.

23. *We have arrived at the aforementioned figure as it is not possible for us to do so with mathematical exactitude. The interim order passed by us was provisional in nature. It would, in our opinion would meet the ends of justice if we direct that the interim order should be made absolute subject to the condition that the number of subscribers shall stand substituted by 3000 subscribers. This order, however, shall be of course subject to any other or further negotiated figure that the parties may arrive at on mutual basis and /or if an agreement is entered into by and between parties, and /or if any occasion arises subsequently.*

Clause 3.2 of the Regulations stipulate a ‘must provide’ clause. In terms of the said Regulations, the broadcasters and/or their distributors are obligated to provide signals and/or cause the same to be provided on a non-discriminatory basis. The terms and conditions must, therefore, also be reasonable. Keeping in view the reasonableness aspect of the matter, we were required to determine the number of subscribers and we have resorted to the aforementioned exercise only with that end in view.

24. *The earlier payments made by the petitioner for 1800 subscribers shall stand revised to 3000 subscribers and the additional payment as arrears, shall be made out of the deposit for three months already available with the respondent as per our orders dated 18.9.2009. Both the parties are directed to sign an agreement on the basis of subscriber base of 3000 and on other reasonable terms and conditions.”*

5. Indisputably, the petitioner has not deposited any other or further amount.

The respondent, on or about 20.05.2010, invited the petitioner herein to have a meeting so that an agreement can be entered into pursuant to the order passed by this Tribunal.

The petitioner responded thereto by an E-mail on 20.05.2010.

The parties were to meet at the Kolkata Office of the respondent on 20.05.2010 wherefor a request had been sent by the petitioner by an e-mail dated 24.05.2010. However, according to the respondent, Mr. Biddut Kalia was to meet the petitioner at its Guwahati Office. A meeting admittedly was held on 26.05.2010.

6. By an E-mail dated 27.05.2010, the petitioner contended :-

“Please refer to our meeting held at the undersigned’s office on 25th May, 2010 during which you had mentioned that you would be sending us the Statement of Accounts, and after which we will proceed further regarding the signing/execution of Subscription Agreement. However, we will proceed further regarding the signing/execution of Subscription Agreement. However, we are still waiting for the same. Thus we request you to please send the said Statement of Accounts/Invoices from date of activation of your services till the receipt of this email.”

7. The respondent replied thereto by an E-mail on 28.05.2010, stating:-

“We write with reference to your email below and confirm that we will be issuing the demand notice till 30.04.2010 and provisional demand notice for the month of May 2010 on the basis of Hon’ble TDSAT’s judgment dated 30.04.2010. After receiving payments, information and documents for renegotiation, parties can execute subscription agreement as well.

Please note that you shall also be liable to account for operators whom you joined during the pendency of the Petition since the Hon’ble Tribunal’s Judgment dated 30.4.2010 is in respect of 3000 subscriber for 17 LCOs only.”

8. The respondent was reminded by the petitioner to send the statement of accounts on 29.05.2010, 31.05.2010 and 02.06.2010.

Yet again, on 04.06.2010, the petitioner sent an E-mail to the respondent.

9. The petitioner received an E-mail on 04.06.2010 wherewith a scanned copy of the Demand Note was sent.

10. A public notice was also issued on 05.06.2010 in two newspapers, which reads as under :-

“This is to inform consumers that signals of some of the channels (comprising of STAR Movies, STAR Plus, STAR World, STAR Gold, National Geographic Channel, The History Channel, STAR One, STAR Vijay, Times Now, Zoom, Channel (V), CNBC TV 18, CNBC Awaz, MGM, Nat Geo Music, FX Fox Crime, Baby TV Star Ananda & Star Jalsha) are likely to be disconnected three weeks from today to the following cable operator(s). M/s. Nirman and Associates Pvt. Ltd. Suraj Complex, Ulubari, Chariali, Guwahati-781007, Assam. All the areas serviced by the Operator and its franchises will be affected.

Issued by STAR DEN MEDIA

Services Private Limited, 7th Floor, Blue Wave, Behind Kuber Chambers, Off Link Road, Andheri West, Mumbai-400053.”

11. Questioning the said notice issued under Clause 4.1 of the Regulations as also the public notice, the petitioner has filed this petition praying, inter-alia, for the following reliefs :-

- “a) Declare that the action of the Respondent No.1, threatening disconnection of signals to the Petitioner is not in terms of the TRAI Regulations; and*
- b) Declare that the communication dated 4.6.2010 issued by the Respondent No.1 is not a notice under Clause 4.1 of the TRAI Regulations and set aside the same; and*
- c) Set aside the Public Notice dated 5.6.2010 issued by the Respondent No.1;*

- d) *Set aside the demand calculation of the Respondent No.1 dated 4.6.2010;*
- e) *Direct the Respondent No.1 to henceforth sign the subscription agreement for Bouquet II to IV of Respondent No.1 on a lesser subscriber base as that of Bouquet-I on non-discriminatory and reasonable basis;*
- f) *Holding and declaring that the appointment of Respondent No.2 as agent/distributor of Respondent No.1 is in violation of the TRAI Regulations;*
- g) *Declaring that the Respondent No.2 cannot be appointed as the agent/distributor of the Respondent No.1.”*

Contentions of the first Respondent

12. The respondent, in its reply, inter-alia, contended:-

- (i) The petitioner had never any intention to enter into an agreement in terms of the order of this Tribunal dated 30.04.2010 and only with a view to delay the execution of the agreement, it had filed a Review Application;
- (ii) After the said order was passed, petitioner had granted connections to various LCOs, wherefor it whimsically demanded their SLRs from the respondent, although it was the responsibility of petitioner to provide for the same;

- (iii) The petitioner, apart from joining various LCOs as mentioned in its various e-mails, had also joined more than 22 additional LCOs in its network, adding 12,896 subscribers, for which no information was sent to respondent.
- (iv) Apart from making part payment of Rs.15 lacs, petitioner has not made any other or further payments, as a result whereof a huge amount became due from it.

13. The other respondents have also filed their replies contending that they have nothing to do with the transactions between petitioner and first respondent;

14. The petitioner, in support of its case, has examined its Chief Executive Officer, Mr. Rana Saidur Rehman.

The Respondent No.1 has examined Mr. Ayan Dash, its Territory Manager – Sales.

The Respondent No.2 has examined the Respondent No.4 as its witness. The Respondent No.3 has examined Mr. Tarun Saha, its partner and authorized representative.

Submissions

15. Mr. Navin Chawla, learned counsel appearing on behalf of the petitioner, urged:-

- (i) The actions on the part of respondent No.1 herein in issuing the impugned notices must be held to be wholly malafide.
- (ii) The action of first respondent in sending a Demand Note only on 04.06.2010 and issuance of a public notice on 05.06.2010, must ex-facie be held to be illegal as no opportunity was given to petitioner to respond thereto.
- (iii) The petitioner having been billed on the basis of the same subscriber base even in respect of the channels 'Star Anand' and 'Star Jalsa', which were thrust upon the petitioner from January 2010, respondent no. 1 must be held to have acted illegally.
- (iv) Keeping in view the fact that Respondent No.4 and his wife had an exclusive contract of distributorship with the first respondent in terms whereof it was to pay a minimum guaranteed amount, evidently the demand of the aforementioned amounts by respondent No.1 must be held to have been made at his instance.
- (v) The Respondent Nos.2 and 4 having the sole distributorship of the Respondent No.1 and Respondent No.3 being its alter-ego as its sole and exclusive MSO of the company, the impugned actions must be held to have been taken with an ulterior motive.

- (vi) The claim of the other respondents that the Respondent No.4 has nothing to do with the distributor of the Respondent No. 1 and it is merely a collection agent, stands belied from the Memorandum of Understanding and Article of Association of the Respondent No.2, from a perusal whereof it would appear that the Respondent No.4 and his wife Meghali Naraian Baruha were the Directors and Promoters of Respondent No.2 company and the later had the power to operate bank accounts and although Meghali Naraian Baruha is no longer its Director but in her place, her Mother-in-law having joined the company, it in fact must be held to be a family concern.
- (vii) In its reply, the first respondent has made out completely a new case, being not the grounds stated in the impugned notices and, thus, it cannot be permitted to improve its case.
- (viii) The additional grounds taken in the reply did not emanate from any event ascribed to be a subsequent one, having regard to the fact that even in the impugned notices, a case of further negotiation has been made out.
- (ix) Keeping in view the fact that the cable operators have migrated to other MSOs, the 2nd proviso appended to Clause 10.2 of the Regulations shall apply and in that view of the matter, petitioner was entitled to be informed as to what amount was being paid by them to Respondent No.1.

- (x) The witnesses examined on behalf of respondent, despite having been called upon to produce the documents but having declined to do so, an adverse inference should be drawn against them.
- (xi) It being not a case of the respondent that the petitioner has not provided any SLR and in fact RW-1 in his cross-examination having admitted that SLRs up to December 2010 had been furnished, the impugned notices cannot be sustained.
- (xii) The contention of Respondent No. 1 that petitioner has resorted to piracy, must be held to have not been established as the video recording produced by the witness is not only supported by any certificate as is required under Section 65-B of the Indian Evidence Act. Even the witness proving the Compact Disc was admittedly not present at the time of recording of the video.

16. Mr. Amit Chadha, learned senior counsel appearing on behalf of Respondent No. 1, on the other hand, urged:-

- (a) No agreement having been entered into by and between the petitioner and the respondent No.1, the former cannot be said to have acquired any legal right to continue to obtain signals of the channels of the later and it merely intends to profiteer from litigations.

