TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 28TH JULY, 2011

R.A. No. 7 of 2011

IN

Petition No. 30 (C) of 2010

ASSAM CABLE COMMUNICATIONS .... Applicant/Petitioner

Vs.

ZEE TURNER LTD. .... Respondent

BEFORE:

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

For Petitioner	Mr. Ramji Srinivasan, Senior Advocate Ms. Kanika Agnihotri, Advocate Mr. Vaibhav Agnihotri, Advocate
For Respondent	Mr. Maninder Singh, Senior Advocate Mrs. Prathiba M. Singh, Advocate Mr. Tejveer Singh Bhatia, Advocate Mr. Vadivelu Deenadayalan, Advocate

O R D E R

1. This review application has been filed for review of the judgment and decree of this Tribunal dated 28.4.2011 whereby and whereunder

while dismissing the petition and allowing the counterclaim filed by the respondent, it was directed as under :-

> "*We, therefore, are of the opinion that the petitioner is bound to restore the benefits derived by it to the respondent by paying the amount as claimed by the respondent, on the basis of a subscriber base of 30,000 keeping in view the parity so far as the ESPN and Star Television is concerned.*
>
> *We, therefore, while dismissing the petition, direct the petitioner to pay to the respondent the amount of subscription fees calculated on a subscriber base of 30,000 from the date of filing of this petition till date. This order shall, however, not exclude the parties to enter into a fresh negotiation. For the purpose of entering into a new agreement, they may meet at the respondent's office at Kolkata, wherein it would be open to the petitioner to bring to its notice any subsequent event. We hope and trust that the respondent shall enter into the negotiation with the petitioner with an open mind and keeping in view the ground realities."*

2. The applicant herein had preferred an appeal before the Supreme Court of India which was marked as Civil Appeal No. 4742 of 2011. The said appeal came up for hearing before the Supreme Court on 25.5.2011 and 30.5.2011.

We may notice the said orders :-

25.05.2011

> "*Learned Counsel for the appellant requests for two days' time to seek instructions. List on Monday the 30th May, 2011.*"

30.05.2011

> *"After arguing the case for some time, Shri U U Lalit, learned senior counsel appearing for the appellant made a request that his client may be permitted to withdraw the appeal with liberty to seek review of the order under challenge.*
>
> *The request of the learned senior counsel is accepted and the appeal is dismissed as withdrawn with liberty in terms of the prayer made."*

3. This review application of 186 pages not only contains the deposition of the witnesses and a copy of the miscellaneous application filed by the applicant but also a judgment of this Tribunal in Petition No. 345 (C) of 2011 dated 01.02.2011, which is said to be a precedent but not followed by us.

Notices purported to have been issued by respondent subsequent to the passing of the decree i.e. on or about 11.5.2011 and 13.6.2011, have also been annexed.

4. Although, before the Supreme Court of India, an appeal in terms of Section 18 of TRAI Act, 1997 was maintainable only on a

substantial question of law and furthermore it raised a limited question as would appear from the said order dated 30.5.2011, the applicant in this review application has taken as many as 20 grounds describing the judgment under review to be the 'impugned judgment'.

5. Mr. Ramji Srinivasan, learned Senior Counsel appearing on behalf of the applicant would urge :-

(i) Direction to the review petitioner to pay the subscription fee on a subscriber base of 30,000 for which an agreement was said to have been entered into with Star Den was not legally correct in view of a judgment of this Tribunal dated 01.02.2011 in Petition No. 345 (C) of 2011, wherein it was held that declaration to one broadcaster should not be considered to be a declaration to another broadcaster.

(ii) The Miscellaneous Application No. 234 of 2011 which was to be considered along with the main judgment should not have been dismissed without taking into consideration the prayers made therein keeping in view the subsequent event namely a modified agreement with Star Den in terms whereof the

subscriber base came down to less than 50 % of the original subscriber base.

(iii) Moreover, from the judgment under review it would appear that an application which was filed by the respondent had been considered and directions have been issued in terms thereof.