- (b) The petitioner disclosed a subscriber base of 1800 only at the time of filing of Petition No. 157 (C) of 2009 and obtained an interim order only on the said basis directing it to pay only a sum of Rs.12 lacs, but it neither made any other or further payment nor entered into any negotiation or entered into an agreement and in that view of the matter, even no notice under Regulation 4.3 was required to be issued keeping in view the 2nd Proviso appended to Clause 8.1 of the Regulations.
- (c) A joint survey was conducted pursuant to the order of this Tribunal in respect of only 17 out of 22 operators showing the subscriber base of the petitioner to be 4664, although petitioner, in all fairness, ought to have complied with the order of this Tribunal in letter and spirit.
- (d) The petitioner having been adding a large number of LCOs in its network, for which informations have been given to the first respondent from time to time, it was bound to pay for the additional operators.
- (e) The petitioner admittedly having expanded its area of operation to neighboring districts and even another MSO having joined its network, the first respondent became entitled to levy of additional amounts;
- (f) It is incorrect to contend that a Demand Note was sent for the first time on 04.06.2010 in respect of the LCOs. The said Demand Note

was in two parts, namely, calling upon the petitioner to pay in terms of the order of this Tribunal passed in Petition No. 157 of 2010; and calling upon it to negotiate in respect of the additional link operators so as to enable the parties to enter into a fresh agreement for the year 2010;

- (g) So far as the channels of 'Star Ananda' and 'Star Jalsa' are concerned, the petitioner was bound to pay on the subscriber base of 3000 in terms of the order of this Tribunal;
- (h) The petitioner having not questioned the correctness of the order of this Tribunal, although it had filed a Review Petition, its contention that 'Star Ananda' and 'Star Jalsa' had been thrust upon it or it was entitled to avail the services of the said channels on a much lower subscriber base, must be held to be barred under the principles of Constructive Res-judicata;
- (i) Keeping in view the fact that from Bouquet 3 of the Respondent No.1, 3 channels have gone out and bouquet 4 having been merged with bouquet 3 and the petitioner having not been taking all the channels of the said bouquet, a sum of Rs. 65/- was being charged, which was calculated on 'a-la-carte' basis.
- (j) The petitioner, keeping in view the order of this Tribunal dated 30.04.2010, must be held to be not entitled to grant of any relief having regard to the following :-

- (i) 2nd proviso appended to Clause 4.1 of the Regulations would apply, as no agreement had been entered into by and between the parties;
 - (ii) The foundational fact and genesis of the order of the Tribunal should be held to be determinative of the subscriber base as on that date;
 - (iii) The petitioner has no locus standi to question the appointment of Respondent No.2 as a 'dealer' of Respondent No.1;
 - (iv) As the petitioner was not required to approach the Respondent No.2 or the Respondent No.3 for supply of signals, and the former merely being a 'dealer' and not a 'distributor of telecommunication service'; the relationship between the Respondent Nos.1 and 2 do not fall foul of the decision of the Supreme Court of India in Star India Pvt. Ltd. Vs. Sea TV Network Ltd., reported in 2007 (4) SCC 656.
- (k) It is incorrect to contend that only because the Respondent No.2 has access to the billing system of the Respondent No.1, it exercised any control over the operation of the Multi System Operators or the Local Cable Operators having regard to the fact that it was necessary for the purpose of ascertaining the fact as to

which LCOs have paid the amount of subscription fees and who have not.

- (l) From a perusal of the dealership agreement, it would be evident that the Respondent No.2 is not even an agent but its relationship with the Respondent No.1 was on a principal to principal basis.
- (m) So far as the list of the local cable operators supplied by the petitioner is concerned, from a perusal of various letters which have been issued, it would appear that whereas 17 operators having regard to the order of this Tribunal dated 30.04.2010 must be held to have a subscriber base of 3000, the 9 other operators, who have joined it during pendency of this petition, on a subscriber base of 880, whereas 31 operators joined the network of the petitioner at a later stage, who were having 8407 subscribers totaling 12287.

17. Mr. Sai Krishna, learned counsel appearing on behalf of the Respondent No.2 and Respondent No.4, submitted :-

- (i) The Respondent No.2 merely being a collection agent of subscription fees and having not been engaged in the business of the distribution of signals, in relation whereto no allegation has been made in the petition, the prayer against it must be held to be wholly misconceived.

(ii) The primary purpose of the dealership agreement being to enable the Respondent No.2 to collect subscription fees, the same must be held to be not for the purpose of distribution of signals, wherefor the Respondent No.2 even does not have any infrastructural set up.

(iii) It being not the case of the petitioner that it was required to approach the Respondent No.3 for supply of signals and the dealership agreement being on a non-exclusive basis, the prayer made for cancellation of the agreement by and between the Respondent No.1 and the Respondent No.2 must be held to be wholly mischievous.

18. Ms. Kanika Agnihotri, learned counsel appearing on behalf of the Respondent No.3 – Assam Cable Communications, urged :-

(i) The Respondent No.3 is being unnecessarily harassed by the petitioner, although for all intent and purport no grievance has been raised against it.

(ii) It is not a case where this Tribunal should resort to the exercise of lifting the corporate veil as even no evidence has been adduced to show that the petitioner has ever been asked to approach Respondent Nos. 2 and 3 by the content aggregator. The malafide

on the part of petitioner in continuing to make baseless allegations against Respondent No.2 – Mr. Sanjiv Narain would be evident from the fact that in various litigations, similar allegations have been made without establishing the same and in some cases, even without impleading him as a party.

(iii) The Respondent No.2, it is not correct to contend, have any monopoly and in any event as has been accepted by PW-1, Mr. Rana Saidur Zaman that Mr. Sanjiv Narain ceased to have any connection with Respondent No.2, it will have no grievance and as Ms. Meghali Narain Barua is no longer the Director of Respondent No.2, the petitioner cannot be said to have any subsisting grievance.

Primary Questions

19. In view of the rival contentions of the parties, the questions which primarily would arise for consideration, although a large number of issues have been framed, are :-

- (a) Whether the impugned notice dated 04.06.2010 and the public notice dated 05.06.2010 are illegal or malafide?

- (b) Whether the Respondent No.1 was entitled to traverse beyond the reasons or the grounds taken in the said notices?
- (c) Whether the contentions with regard to the actual subscriber base of the petitioner and/or acts of piracy on its part have been established?
- (d) Whether in terms of the order of this Tribunal dated 30.04.2010, the subscriber base of the petitioner should be taken to be 3000 even in relation to bouquets 2 and 3 as also 'Star Ananda' and 'Star Jalsa'?
- (e) What is the true nature and purport of the agreement entered into by and between the Respondent No.1 and the Respondent No.2?
- (f) Whether the Respondent Nos. 2 to 4 were otherwise the necessary or proper parties?

Factual Analysis

20. The petitioner made a request for supply of signals of the channels, of which Respondent No.1 was the content aggregator.

As the said request of petitioner was not acceded to, the aforementioned Petition No. 157 (C) of 2009 was filed in July, 2009. By an order dated 18.09.2009, while directing joint survey by appointing a Local Commissioner at the cost of petitioner having regard to the nature of the dispute i.e. the subscriber base, namely whether it was 1800 as contended by the petitioner or 25000 as contended by the respondent, it was directed as under :-

“The petitioner will make the deposit of Rs.12 lakhs by a Demand Draft as a lum-sum amount, by 22.09.2009 with the respondent. This amount of deposit will be reviewed after subscriber base is determined on the basis of joint survey. Subscription per month will also be decided on the basis of the report of joint survey. The signals will be provided to the petitioner within 48 hours, after the petitioner deposits the above amount with the respondent.”

21. Indisputably, the petitioner deposited the aforementioned amount of Rs.12 lacs whereupon bouquets 1, 3 and 4 of Respondent No.1 were activated by it on or about 25.09.2009.

22. We may in this behalf notice the statements of the Respondent No.1's witness:-

“14. I say that there was an outstanding amount of Rs.29,32,972.04/- against the Petitioner which amount has been calculated as per the judgment dated 30.04.2010. The Respondent No.1 was giving signals of its Bouquet Nos. 1, 3 & 4 since

September, 2009 and STAR Jalsha and STAR Ananda on bouquet rates since January, 2010. The Bouquet rates for Bouquet-1 is Rs.50.08/-, Bouquet-3 is Rs.44.51, Bouquet-4 is Rs.17.12/- and Bouquet rate for STAR Jalsha and STAR Ananda channels is Rs.14/-. Thus, liability of the Petitioner for Bouquet-1, Bouquet-3, Bouquet-4 and STAR Jalsha and STAR Ananda channels from September, 2009 till June, 2010 works out to be Rs.36,83,081.60/- (including taxes) as per Judgment dated 30.04.2010.”

23. It may also be placed on record that during pendency of the said petition, the petitioner had requested Respondent No.1 to supply decoders for ‘Star Jalsa’ and ‘Star Ananda’.

24. By an E-mail dated 22.12.2009, the petitioner requested the respondent No.1 to supply the said channels in the following terms :-

“Please refer to the Order of the Hon’ble TDSAT on 18th Sep ’09 against Petition No.157(C) of 2009 (With M.A. No.117 of 2009), through which the Court had been pleased to issue us the decoders of Star Bouquet. Accordingly, for the compliance of the order of the Hon’ble TDSAT, the undersigned reached your Kolkata office where the decoders along with the IRD, viewing no. etc. were issued us on 25th Sep.’09. During the collection of the decoders, the undersigned had requested you for the issuance of the decoder Star Jalsa as well. And your

company personnel Mr. Amit Kr. Tiwari had verbally committed that the said decoder would be delivered at your Guwahati Office by your company as early as possible. Surprisingly since last Sep.'09, more than 2 months have lapsed, and in spite of various verbal commitments from you, we are yet to receive the said decoder. Therefore we are again requesting you to kindly issue us the decoder of Star Jalsa, and also for the decoder of Star Anand as well.

This is for your kind attention and necessary action please. Kindly appreciate the above information and do the needful in this regard. And we look forward to increasing our relationship with you in near future which will be mutually beneficial and profitable to all concerned.”

25. Indisputably, the petitioner had supplied the list of 17 Local Cable Operators, to which we would refer to a little later. The Local Commissioner submitted an interim report which, however, was the subject matter of a challenge. By an order dated 30.04.2010, this Tribunal inter-alia on the premise that the report of the Local Commissioner was confined to 17 operators having a number of subscribers at 4606, opined that the negotiable subscriber base should be kept at 3000, the premise wherefor has been noticed earlier.

26. The petitioner, however, had not been supplied with any Demand Note.

27. The Respondent No.1 further, by an E-mail dated 27.05.2010 reminded the petitioner to send its statement of account as mentioned by the petitioner in the meeting. In the meanwhile, it may be noticed, the petitioner by its E-mails dated 07.05.2010, 10.05.2010 and 13.05.2010 asked for a format of the agreement so as to enable it to execute the same.

The respondent replied thereto only on 14.05.2010, stating :-

“We acknowledge receipt of your emails dated 07/05/2010, 10/05/2010 and 13/05/2010, which have been issued to us seeking Subscription Agreement for execution of the same as per Hon’ble TDSAT’s Judgment dated 30.04.2010.

We state that we are now in the process of preparing a demand note on the basis of Hon’ble TDSAT’s Judgment and shall send you the same for payment/clearance in due course. We would request you to please first comply with Hon’ble TDSAT’s Judgment by clearing your dues and making payment of deposit equivalent of one month’s subscription fee, so that agreement may be executed between the Parties.

Further, since you have also joined Cable Operators which have not been accounted in Hon’ble TDSAT’s Judgment, therefore, we would request you to please come for a meeting to our Calcutta office on 18/05/2010 at 11.00 a.m. so that Parties may discuss and close the issue of their sub-base as well. In this regard, you will have to account for the additional LCOs joined by you w.e.f. the date of joining of the LCOs.

Kindly note that the present communication is being issued to you without prejudice to our rights and contentions.”

28. It is, therefore, evident that :-

- (i) The Demand Notes were to be prepared and served;
- (ii) The petitioner was to make the payment thereof;
- (iii) Thereafter, only an agreement was to be entered into; and
- (iv) Negotiations were to be held between the parties with regard to the additional LCOs.

29. The first respondent does not contend that at that point of time the petitioner should have made payments voluntarily in strict compliance of the order of this Tribunal i.e. on a subscriber base of 3000 for all the channels, signals whereof were being supplied to it.

Indisputably, after the order of this Tribunal was passed and before the impugned notice was issued, the parties held negotiations for the purpose of entering into an agreement. The parties held a meeting at Guwahati on 26.05.2010 whence the statements of account were to be seen. Further negotiation was to be held only after the statement of accounts was received from the respondent. The statement of accounts was sought for by petitioner on 27.05.2010, whereto the Respondent No.1 by an E-mail dated 27.05.2010 responded, stating :-

“We write with reference to your email below and confirm that we will be issuing the demand notice till 30.04.2010 and provisional demand notice for the month of May 2010 on the basis of Hon’ble TDSAT’s judgment dated 30.04.2010. After receiving payments, information and documents for renegotiations, parties can execute subscription agreement as well.

Please note that you shall also be liable to account for operators whom you joined during the pendency of the Petition since the Hon’ble Judgment’s Judgment dated 30.04.2010 is in respect of 3000 subscriber for 17 LCOs only.”

30. The petitioner again sought for the statement of accounts by E-mails dated 31.05.2010, 02.06.2010 as well as on 04.06.2010.

31. It is in the aforementioned context, we may analyze the purported notices under Regulation 4.1 whereby, for the first time, the demand note was sent.

The relevant portion of the said notice dated 04.06.2010 reads as under:-

“3. It may be noted that the Demand Note pertains only to 17 LCOs as contemplated in the Hon’ble TDSAT’s judgment (namely, Lotus Group Cable Network, D.G. Digital Network, Farhaz Digital Network, Z.R. Vision, N.K. Digital Network, New Fashion World, N G Digital Network, Global Network, Athindra

Chakraborty, Parag Vision, Unique Channel, Sat Cab Vision, C D Palace and Electronics, R B R Cable Network, Kharguli Siti Digital, S H Communication and P S Digital Network).

4. We state that apart from the operators mentioned above, you are admittedly catering to 10 additional operators, which were reported to us by you (namely, M/s. Igloo Cable Network, M/s. Barsa Cable Network, M/s. Samin Ahmed, M/s. Abdul Majid, M/s. Mitali Baskar, M/s. Friends Cable Link, M/s. Sky View Cable Network, M/s. Rainbow Cable TV Network, M/s. Channel Dan, M/s. Rohini Cable). We state that you are liable to account for these LCOs additionally since no payments (not even the admitted amounts) have been made to us. In this regard, that you will be liable to make payment for these additional LCOs w.e.f. their date of joining your network.

It may be noted that Eight out of these ten LCOs were previously declared by you in your alleged list of 1.32 Lakh subscribers of M/s. Assam Communication. In the said list, you had declared 2,800 subscribers for 8 LCOs however, two LCOs (namely, Abdul Majid and Mitali Laskar) were not mentioned in the said list. We would like to bring to your attention that in terms of Clause 3.2 of TRAI's Interconnect Regulations, it is obligatory for an MSO to check Invoices issued on an LCOs by previous MSO before commencing supply of signals. Further, you have till this date not disclosed the subscriber numbers of these Operators in agreements executed with them.

As such, after clearing the aforesaid amount, we would request you to kindly come for a meeting to our Kolkata office

together with information/documents in your possession for these additional LCOs so that Parties may negotiate and execute subscription agreement for the additional LCOs as well.

5. Under the circumstances, we request you to kindly make a payment of Rs.29,32,972.04/- (twenty nine lakhs thirty two thousand nine hundred seventy two and four paise) and approach us for execution of Subscription Agreement in terms of Hon'ble TDSAT's Judgment dated 30.04.2010. we state that execution of Subscription Agreement is necessary since Clause 4A of the TRAI's Interconnect Regulations dated 17.03.2009 clearly prohibits broadcasters to provide signals to distributor of TV channels in the absence of a written agreement.

We state that once payments are made and Subscription Agreement is executed then, Parties can negotiate and execute suitable Annexures to Subscription Agreement revising your monthly Subscription Fees and list of LCOs.”

32. The public notice, for which preparation must have been made from an earlier date, was also published on 05.06.2010 on two counts :-

- (i) non payment of the subscription fees; and
- (ii) non-execution of the agreement.

33. The petitioner evidently had no other option but to make payment or to protest thereagainst as the aforementioned notices were to be given effect to. It even could not hold any negotiation in respect of the agreement for the period 2010-2011 on the basis of the increased subscriber base, which according to Mr. Chadha was necessary in view of the aforementioned notice dated 04.06.2010.

The petitioner, however, offered a sum of Rs.15 lacs towards the amount outstanding in terms of its letter dated 08.06.2010, stating:-

“Further it has come to our knowledge that your channel distributor Mr. Sanjive Narain has blocked huge amount of payment. We have reasonable grounds to believe that your issuance of Public Notice in our name is nothing but a pressure tactic on us. You are clearly working in collusion with Mr. Sanjive Narain who is also your Channel Distributor and trying to create a chaos among our operators & luring them to join/migrate to the rival MSO. Several times in the past also you in collusion with Mr. Sanjive Narain had tried to disturb our network; now yet again you together with Mr. Narain & his M/s. Assam Cable Communication & Dolly’s Cable Network, want to sabotage my small network and are indirectly helping the rival MSOs to continue their MONOPOLY.

We are still in the process of verification of the Demand Note as sent by you; nevertheless we are making a payment of Rs.15.00 lakhs (Rupees Fifteen lakhs) vide cheque No.365097 dated 8th June, 2010, United Bank of India, GS Road Branch, Guwahati-781007, without prejudice to our rights and

contentions. Any other amount found due after reconciling the same with our amounts will be made.

We would therefore request you to please withdraw the Public Notice as it is hampering our business.

This is for your kind information & necessary action please. The present communication is being issued to you without prejudice to our rights contentions. We also reserve our right to give detailed response to your aforementioned letters/faxes and notices.”

34. The parties, however, did not meet nor did Respondent No.1 reply thereto. However, the cheque for a sum of Rs.15 lacs was accepted by the representative of the Respondent No.1, stating:-

“1. Cheque No.365097 received (subject to its realization) without prejudice to our rights and contentions.

2. Please make balance payment as soon as possible in order to avoid any inconvenience.

3. Cheque has been received for and on behalf of Star DEN Media Services Pvt. Ltd.”

35. It is on the aforementioned premise, the present Petition was filed on 21.06.2010 by the petitioner.

36. The matter relating to grant of interim relief as prayed for by the petitioner was considered by this Tribunal on 25.06.2010.

By an order of the said date, it was observed:-

“Having heard the learned counsel for the parties and having considered the submissions made before us, we are of the opinion that there is absolutely no reason as to why the petitioner shall not pay to the respondent the demand made by it on the basis of 3000 subscribers keeping in view the order of this Tribunal dated 30.04.2010.

Admittedly, except increase to the supply of Bouquet 3 and the subscriber base of Star Jasla and Star Anand, the petitioner does not raise any other dispute. The disputed amount thus would be around 4 lakhs and not more. We, therefore, are of the opinion that interest of justice would be subserved if the petitioner is directed to pay an amount of Rs.11 lakhs to the respondent. Negotiations between the authorised representatives of the parties may take place at the Kolkata Office of the respondent within 10 days from date with regard to the number of subscribers. They shall further discuss the issue whether the Bouquet 3 is no longer available to the petitioner and whether he has to pay to the

respondent on ala-carte basis or not. It shall also negotiate the charges payable by the petitioner so far as the Star Jalsa and Star Anand are concerned.

The said payment shall be made within two weeks from date but the same shall be without prejudice to the rights and contentions of the petitioner.

Subject to the compliance of this order, the respondent shall not disconnect the supply of signals of its channels to the petitioner.”

37. The said order was complied with. The petitioner has made various payments from time to time as has been directed by this Tribunal.

38. A disturbing feature has been brought to our notice by Mr. Naveen Chawla that incidentally ESPN also issued notice under Regulation 4.1 on 04.06.2010 and public notice on 05.6.2010, which was the subject matter of a petition before this Tribunal marked as Petition No. 157 (C) of 2010.

The action on the part of the respondent therein keeping in view the undue haste with which it made attempts to disconnect the signals of the petitioner was held to be an act of malice, stating :-

“30. Keeping in view the fact that a proceeding had been pending before this Tribunal, in the event the respondent No. 1 had any grievance with regard to any action on the part of the petitioner it could have said so. It could not have made an attempt to overreach the court. It knew that it could not have

disconnected the signal. If that be so, we fail to understand what was the purpose of issuing two notices in two days and publication of a public notice on the third day? The conduct of the 1st respondent is such, which compels us to lead to a conclusion that the said notices had been issued only to cause harm to the petitioner.

31. We, therefore, are of the opinion that the conduct of the respondent constitutes a malice of fact. Any act which is malafide cannot be legal. The statute contemplates service of a notice for just cause. It contemplates that a broadcaster shall act bonafide. It, should not assume itself a function indirectly which it could not assume directly. We, for the aforementioned reason, must hold that the purported notice dated 4th June, 2010 issued in terms of Regulation 4.1 and the public notice dated 5th June, 2010 are not sustainable in law.”

Construction of the impugned notice

39. In the aforementioned backdrop of events, we may notice the submissions of Mr. Chadha that the demand note of 04.6.2010 is in two parts, namely, the first part deals with non-payment of the dues by the petitioner in terms of the order of this Tribunal; and (ii) the second part with negotiations required to be held on additional subscriber base i.e. over and above 3000.