(iv) This Tribunal has not correctly reproduced the cross examination of Shri Tarun Saha as also Shri Sanjeev Narain so far as the terms of the agreement with the respondent is concerned namely as to whether the agreement has expired on 31.3.2009 or not.

(v) This Tribunal has also not taken into consideration the evidence of Shri Raghvendra Singh with regard to the industry practice as also the contention of petitioner that in fact another agreement had been sent to the office of respondent for execution thereof by it.

6. Mr. Maninder Singh, learned Senior Counsel appearing on behalf of the respondent, on the other hand, submitted :-

(a) The Supreme court of India had only asked petitioner as to how much time it required for payment of the decretal amount for which only two days' adjournment was sought for to seek instructions.

(b) From a letter of the respondent dated 11.5.2011, which was a part of the record before the Supreme Court of India, recording a meeting which had taken place between the parties on 02.5.2011 it would appear that Mr. Sanjeev Narain had assured respondent to clear the outstanding dues of Rs.4,60,0549/- and, thus, the petitioner did not represent correctly before the Supreme Court of India that it was not in a position to pay the decreetal amount.

(c) From a perusal of the judgment of this Tribunal dated 01.2.2011 passed in Petition No. 345 (C) of 2010, it would appear that the observations were made therein of which the petitioner intends to take advantage in a case where the broadcasters intended to raise the subscriber base during currency of the agreement on the basis of subscriber base declared with another broadcaster which was found to be non-permissible in law.

(d) From a perusal of the application filed by the petitioner being M.A. No. 234 of 2010, it would appear that the purported agreement was filed before this Tribunal in a sealed cover without supplying a copy thereof to respondent and thus it did not have any opportunity to rebut the contents thereof and the

circumstances attending thereto. The said purported Memorandum of Understanding by and between petitioner and ESPN as also Star Den and petitioner have been annexed for the first time with the review application which cannot be considered at this stage.

(e) In any event, from a perusal of the MOU with ESPN, it would appear that the applicant was ready and willing to pay a sum of Rs.7,54,114/- for a Sports Channel, the viewership whereof would be much lessor than that of an Entertainment Channel like Zee, which is of the same genre as of Star.

(f) From a perusal of the cross examination of Shri Tarun Saha, it would appear that an agreement had been entered into with Neo Sports on 15.11.2009 and thus the petitioner being in possession of three agreements before filing of the said Miscellaneous Application No. 234 of 2010 and assuming that the agreement with Star which also came into effect on and from 01.01.2010 could not be produced before the Tribunal at the time of examination of the petitioner's witnesses; there was absolutely no reason as to why the other two agreements were not filed.

(g) This Tribunal, although, took notice of the application for modification filed by respondent, the

directions issued by this Tribunal are independent thereof.

7. This Tribunal in the petition was mainly concerned with a public notice issued by the respondent on 22.01.2011. A prayer was also made for reconciliation of the accounts on the premise that a large number of operators have left the network of the petitioner.

By an interim order dated 11.02.2010, petitioner was directed to deposit a sum of Rs.25 lacs. During pendency of this petition, the parties had also met for reconciliation of their accounts. This Tribunal in its order dated 22.3.2010 observed that although the MSO must pay the monthly subscription fee on regular basis keeping in view the fact that parties intended to settle the matter amicably.

8. By reason of the said order, it was recorded that a cheque for a sum of Rs.25 lacs as also for a sum of Rs.4,90,000/- would be cleared on presentation. It was directed that the petitioner shall pay a sum of Rs.6.45 lacs per month exclusive of tax from April 2010 till further orders.

The respondent, however, had time and again been pointing out that the interim order of this Tribunal had not been complied with. Amongst others in our order dated 22.3.2010, the said fact has been noticed.

9. One of the questions which cropped up for consideration before this Tribunal was as to whether the purported agreements dated 29.5.2009 and 3.7.2009 were forged and fabricated ones and in any event the effect thereof; the respondent having not signed the same.