40. It is true that the notice dated 04.6.2010 refers extensively to the findings of this Tribunal in Petition No.157 (C) of 2009. Para 2 of said letter, however, states that demand note was prepared on the basis thereof, the details whereof are as under :-

Period From	Period To	Days	B1	B3	B4	Jalsha/ Ananda	Total Rate	Subs	Revenue	ST @ 10.3%	Total	Remarks
25 Sep-09	30 Sep-09	6 days	50.08	44.51	17.12		111.71	3000	67026.00	6903.68	73929.68	Activation date 25.09.09
01 Oct-09	31 Oct-09	1 month	50.08	44.51	17.12		111.71	3000	335130.00	34518.39	369648.39	
01 Nov-09	30 Nov-09	1 month	50.08	44.51	17.12		111.71	3000	335130.00	34518.39	369648.39	
-1 Dec-09	31 Dec-09	1 month	50.08	44.51	17.12		111.71	3000	335130.00	34518.39	369648.39	
01 Jan-10	20 Jan-10	20 days	50.08	44.51	17.12		111.71	3000	216212.90	22269.93	238482.83	
21 Jan-10	31 Jan-10	11 days	50.08	44.51	17.12	14.00	125.71	3000	133820.32	13783.49	147603.82	Jalsha and Ananda seeded on
01 Feb-10	28 Feb-10	1 month	50.08	44.51	17.12	14.00	125.71	3000	377130.00	38844.39	415974.39	
01 Mar-10	31 Mar-10	1 month	50.08	44.51	17.12	14.00	125.71	3000	377130.00	38844.39	415974.39	
01 Apr-10	30 Apr-10	1 month	50.08	65.08		14.00	129.16	3000	387480.00	39910.44	427390.44	(B3 rate of Rs.65.08 is the summation of a-la-carte rates as per details below)
01 May-10	31 May-10	1 month	50.08	65.08		14.00	129.16	3000	387480.00	39910.44	427390.44	Same as above
01 Jun-10	30 Jun-10	1 month	50.08	65.08		14.00	129.16	3000	387480.00	39910.44	427390.44	Same as above
									3339149.23	343932.37	3683081.60	

Description	Amount in Rs.
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<i>Total Subscription Fees Payable</i>	36,83,081.60
<i>Add : Box Money for 9 channels</i>	22,500.00
<i>Add: One Month's Advance as per Order</i>	4,27,390.44
Total amount payable from Nirman & Associates	41,32,972.00
Less : Money already deposited as per Interim Order	12,00,000
Total Amount payable in terms of Hon'ble TDSAT's Judgment	29,32,972.04

<i>A-la-carte rates</i>	
<i>Channels</i>	<i>A-la-carte Rates (INR)</i>
<i>Star One</i>	21.94
<i>Times Now</i>	9.1
<i>Zoom</i>	8.35
<i>CNBC TV18</i>	9.10
<i>CNBC Awaaz</i>	4.82
<i>CNN-IBN</i>	5.35
<i>MGM</i>	6.42
<i>Total Bouquet 3</i>	65.08

41. The demand in respect of 17 local cable operators is said to have been raised on the basis thereof, Para 4 refers to petitioner's alleged catering to 10 additional operators, which was for subsequent period and the same was to take effect from the date of their joining of the petitioner's network.

It was stated :-

"4. We state that apart from the operators mentioned above, you are admittedly catering to 10 additional operators, which were reported to us by you (namely, M/s. Igloo Cable Network, M/s. Barsa Cable Network, M/s. Samin Ahmed, M/s. Abdul Majid, M/s. Mitali Baskar, M/s. Friends Cable Link, M/s. Sky View Cable Network, M/s. Rainbow Cable TV Network, M/s.

Channel Dan, M/s. Rohini Cable). We state that you are liable to account for these LCOs additionally since no payments (not even the admitted amounts) have been made to us. In this regard, that you will be liable to make payment for these additional LCOs w.e.f. their date of joining your network.

It may be noted that Eight out of these ten LCOs were previously declared by you in your alleged list of 1.32 Lakh subscribers of M/s. Assam Communication. In the said list, you had declared 2,800 subscribers for 8 LCOs however, two LCOs (namely, Abdul Majid and Mitali Laskar) were not mentioned in the said list. We would like to bring to your attention that in terms of Clause 3.2 of TRAI's Interconnect Regulations, it is obligatory for an MSO to check Invoices issued on an LCOs by previous MSO before commencing supply of signals. Further, you have till this date not disclosed the subscriber numbers of these Operators in agreements executed with them.

As such, after clearing the aforesaid amount, we would request you to kindly come for a meeting to our Kolkata office together with information/documents in your possession for these additional LCOs so that Parties may negotiate and execute subscription agreement for the additional LCOs as well.

5. *Under the circumstances, we request you to kindly make a payment of Rs.29,32,972.04/- (twenty nine lakhs thirty two thousand nine hundred seventy two and four paise) and approach us for execution of Subscription Agreement in terms of Hon'ble TDSAT's Judgment dated 30.04.2010. we state that execution of Subscription Agreement is necessary since*

Clause 4A of the TRAI's Interconnect Regulations dated 17.03.2009 clearly prohibits broadcasters to provide signals to distributor of TV channels in the absence of a written agreement.

We state that once payments are made and Subscription Agreement is executed then, Parties can negotiate and execute suitable Annexures to Subscription Agreement revising your monthly Subscription Fees and list of LCOs.”

42. The demand was made for the first time. It is difficult for us to understand as to how the petitioner was asked to come to the respondent's office at Kolkata only after making payment and such payment was to be made at the first instance before holding negotiations while the said letter was to be treated as a notice under Regulation 4.1 of Regulations.

43. The respondent No.1 proceeded on the basis that in terms of the judgment of this Tribunal dated 30.4.2010, the subscriber base of the petitioner must be taken at 3000. So far as the LCOs named at serial Nos. 18 to 27 are concerned, their subscriber base was 880. However, those whose names have been mentioned at serial Nos.28 to 59 recently migrated from the network of the Respondent No.3.

44. Mr. Ayan Das with his affidavit annexed a letter dated 28.12.2010 of the Respondent No.3. We would notice the contentions thereof a little later.

45. The respondent No.3, however, in its reply did not raise any such contention.

46. A chain of correspondence had been exchanged between the operators and first respondent.

We would notice the statement of Mr. Ayan Das in his cross-examination while considering the piracy issue.

47. It may be noticed that actions were required to be taken in terms of the impugned notice at three stages namely (i) payments have to be made (ii) Subscription Agreement was to be then executed, and (iii) the parties can thereafter negotiate and execute suitable agreement to subscription agreement revising the monthly subscription fees and list of LCOs.

48. The notice of termination was issued within a few weeks of passing of the order by this Tribunal. If respondent No.1 was interested in executing the agreement, it could have done so. It could have raised the demand on petitioner within a few days from the said date. It could have asked for other or

further details to hold negotiations in future. Ex-facie, the Respondent No.1 acted malafide.

It intended to bring an end to transmission of signals to the petitioner's network. A demand note and the notice under Regulation 4.1 in a situation of this nature could not have been issued simultaneously. Some sort of an application of mind was required to be made before a Multi Service Operator is dubbed as a defaulter and that too where the parties are supposed to act in terms of the order of this Tribunal.

Interpretation of Regulation 4.1

49. The Telecom Regulatory Authority of India (TRAI) in exercise of its power conferred upon it under Section 11 (1) (b) of the TRAI Act, 1997 ('The Act') made Regulations known as Telecommunication (Broadcasting & Cable Services) Interconnection Regulations, 2004 ('The Regulations'). By reason of the 5th Amendment Regulation, Clause 4-A was introduced.

Mandatorily, in terms thereof all Interconnection Agreements are to be executed in writing.

Consequently, the word 'agreement' is substituted by a word 'written agreement' in the 2nd proviso appended to Clause 4.1 by reason of the amendment.

50. In the aforementioned context, we may notice Clause 4.1 and the 2nd proviso appended thereto.

“4. In regulation 4 of the principal regulations,---
(a) in the first proviso to sub-regulation 4.1, for the words
“an agreement, written or oral”, the words “a written
agreement” shall be substituted;
(b) in the second proviso to sub-regulation 4.1, for the
words “agreement, written or oral,” the words “written
agreement” shall be substituted;”

51. Mr. Chadha urged that as no written agreement was entered into, notice under Clause 4.1 was not necessary. On a plain reading of the 2nd proviso appended to Clause 4.1, no exception thereto can be taken.

But then, apart from the fact that such a stand had not been taken by the respondent in its pleadings or any correspondence except while making oral submissions, we may notice, the direction of this Tribunal was to enter into the agreement on reasonable terms.

52. It must be borne in mind that the said direction was issued keeping in view the ‘Must Provide’ clause contained in Clause 3.2 of the Regulations. The agreement was to cover the entire period of litigation. If that be so, Respondent No.1 was bound to act in true letter and spirit of the said order. Even if a notice

under Clause 4.1 was not necessary, a public notice in terms of Clause 4.3 of the Regulations was required to be issued. But then before such a public notice was issued, the petitioner should have been given a reasonable opportunity to make the requisite payments. The scope and object of Clause 4.2 and Clause 4.3 are different. A consumer is entitled to know the reasons as to why transmission of signals by a Multi Service Operator or a Local Cable Operator would not be allowed by a Broadcaster.

In terms of Clause 4.3 of the Regulations also, besides 4.1, reasons for disconnection in brief are to be assigned.

The Local Cable Operators in the interest of consumers, in turn, were entitled to migrate to the network of another MSO. A decision to issue a notice must have been taken before the purported notice under Regulation 4.1 was issued or at least simultaneously or otherwise, the public notice could not have been published in the newspapers on 05.6.2010

Bouquet III and Bouquet IV

53. From the chart we may notice the components of Bouquet 3 and Bouquet 4, as also al-a-carte rates in the year 2009 thereof, being as under :-

B3	<i>Star One</i>	44.51	21.94	
	<i>Hungama</i>		8.35	
	<i>The Disney</i>		9.52	
	<i>Toon Disney</i>		9.52	
	<i>Times Now</i>		9.1	

	<i>Zoom</i>		8.35	<i>Availed by the Petitioner</i>
			66.78	
<i>B4</i>	<i>CNBC TV18</i>	17.12	9.1	<i>Availed by the Petitioner</i>
	<i>CNBC Awaz</i>		4.82	
	<i>CNN IBN</i>		5.35	
	<i>MGM</i>		6.42	
			25.69	

54. Admittedly, the channels Hungama, Disney and Toon Disney went out of Bouquet 3 leaving only the channels Star-One, Times Now and Zoom. The total amount payable by the petitioner both for Bouquet 3 and Bouquet 4 was Rs.61.63 paise proportionately.

The petitioner, however, for Bouquet 3 and Bouquet 4 was charged @ Rs.61.08 paise for the month of April, 2010 and for May and June, 2010 at the same rate.

55. Could it be done? Admittedly, the matter is governed by Telecommunication (Broadcasting & Cable) Services (2nd Tariff) (8th Amendment) Order 2007 (No.3 of 2007), which came into force with effect from 04.10.2007. The said order was, however, set aside by this Tribunal. The matter has been taken to Supreme Court of India, wherein an order of status quo was passed.

It, however, appears that for the three channels, which is part of bouquet 3, the bouquet rate was Rs.26.26 paise. So far as the Bouquet 4 is concerned, a few more channels were added to it, the rate list whereof is as under:-

Bouquets	Name of channels in Bouquets	Bouquet Rate (Rs.)	A-la-carte rates (Rs.)	Remarks
B1	Star Movie	50.08	17.66	Availed by the Petitioner
	Star Plus		18.73	
	Star World		4.87	
	Star Gold		17.66	
	Channel (V)		1.07	
	National Geographic		6.15	
	History		4.71	
	Vijay		4.28	
		75.13		
B2*	STAR One	26.26	21.94	Bouquet not availed by the Petitioner
	Times Now		9.1	
	Zoom		8.35	
			39.39	
B3	FX*	99.18	15.5	
	FX Crime*		15.5	
	Baby TV*		13.25	
	Nat geo wild*		16	
	Nat geo adventure*		16	
	Nat geo Music*		7.4	
	Star One		21.94	
	Times Now		9.1	
	Zoom		8.35	
	CNBC TV 18		9.1	
	CNBC Awaaz		4.82	
	CNN-IBN		5.35	
	MGM		6.42	
	148.73			

B4	Star Ananda	14	6	Availed by the Petitioner
	Star Jalsha		12	
			18	

Channels/bouquet not availed by the Petitioner.

56. All the aforesaid channels of the aforementioned bouquets having not been subscribed by petitioner, according to Respondent No.1 a-la-carte rates applied, which came to Rs.68/-.

The provision of the said Tariff Order was to be given effect to.

57. **Effect of the Rates**

(i) The rates were fixed by the respondent in respect of the channels included in the bouquet-4 after re-constitution of bouquet-3 and bouquet-4. They were to conform to the requirements of the Telecommunication (Broadcasting & Cable Service) Interconnection Regulations, 2004. Secondly, Tariff Order, 2007 inasmuch as the requisite rates have been notified by the TRAI have also been put on its website.

(ii) In terms of the provisions of the said order, the only restriction which can be imposed, related to the pro-rata rate to be fixed for bouquets vis-à-vis the Ala-carte as in terms thereof, the discount

granted for the bouquet cannot be less than 150% of the total rates fixed for each of the channels on A-la-carte basis.

- (iii) The 2nd proviso appended to Clause 3 (c) of the said order would have no application as it refers to 01.12.2007 as the date fixed in relation thereto.

58. We may notice some provisions of the Telecom Broadcasting & Cable Service (Eighth Amendment) Tariff Order, 2007.

We may notice the following clauses of the said Tariff Order :-

“Clause 4(2) : Every broadcaster who, after the 1st day of December, 2007,--

(a) introduces any new pay channel or free to air channel; or

(b) converts any pay channel into free to air channel; or

(c) converts any free to air channel into pay channel; or

(d) discontinues any free to air channel or pay channel; or

(e) introduces any new bouquet or discontinues any bouquet or modifies any bouquet,

shall, within seven days of such introduction or conversion or discontinuation, furnish to the Authority the information required in items (a) to (h) of sub-clause (1).

(3) Every broadcaster shall exhibit on its website the

information furnished under sub-clauses (1) and (2) immediately except items (d) and (g) of sub-clause(1).

4A. Power of Authority to intervene.

The Authority may, by order or direction made or issued by it, intervene in order to secure compliance of the provisions of this Tariff Order, or protect the interests of subscribers and service providers of the broadcasting services and cable services, or promote and ensure orderly growth of the broadcasting services and cable services, or facilitate competition and promote efficiency in the operation of broadcasting services and cable services so as to facilitate growth in such services.”

The manner, in which the rates are to be fixed, is provided in Clause 3-C of the said order.

It reads thus :-

“3C. Manner of offering channels by broadcasters.

(1)Every broadcaster shall offer or cause to offer on non-discriminatory basis all its channels on a-la-carte basis to the multi system operator or the cable operator, as the case may be, and specify an a-la-carte rate, subject to provisions of sub-clause (2) of this clause and clauses 3 and 3B, for each such pay channel offered by him.

For proper application of the terms of the aforementioned provision, we may notice an example.

If Ala-carte rate has been fixed at Rs.150/- per channel, the bouquet also cannot be less than Rs.100/-. Clause 3-C (d) provides for three times of average rate of pay channels. The 2nd proviso appended thereto shall not have any application in the instant case, as the same refers to the cut-off date of 01.12.2007.

In terms of the said provision, the bouquet rates are required to be brought down to the same proportion. According to the respondent, the rates fixed by it meet the requirements as also the conditionalities provided for in the said order.

So far as the rates fixed by the respondent after some of the channels went out of its network is concerned, there cannot be any doubt that it would be entitled to re-constitute the same.

We may notice one example. If a sum of Rs.100/- has been fixed for a bouquet of 10 channels, A-la-carte rate of Rs.10/- for each of the channels and in the event two of the channels gone out, then the rate has to be brought down by 20%. The bouquet rate has also to be brought down in the same proportion bearing the same weightage. If the rate fixed as Rs.50/-, the pro-rata rate would be Rs.50 – Rs.10 i.e. Rs.40/-.

The petitioner in terms of the order of this Tribunal dated 30.4.2010 was liable to pay the subscription amount of all the channels, of which the

respondent is the content aggregator and signals whereof are being supplied to it on a subscriber base of 3000.

Even though the 'Star Jalsa' and 'Star Ananda', were regional channels, which may be very popular, but the subscriber base of 3000 in regard to those channels also cannot be held to be justified.

59. According to Mr. Chadha, the requirements of the said order have been complied with. This may or may not be so. We would assume in favour of the First Respondent. We would also assume that the rates have been notified in terms of the said order as also the Tariff Order. Be that as it may, one of the questions which arises for consideration is the applicability of the 2nd proviso to Clause 6C of the said order.

60. Mr. Chadha would contend that the said proviso has no application. But, there is nothing on record to show that the broadcaster was to make the said of channel on listing thereof available on the 1st day of December, 2007 which is essentially a question of fact. What we intend to convey is that the petitioner was entitled to a hearing. It could have asked to make a choice. It should have been directed to raise a contention that it would like to subscribe to those channels even on the same subscriber base (in the event the 2nd proviso

appended to Clause 6C was applicable). Had an opportunity been given, the petitioner could have opted for one of the bouquets. The rate has been imposed unilaterally. The petitioner's contention is that for the said two bouquets it was required to pay only Rs.26.26 and Rs.17.12 paise totaling Rs.43.38 in stead and in place of Rs.65.08 paise. The petitioner, therefore, was entitled to have its say in the matter.

Subscriber Base with regard to the Bouquet 3 and Bouquet 4, Star Jalsa and Star Ananda

61. For the purpose of appreciation of the rival contentions, it is necessary for us to notice the order dated 30.4.2010. Upon considering the provisions of Clause 3.2 and Clause 9.1 of the Regulations as also the contentions of the parties and some orders passed by this Tribunal from time to time, it was directed :-

“20. We have gone through the documents which have been provided to us in a sealed cover by the respondent and we find that the highest subscriber base mentioned for bouquet one in one of the three agreements is not exceeding 30,000 subscribers. In the other two agreements the subscriber base for bouquet one is not exceeding 3100 subscribers. It, therefore, appears to be consistent with the regulation to adopt a subscriber base which is not based upon the actual count, but is based upon the negotiated figure arrived at between the parties.”

62. This Tribunal noticed that the issue between the parties was a contentious one in relation to subscriber base i.e. whether the same was 1800 Vs 12000.

In para 20 of the Order what was considered was the subscriber base disclosed in the documents i.e. agreements by and between the First Respondent and other MSOs. It was opined that in one of the three agreements, subscriber base was kept at 30,000 being the highest subscriber base of bouquet I and 3100 in the other two, the three cable operators were (1) Indo-Hongkong; (2) Sudarshan; and (3) Assam Communications.

63. The Local Commissioner found that the subscriber base of the petitioner was about 4606. It was, however, stated :-

“The petitioner has accepted that it has about 4606 subscribers. Having regard to the fact that originally the subscriber base is determined on a negotiated basis, we as at present advised, are of the opinion that interest of justice shall be subserved if the subscriber base is kept at 3000.”

64. The petitioner has accepted the subscriber base of 4606. Admittedly, a Review Petition was filed being Review Application No. 8 of 2010 and by an order dated 30.4.2010 while maintaining the operative part of the order namely

keeping the subscriber base at 3000, the so called admission on the part of the petitioner was deleted. It was found that the figure in stead and in place of 4606, would be 4084.

65. The right of a 'distributor of T.V. channels' in terms of Clause 3.2 is to receive supply of signals on reasonable terms. Supply of signal to it must be on a non-discriminatory basis. The Regulations provide for a level playing field at the hands of the broadcasters. It postulates a healthy competition. If that be so, this Tribunal could not have irrespective of the popularity of the channels as well as viewership thereof vis-à-vis that of a limited number of regional channel could not have opined that negotiated/declared subscriber base should apply in respect of each and every channel.

66. The Respondent has, however, raised a plea that the MSOs have been asked to pay subscription fees in respect of bouquets on a uniform basis in the following terms :-

"21. Regarding para 11 (7) of the Petition, it is submitted that admittedly Star Jalsha and Star Anand are regional channels. The channels being in regional language are more popular than the general entertainment channels comprising part of Bouquet 1 being distributed by the answering Respondent. The Petitioner, therefore, cannot enjoy the signals of the aforesaid two channels at 15% of the total subscriber base determined by the Local Commissioner. The answering Respondent also states that for these two regional

channels, it is requesting all the existing MSOs in Guwahati to execute the Subscription Agreements on the same subscriber base for all bouquets as has been communicated to the Petitioner by the answering Respondent vide its e-mail dated 22.06.2010. Thus, the Petitioner who all this while had been raising pleas of parity and level playing field should also pay for the subscriber base equal to that of Bouquet 1.”

67. It is, however, not denied or disputed that Respondent No.1 in his e. mail dated 22.6.2010 stated as under :-

9. We state that since all the MSOs are probably hand in gloves and trying to pull-down declarations in Guwahati market therefore, we have requested other MSOs in Guwahati to execute agreements for all bouquets on same sub-base. This decision is being taken uniformly and is on non-discriminatory basis. We state that this position was explained to you during our meeting also but you are deliberately raising the same issue over and over again. You will appreciate that subscribers mentioned in other bouquets form part of Bouquet 1 and therefore there is no question of you alleging unreasonableness.”

68. What would be the charges levied by the Respondent No.1 was not known to the petitioner. It could not have, having regard to the long correspondences between the parties at least in respect of ‘Star Ananda’ and ‘Star Jalsa’, the petitioner could not have visualized the amount of charges as

the action was totally unilateral. It may be true that 'Star Ananda' and 'Star Jalsa' are popular channels amongst a section of the viewers of a particular area and as would appear from the correspondences exchanged by the parties, but it is difficult for us to accept the submission of Mr. Chadha in absence of any material having been placed on record that viewership of a Bengali channel in Assam or in the town of Guwahati would be the same as that of a local channel. We are of the opinion that prima facie it cannot be so. It is also of some significance to notice that the three other MSOs, who are operating in the area, admittedly do not pay the subscription fees on that basis for the said two channels.

69. The Respondent No.1 examined Mr. Ayan Das. He, in his deposition in this behalf, stated as under:-

“Q: How many of such agreements were signed by MSOs in Guwahati after your request for same subscriber base for all bouquets?”

A: No.

Vol. It has been communicated and agreed that after the outcome of this case, they would execute the agreement on those terms.

Q: With who all operators you have such understanding?

A: *With my 3 MSOs namely ACC, Sudershan and Indo Hong Kong.”*

70. It is of some interest to notice that in para 14 of his Affidavit, the said witness stated :-

“14. I say that there was an outstanding amount of Rs.29,32,972.04 against the petitioner which amount has been calculated as per the judgment dated 30.04.2010. The Respondent No.1 was giving signals of its Bouquet Nos. 1,3 & 4 since September, 2009 and STAR Jalsha and STAR Ananda on bouquet rate since January, 2010. The Bouquet rates for Bouquet-1 is Rs.50.08, Bouquet -3 is Rs.44.51, Bouquet-4 is Rs.17.12 and Bouquet rate for STAR Jalsha and STAR Ananda channels is Rs.14/-. Thus, liability of the petitioner for Bouquet-1. Bouquet-3, Bouquet-4 and STR Jalsha and STAR Ananda channels from September, 2009 till June, 2010 works out to be Rs.36,83,081.60 (including taxes) as per Judgment dated 30.04.2010.”

71. As regards popularity of ‘Star Ananda’ and ‘Star Jalsa’, RW-1 stated :-

“Q: Have you filed anything on record to show that Star Jalsa and Star Ananda are more popular than general entertainment channels?

A: *No.*

Vol. I can produce the records, which can prove it.”

72. It is not the case of the first respondent that any action has been taken against the other MSOs.

73. We are, therefore, are of the opinion that the respondent No.1 cannot discriminate against the petitioner in respect of ‘Star Ananda’ and ‘Star Jalsa’ so far as a subscriber base is concerned or in relation to Bouquet 3 and Bouquet 4, now constituted as Bouquet 2 and Bouquet 3 vis-à-vis the other MSOs operating in the said town.

74. The petitioner contends that the Bouquet 3 and Bouquet 4 should have been charged on subscriber base of 25% of Bouquet 1 and about 15% so far as ‘Star Anand’ and ‘Star Jalsa’ is concerned.

We would assume that supply of signals of ‘Star Anand’ and ‘Star Jalsa’ also formed part of the order of this Tribunal dated 15.4.2010 despite the fact that the request therefor by the petitioner was made during pendency of the said Petition No. 157 (C) of 2010. But, supply of signals of the said channels were to be on a non-discriminatory basis.

Reading of the judgment

75. The judgment of a Court must be based on the object of the statute. It must be read reasonably and not as a statute. It was, therefore, obligatory, in our considered opinion, to hold negotiation for the said purpose. The demand on the part of the First Respondent, was therefore, not correct, so far as the rates of 'Star Jalsa' and 'Star Anand' is concerned. The petitioner was, however, bound to pay at the rate of Rs.14/-, which has been charged. It is, therefore, necessary to rework the negotiated subscriber base of the said channels.

Constructive Res-judicata issue

76. Submission of Mr. Chadha that the petitioner having not asked for a subscriber base in respect of Bouquet 3 and Bouquet 4 and 'Star Jalsa' and 'Star Anand', which remedy was available to it, the contention of the petitioner is barred under the principles of res-judicata in a case of this nature, cannot be accepted.

77. The principles of res-judicata would be attracted where the adjudication on an issue between the parties thereto, which had been or might have been an issue, was final. It would not apply to a Review Application in a case of this nature. The said Review Petition and this Petition, moreover, were filed on the same date.

As a matter of fact, this petition has been filed without prejudice to the rights and contentions of the petitioner to file a Review Petition as would appear from para 8 of this petition.

78. In *Alka Gupta Vs. Narender Kumar Gupta* reported in 2010 (10) SCC 141, upon which Mr. Chawla has placed strong reliance, the Supreme Court of India stated the law thus :-

“19. The learned Trial Bench passed the order on 13.3.2009 on the preliminary issue (Issue I) relating to res judicata. But there is absolutely no discussion in the order of the learned Single Judge in regard to the bar of res judicata except the following observation at the end of the order : “Of course it cannot be said that the present suit is barred by res judicata inasmuch as the said claims were not decided in that case. But the principle of constructive res judicata is applicable.” This was not interfered by the Appellate Bench. Both proceeded on the basis that the suit was not barred by res judicata, but barred by principle of constructive res judicata without assigning any reasons.

20. Plea of res judicata is restraint on the right of a plaintiff to have an adjudication of his claim. The plea must be clearly established, more particularly where the bar sought is on the basis of constructive res judicata. The plaintiff who is sought to be prevented by the bar of constructive res judicata should have notice about the plea and have an opportunity to put forth his contentions against the same. In this case, there was no plea of constructive res

judicata, nor had the appellant-plaintiff an opportunity to meet the case based on such plea.”

79. Applying the said principles, it was found :-

“In the instant case, the High Court has not stated what was the ground of attack that the appellant-plaintiff ought to have raised in the first suit but had failed to raise, which she raised in the second suit, to attract the principle of constructive res judicata. The second suit is not barred by constructive res judicata.”

80. In this case also the respondent has not raised any such plea. In any event the cause of action for filing the instant petition is the issuance of the Notice of demand under Clause 4.1 and Public Notice under Clause 4.3 of the Regulations.

Piracy Issue

81. The Respondent No.1 has also alleged acts of piracy on the part of the petitioner. Only a comparative chart was filed along with the affidavit of Mr. Ayan Das. The said witness, however, stated that he was not present at the relevant time.

We may notice the following statements from his cross-examination :-

“(Witness shown para 8 of the affidavit)

Q. Were you part of the random sample survey as mentioned in para 8 of your affidavit?

A. No.

It is incorrect to suggest that no such random sample survey took place on 17.11.2010, 25.11.2010, 26.11.2010, 28.11.2010 & 29.11.2010, as mentioned in para 8 of my affidavit.

Since I was not part of the random sample survey as mentioned in para 8 of my affidavit, there is no question of me seeing the encrypted hash code displayed on screen in the areas of Fatashil (Ambari) Kahelipara, Bhootnath, AT Road, Tokobari, Rehabari, Hedyatpur and Kala Pahar.

Vol. Since my work includes traveling through out North East and when the random sample survey took place, the job was assigned to my Local Field Supervisor Mr. Arup Barua.”

Migration of the LCOs/MSOs

82. A chart has been placed before us showing the number of LCOs, who have migrated.

83. The Respondent No.1, however, proceeded on the basis that in terms of the judgment of this Tribunal dated 30.4.2010 the subscriber base of the petitioner must be taken as 3000. So far as the names mentioned at serial Nos.

18 to 27 therein are concerned, their subscriber base is at 880. However, those operators, whose names find place at Serial Nos. 28 to 59, have recently migrated from the network of the Respondent No.3.

84. Mr. Ayan Das in his evidence has annexed a letter of the Respondent No.3, which reads as under:-

“We would like to again your kind notice that the following LCOs were taking feed from our network and has shifted to M/s. Nirman & Associates Pvt. Ltd. These operators did not join us after migrating from out network.

Sl. No.	Name of operator	Area of operation	Date of joining	Subscriber base
1	Amsing Cable	Amsing Jorabat	15.05.09	300
2	Bindia Cable	Amsing Jorbat	15.05.09	100
3	Sekhar	Bhoot Nath	01.04.10	100
4	Rinku Bhatta	Birubari	01.05.10	75
5	Dipika Cable	Army Hospital, Basista	01.05.10	50
6	Niharika Cable	Latakata	01.05.10	66
7	Suleshwar	Pattarkuchi	01.05.10	100
8	Apollo 1	Rehabari	25.06.10	150
9	Global Glaze	Hedayetpur	15.03.10	350
10	Suraj Sharma	Islampur	01.05.10	100
11	D.C. Cable	Rahabari	01.06.10	200
12	Ramchandra	Sweeper Colony	05.01.10	200
13	Lalit Singh	Manipuri Basti	07.02.10	200
14	R.B. Network	South Sarania, Gandhi Basti, Ulubari	28.10.08	1400
15	NST Network (now merged with RB Network)	Sough Sarania, Gandhi Basti, Ulubari	28.10.08	900

16	<i>Trimurty Cable</i>	<i>Maligaon</i>	<i>08.12.10</i>	200
17	<i>Biswakarma Cable</i>	<i>Maligaon</i>	<i>08.12.10</i>	150
18	<i>TRT Cable</i>	<i>Maligaon</i>	<i>08.12.10</i>	300
19	<i>Jupiter Cable</i>	<i>Khailpara</i>	<i>01.08.10</i>	100

85. The Respondent No.3, however, as indicated heretobefore in its reply has not raised any such contention.

It has been accepted by the witness of the Respondent No.1, Mr. Ayan Das, as indicated heretobefore, that the petitioner had furnished the SLR up to December, 2010. It is, furthermore, accepted that the concerned MSO has been given a reduction. It was stated :-

“It is correct that we have given reduction in subscription fees to the MSOs against the migration as mentioned in the letters as stated above.

Q: When and to whom did you give this reduction?

A: I will have to check the company records and I can produce them.

(Learned Counsel for the Petitioner calls upon the witness to produce such records.)

(Learned Counsel for the Respondent No. 1 objects to production of such records for these being confidential commercial terms with parties.)

It is incorrect to suggest that no such reduction was ever given to any of the MSOs against the migration, had it been the case, the same would have been mentioned in my affidavit.

I am aware of the ground position in Guwahati.”

86. As a Territory Manager, he was to look after all North-Eastern States. He was also aware of the correspondences exchanged between the operators and the first respondent.

In this connection, he stated :-

“Q: Whenever any cable operator/MSO sends you an SLR, you are aware of the same?”

A: Yes.

Q: Name the MSOs who used to send you regular SLRs?

A: Sudershan only.

Q: Have you placed the SLRs of Sudershan on the record?

A: I will have to check.

Q: Have you ever demanded cable registration certificates of affiliates of Indo Hong Kong, Sudershan and ACC?

A: No.

Vol. *As they are my direct customers and I give feed to them, they are not liable to give me certificates of their affiliates. They are only required to give their own certificates.*

Q: *Then how will you check whether the so called affiliates of Indo Hong Kong, Sudershan and ACC are cable operators?*

A: *Through the letters written by them.*

It is incorrect to suggest that Indo Hong Kong, Sudershan, ACC, who claim that operators are migrated from them, most of such names are not cable operators and are fictitious names.

It is incorrect to suggest that no such migration took place or that the letters are procured for the purpose of this petition.”

87. So far as the list of Local Cable Operators supplied by the petitioner is concerned, he said that he has to ask for enhancements from the other MSOs as is revealed from the following :-

“Witness is shown para 6 of the affidavit)

It is incorrect to suggest that the petitioner does not have 58 affiliate cable operators.

It is incorrect to suggest that the petitioner did not have even a single direct subscriber.

It is incorrect to suggest that the petitioner does not have 20,000 subscribers.

It is incorrect to suggest that the subscriber base of the petitioner is 3003 as per the SLR of January 2011.”

It is, therefore, difficult to hold relying on or on the basis of the evidence of the said witness that the respondent No.1 has been able to establish its contention that the petitioner was guilty of acts of piracy.

Conduct of the Parties

88. The learned counsel for the respondent would contend that the petitioner had been approaching this Tribunal again and again not only against first respondent but also against the other broadcasters and in fact he has been thriving on litigation.

89. Ms. Kanika Agnihotri also submitted that respondent No.3 has not only been impleaded as party in this case but also in the cases against ESPN Software India Pvt. Ltd., Taj Television as also Star Den Pvt. Ltd being Petition No. 187 (C) of 2010 and Petition No. 249 (C) of 2010. According to the learned counsel, the petitioner, without impleading him as party, has raised the same issue, in the earlier rounds of litigation namely Petition No. 157 (C) of 2010.

90. We have noticed heretofore the interim order passed by this Tribunal. Can it in facts and circumstances of case be said that this petition is an abuse of process of Court?

91. In our considered opinion it is not so.

The first respondent is broadcaster. It has statutory obligations to provide for signals on request made by a distributor of TV channel in terms of Clause 3.2 of the Regulations.

The first respondent was bound to consider the said request and to provide the signals within the prescribed period of 60 days.

It failed/neglected to do so and, thus, the petitioner had no other option but to approach this Tribunal.

If for the same reason, the petitioner had to file petitions against other broadcasters, no exception thereto can be taken.

Approaching a court of law by itself cannot be act on the part of an aggrieved person to be an act of malafide unless abuse of the process of law is established.

This Tribunal passed an interim order upon arriving at a prima facie finding.

The petitioner was also directed to deposit a sum of Rs.12,00,000/-, which order was complied with.

If we consider the subscriber base of the petitioner, the same had all along been taken at 3000. Keeping in view the report of the learned

Commissioner, a sum of Rs.12,00,000/- prima facie would have been sufficient for meeting the quantum of subscription fees for 6-7 months.

While passing the order dated 30.04.2010 the interest of the respondent had been safeguarded. We have held heretofore that the respondent no.1 acted in undue haste in issuing the impugned notices.

In commercial transactions wherein the broadcasters are statutorily obligated to supply continuous signals, subject of course to making of payments therefor and/or compliance of the other statutory obligations on the part of the Multi Service Operators, they for all intent and purport are expected to be reasonable in their conduct.

92. The petitioner has alleged that the respondent No.4 keeping in view its position both in relation to Respondent No. 2 and 3 had been if not directly but indirectly making all endeavors to obstruct supply of the signals to the petitioner's network.

93. The legal aspect of the said allegations would be considered a little later but if the allegations were correct, it cannot be said that the petitioner's conduct is such which would disentitle it to obtain any relief from this Tribunal.

94. Recently, the Supreme Court of India in Alka Gupta (supra) opined :-

“34. The High Court recorded factual findings on inferences from the plaintiff’s (appellant) conduct and branded her as an unscrupulous person who abuses the process of court and as a person who utters falsehoods and manipulates documents without there being a trial and without there being an opportunity to the plaintiff to explain her conduct. To say the least, such a procedure is opposed to all principles of natural justice embodied in the Code of Civil Procedure. At all events, the alleged weakness of the case of the plaintiff or unscrupulousness of the plaintiff are not grounds for dismissal without trial.

35. We also fail to understand how costs of Rs.50,000 could be levied. This Court has repeatedly stated that in dealing with civil suits, courts will have to follow the provisions of the Code of Civil Procedure in levying costs.

36. This order should not be construed as a finding on the conduct of the appellant one way or the other. We have examined the matter only for the limited purpose of finding out whether the High Court had proceeded in accordance with law and the provisions of the Code of Civil Procedure. If on evidence, the conduct of the plaintiff or the defendant is found to be unscrupulous or unbecoming, it is open to the court at that stage to decide upon the consequences that should be visited upon her or him.”

95. In Arunima Baruah Vs. Union of India reported in 2007 (6) SCC 220, the Supreme Court of India held :-

“11. The court’s jurisdiction to determine the lis between the parties, therefore, may be viewed from the human rights concept of access of justice. The same, however, would not mean that the court will have no jurisdiction to deny equitable relief when the complainant does not approach the court with a pair of clean hands; but to what extent such relief should be denied is the question.

12. It is trite law that so as to enable the court to refuse to exercise its discretionary jurisdiction suppression must be of material fact. What would be a material fact, suppression whereof would disentitle the appellant to obtain a discretionary relief, would depend upon the facts and circumstances of each case. Material fact would mean material for the purpose of determination of the lis, the logical corollary whereof would be that whether the same was material for grant or denial of the relief. If the fact suppressed is not material for determination of the lis between the parties, the court may not refuse to exercise its discretionary jurisdiction. It is also trite that a person invoking the discretionary jurisdiction of the court cannot be allowed to approach it with a pair of dirty hands. But even if the said dirt is removed and the hands become clean, whether the relief would still be denied is the question.”

96. We have no doubts that in discretionary matters, the conduct of the parties plays an important role in commercial transactions. But then, while determining a question as to whether the Tribunal should refuse to grant any relief to the petitioner only on that basis would depend on the facts and circumstances of each case. Indisputably, the dirt in the hands of the plaintiff

should be such and so depraving that the same will disentitle it from obtaining any relief.

‘Spry’ in his authoritative list ‘Equitable Remedies’ state :-

“Sometimes over-simplified or misleading statements of equitable principles of this nature do not cause mischief. Judges who are experienced in exercising equitable discretions may have no difficulty in granting relief in appropriate circumstances where, for example, the hardship that will thereby be caused to the defendant is sufficiently offset by the inconvenience or detriment that would be suffered by the plaintiff if he were left without an equitable remedy. But nonetheless it is found that a statement that has been extrapolated from an equity judgement, and is then construed out its context, give rise to use of the maxim, he who comes to equity must approach the court with clean hands. This is doubtless a maxim which is both striking and succinct and which may be found to be of value for many explanatory or justificatory purposes. But when its content is examined it is seen specific performance is sought, relief should in the particular circumstances be refused. So it has been established that even a plaintiff who has been guilty of fraud, which is hardly consistent with clean hands, may under some circumstances obtain equitable relief, such as where, for example, the fraud has been waived by the other party and there is no additional consideration that renders the grant of that relief unjust. Again, it has been laid down that the absence of clean hands is of no account “unless the depravity, the dirt in question sued for”. When such exceptions or qualifications are examined it becomes clear that

the maxim that predicates a requirement of clean hands does not set out a rule that is either precise or capable of satisfactory operation. Rather in order to establish whether equitable relief should be refused through dishonesty or on a cognate ground it is necessary to examine precisely the rules and practices which have been established and followed by courts or equity and which are generally referable to such established considerations as fraud, misrepresentation, illegality or unfairness.

97. The parties have gone to the trail.

Evidently the petitioner has been more sinned against than sinning. The respondent no.1 for supply of signal of its channels to the petitioner is entitled be compensated but it is only entitled to a reasonable sum and the amount due to it. It cannot be permitted to unjustly enrich itself.

In that view of the matter it is difficult for us to hold that this proceeding is an abuse of process of Court.

Whether the Respondent Nos. 2 to 4 are necessary and proper parties?

98. Mr. Chawla would urge that the Respondent No.4 being at the helm of the affairs of both Respondent Nos. 2 and 3, which is a family business have a stake in the matter as it did not allow any competition.

Although, the allegations appear to have some force at the first flush, the only question which is to be posed and answered in this case is as to whether the arrangements amongst the concerned respondents fall foul of the judgments of the Supreme Court of India in the SEA TV (supra). The Apex Court in that case was considering the fact situation involved therein viz. the agent was also a Multi Service Operator. The Respondent No.2 in this case is not a distributor of TV channels. The respondent No.1 has entered into a dealership agreement with it. It has various functions to perform thereunder but by and large it is a dealer not a distributor.

The respondent No. 1 has never asked the petitioner to take supply of signals from the respondent No. 3, who is a Multi Service Operator. For any purpose, the petitioner was not asked to approach the said respondents either jointly or severally.

So far as supply of signal of its channels is concerned, the respondent No. 1 had been dealing with the petitioner directly. There is a little controversy as to whether the respondent No. 4 was present in the meeting held at Kolkata. The respondent No. 4 denies and disputes the same.

The burden of proof in this regard was on the petitioner. Apart from certain inferences which we have been called upon to draw from the circumstance attending to the supply of the signals to the petitioner's network by the respondent No. 1, we do not find that any material has been brought on

record by the petitioner to firmly establish that the respondent Nos. 2 to 4 had at any point of time been interfering in the affairs of the respondent no. 1.

The agreement dated 11.03.2010 was entered into by the parties thereto for facilitation in the conduct of business of the respondent No.1. Clause 3 provides for collections of subscription. Clause 5 provides for infrastructure. Clause 5. 2 provides for maintenance of office.

Clauses 10.1, 10.2 and 10.4 read as under :-

“10.1 The Dealer shall be responsible for collecting on behalf of STAR DEN all subscription fees and any other fees or charges due and all applicable taxes thereon from the Affiliates including sales and renewals charges and subscription charges for sales made prior to the date of this Agreement and payments for initial subscription charges for and increase in subscriber numbers. All fees or charges payable by the Affiliates shall be in the form of demand drafts or pay orders in favour of “STAR DEN Media Services Private Limited” only and collected in strict accordance with the collection procedure notified by STAR DEN to the Dealer from time to time. However, the Dealer shall not collect cash from affiliates in any event whatsoever.

10.2 The Dealer will issue a receipt for the amounts collected from each Affiliate from the billing system provided to the Dealer by STAR DEN.

10.3 If the Dealer fails to comply with the provisions of this clause 11(10) or the relevant STAR DEN collection procedures, the sale will not be credited to the Dealer and the Dealer will not be entitled to claim any commission for the same. In addition it is acknowledged and agreed by the Dealer that any collection of subscription

amounts in cash shall be construed as material breach of this Agreement and in such event STAR DEN will have a right to immediately terminate this Agreement without giving notice to the Dealer and/or appoint another Dealer in the Territory and/or retain the Deposit apart from any other legal actions which it so chooses to initiate.”

99. Indisputably, however, it is not a Multi Service Operator. The main purpose to appoint respondent No. 2 was to enable it to collect the amounts of subscription fees for the operators as opposed to a distributor of signals. It is not sated that the respondent No. 2 has even any infrastructural set up for the said purpose.

In Star India Pvt. Ltd. (Supra), the Apex Court stated :-

“15.2 Every contract under the Interconnection Regulations has two aspects. One concerns the commercial side whereas the other concerns the technical side. There is no difficulty for the commercial side. If the broadcaster appoints an agent on the commercial side to collect the statistics of the number of subscribers or for distribution of decoders there is no dispute. On the commercial side when an agent is appointed by the broadcaster that agent need not be from the operation network. Such an agent normally is not a technical service provider.

15.3 The difficulty arises when the broadcaster as in the present case appoints or enters into an agreement with a distributor, who in turn is an MSO and who in turn has his own business because in such a case an agent-cum-distributor is also a competitor of the

MSO who seeks signals from the broadcaster. We are living in a competitive world today. If under the Interconnection Regulations an MSO is entitled to receive signals directly from a broadcaster, if directed to approach his competitor MSO then discrimination comes in. The reason is obvious. The exclusive agent of a broadcaster has his own subscriber base. His base is different from another MSO in the same territory. If that another MSO has to depend on the feed to be provided by the exclusive agent of the broadcaster then the very object of the Interconnection Regulations stands defeated.”

100. Having regard to the fact that the petitioner was never required to approach Respondent No. 3 and furthermore in view of the fact that the dealership in question was granted on a non-exclusive basis, the arrangement did not affect the dealings by and between petitioner and respondent No. 1.

It is, therefore, difficult for us to accept the contention of Mr. Chawla that the petitioner is entitled to a direction from this Tribunal for cancellation of the said dealership agreement.

101. So far as the Respondent No. 3 is concerned, no case has been made out to lift the corporate veil. The petitioner has hardly made any averment in its petition against the respondent No. 3. No evidence has been adduced.

The only averments made are :-

“The Respondent No.3 is Assam Cable Communications, which is a MSO operating in the area of Guwahati and adjoining areas. The Respondent No.4 is Mr. Sanjeev Narayan, who is the person behind, incharge and responsible for the functioning of Respondent No.2 and 3. The Respondent No.3 is a partnership firm. The wife of Respondent No.4 is the partner in Respondent No.3 for name sake only, she is also a Director in Respondent No.2. The affairs of Respondents No.2 and No.3 are solely managed by Respondent No.4. The Petitioner and the Respondents are service providers in terms of the TRAI Regulations and this Hon. Tribunal has the jurisdiction to adjudicate the present dispute.

It is submitted that in violation of the orders of the Hon. Supreme Court in this Hon. Tribunal in the case of Sea TV, the Respondent No.1 has appointed Mr. Sanjeev Narayan as the distributor of Respondent No.1 and the wife of Mr. Sanjeev Narayan as the MSO of Respondent No.1 namely Assam Cable Communications-Respondent No.3.”

102. We have noticed heretobefore that no relief has been claimed against the respondent No. 3.

103. Ms. Agnihotri may be right in submitting that in Petition No. 157 (C) of 2009 also some allegations have been made without impleading it as a party.

In the said petition, it was held:-

“20. We have gone through the documents which have been provided to us in a sealed cover by the respondent and we find that the highest subscriber base mentioned for bouquet one in one of the three agreements is not exceeding 30,000 subscribers. In the other two agreements the subscriber base for bouquet one is not exceeding 3100 subscribers. It, therefore, appears to be consistent with the regulation to adopt a subscriber base which is not based upon the actual count, but is based upon the negotiated figure arrived at between the parties.”

So far as the other operators namely ‘Indo Hongkong’ and ‘Sudershan’ are concerned, it appears from the evidence of Shri Tarun Saha that they received the signal of free to air channels only.

It was stated :-

“Q. Was Indo Hong Kong ever taking feed from Guwahati/Assam Cable Communications?

(Objected to by Learned Counsel for the Respondent No.3 as being irrelevant and beyond the pleadings of this case).

A. Yes.

Q. Is Indo Hong Kong still taking feed from Assam Cable Communications?

(Objected to by Learned Counsel for the Respondent No.3 as being irrelevant and beyond the pleadings of this case).

A. Yes.

Q. Is there an operator by the name of Sudershan Cable TV Operator and is he still taking feed from Assam Cable Communications?

(All the above put questions are objected to by Learned Counsel for the Respondent No.3 as being irrelevant and beyond the pleadings of this case).

A. Yes.

Vol. They are all separate for the purposes of pay channels and not connected with us.”

104. Even, Shri Rana Saidur Zaman, in his cross examination, stated as under :-

“Q1. What is your dispute with R3 for the purpose of this petition?

A. R3 is a rival MSO as well as the distributor of R1.

Q2. Have you stated in your petition or in your affidavit that R3 is the distributor of R1?

A. I have not stated.

Q3. Have you prayed for any relief against the R3 in this petition?

A. R1 to R4 are the same person. Mr. Sanjeev Narain is playing a key role behind the scene in regard to affair with R4.

Q4. Was R3 a party in Petition No. 157 (C) of 2009?

A. No.”

105. Mr. Sanjive Narain, in his evidence has also denied and disputed that the contention of the petitioner, stating that he had nothing to do in the matter.

106. We may notice that this Tribunal in Petition No. 187(C) of 2010 opined as under :-

“24. The petitioner herein was a new entrant. It requested the respondent to provide signal of its channels. It having not receive a favourable reply, approached TRAI. A subscription agreement was entered into on or about 19/6/2009 on a monthly subscription fee of Rs.1,35,960/-. The said agreement has come to an end on 13th June, 2010. The petitioner, as indicated hereinbefore, has filed a petition before this Tribunal on or about 15.10.2009 after the signal was disconnected by the respondent. Indisputably the said order of injunction is operative. In Petition No. 229 (C) of 2009 what was in question was the notice under Clause 4.1 being dated 24.9.2009 as also public notice of the same date.

The said petition was heard on 30.7.2010 and the judgment has been reserved. It, however, stands admitted that while the said order of injunction was operative, the impugned notices have been issued. One of the questions which arise for our consideration is as to whether the same is malafide and/or has been issued to show any favour to the respondent Nos. 2 and 3.

The petitioner in support of its plea of malafide and/or discriminatory acts on the part of the 1st respondent vis-à-vis

the 2nd and 3rd respondent has made certain allegations in paragraphs 5, 6, 12 and 18 as also ground (e) thereof.

It is, however, stated that the respondent No. 3 is no longer a distributor of the first respondent; the distributorship agreement having been terminated w.e.f. March, 2010.

25. *It is not necessary for us to go into the question as to whether the respondent No. 3 being a distributor of the 1st respondent, any favour was to be shown in favour to respondent No. 2 to retain its monopoly. No material has been placed on record to establish malafide and/or any discriminatory treatment.*

It is now a well settled principle of law that the allegations of malafide must not only be made but established.

In absence of any plea of the details of malice and discrimination, so far as the respondent Nos. 2 and 3 are concerned, we are of the opinion that no case has been made out against them.”

107. The situation obtaining in the present proceedings is identical in nature. It is therefore, difficult for us to accept that the respondents, having regard to the fact situation involved in present proceeding have been arrayed as necessary or proper parties.

108. These petitions are, for the reasons aforementioned, disposed of with the following directions :-

1) The public notice under Clause 4.3 of the Regulations being malafide must be set aside.

2) The authorized representative of the parties should meet at the Kolkata office of respondent No. 1 within two weeks from date and hold negotiations on the subscriber base of the petitioner.

Both parties shall be entitled to furnish such informations/ evidences in support of their respective contentions, which would be taken into consideration by the other side.

3) The parties shall enter into an agreement on the basis of the negotiated subscriber base so far as Bouquets 2, 3 and 4 are concerned on similar terms on which the respondent No.1 had been supplying signals to other MSOs including respondent No. 3 herein. It is made clear that so far as percentage of subscriber base of those two bouquets vis-a-vis Bouquet 1 is concerned, petitioner shall not be discriminated against.

4) While determining the question of subscription fee, the respondent No. 1 shall give due credit to the amount of the subscription fee reduced from the subscription fee of the respondent No. 3 by reason of migration of a large number of

LCOs from the network of the respondent No. 3 to the network of the petitioner.

- 5) One agreement shall be entered into in terms of the order of this Tribunal dated 30.04.2010 passed in Petition No. 157 (C) of 2010 and the subscription fee once determined, shall be paid by the petitioner.

The arrears, if any, shall be cleared by the petitioner within one week from the date of arriving at the subscriber base upon making the necessary adjustment of payments made by it.

- 6) For the year 2011 the parties shall hold negotiations on such subscriber base as may be mutually agreed upon, keeping in view SLRs filed by petitioner upto January 2011.
- 7) The petitioner shall supply the SLRs for the subsequent months to respondent No. 1 within one week from date, if not already done.
- 8) It will be open to the parties to produce evidences so far as the subscriber base of the petitioner is concerned. If they cannot arrive at mutually negotiated subscriber base, a joint survey may be undertaken.

9) The petitioner shall continue to pay monthly subscription fee, albeit on an ad-hoc basis at the same rate, which it had been paying during pendency of this proceeding.

10) The respondent No.1, if so desires, may raise a demand on a provisional basis which should be divided into two parts namely one in terms of the order of this Tribunal and the other for the subsequent period.

109. We hope and trust that the respondent No.1 shall hold negotiations with petitioner in a fair and equitable manner as well as with an open mind.

110. This petition is disposed of on the above terms. So far as petitioner and respondent No.1 are concerned, they shall pay and bear their own costs but the petitioner should pay and bear the costs of the respondent Nos. 2 to 4. Advocates fee assessed at Rs.50,000/- representing the said respondents separately.

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

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(G.D. Gaiha)
Member

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(P.K. Rastogi)
Member