10. The petitioner filed an application for amendment of the petition, which was, however, dismissed. This Tribunal, although, described the said M.A. No. 234 of 2010 as an application for adduction of additional evidence for the purpose of explaining as to what on premise it had entered into an agreement with the other broadcaster after the evidence in this case had come to a close, but as would appear from the prayer portion thereof, merely a prayer had been made to take the agreement which was filed in a sealed cover on record.

The said document was, thus, not to be exhibited. Unless a document is proved, it cannot be taken on record. It is true that sometimes a document may be produced in a sealed cover as the

same may contain confidential informations but in this case, if Mr. Srinivasan's submissions are to be accepted, petitioner intended to put the same in evidence, which would have been possible only in the event execution thereof was proved.

11. We may notice the relevant portions of the said application.

> *"The entire case of the respondent is based on the declaration of the Petitioner to Star. However, Star itself has afforded the Petitioner the opportunity to re-negotiate the subscription figures. The subscription fee payable by the Petitioner to Star is for a subscriber base which is less than half of what it was earlier. It is the copy of this agreement entered into by the Petitioner alongwith a few other similar documents that are sought to be produced before this Hon'ble Tribunal in a sealed envelope.*
>
> *It is humbly submitted that the general practice in the industry is that representative of the broadcaster take the signed copy of the Agreement from the Petitioner for signatures by the Broadcaster. Even in the Agreement for reduced subscriber base, the Agreements were taken by the Broadcaster after the same were signed by the Petitioners representative. Therefore the Petitioner had to request the broadcaster to provide the Petitioner with a signed copy of the same. The latest of the Agreements has been signed on 7th June 2010 and the Agreements are being produced before this Hon'ble Tribunal on the earliest opportune moment after the signed copies of the same have been received from the broadcaster."*
>
> ***(Underlining is ours)***

12. No amendment of the petition was prayed for in terms of Order VI Rule 17 of the Code of Civil Procedure to plead a subsequent event. No application for adduction of additional evidence was filed. The petitioner should have filed an application for recalling of the witness, Shri Tarun Saha, who is its partner or for examining any other witness. Keeping in view the fact that the negotiation for entering into a fresh agreement for renewal of the agreement starts two months before the expiry thereof and as by 31.5.2010 the parties must have arrived at a settlement, the same should have been referred to by Shri Tarun Saha, the partner of the petitioner, in his evidence. The least which could have been done was to produce before this Tribunal the SLRs furnished by the petitioner to the broadcasters namely Star, ESPN and Neo Sports. The agreement with Star expired in May 2010. A fresh agreement is said to have been entered into on 09.6.2010.

13. The witnesses of respondent had been cross examined by the counsel for petitioner on 08.7.2010. The respondent had also filed an application for vacation of the interim order which was marked as M.A. No. 155 of 2010. The said application as also petitioner's application for amendment was to be heard at the final hearing along with other M.As.

14. A finding of fact has been arrived at that the agreement in question had expired on 31.3.2009. The purported subsequent agreement dated 01.10.2008 had also not been produced by petitioner. So far as a copy of the agreement which was said to have been with the respondent from July 2009 is concerned, it was held that the MSO must show that the commercial terms had been agreed to by the parties and having regard to the Regulations framed by the TRAI, conduct of the parties will have no application as an agreement in writing was required to be entered into.

15. The said agreement, we may notice, was contended to be a forged and fabricated one. Genuineness of various other letters was also in question. In that view of the matter, petitioner could not be said to have any legal right to obtain supply of signals of the channels of the respondent keeping in view the provisions contained in Clause 8.1 of the Regulations.

16. The counterclaim of respondent was considered from the point of view of the doctrine of "Restitution" as the interim order passed by this Tribunal affected the rights of the parties. The channels of 'Star' and 'Zee' are of the same genre namely General Entertainment Channel.

17. This Tribunal considered the question of parity only for the purpose of applying the doctrine of "Restitution" and not for any other purpose. Such a figure was arrived at as it was not disputed that atleast till May 2010, the subscription fee was being paid on that basis.

18. It is on the aforementioned factual backdrop, we may notice the decision of this Tribunal in Petition no. 345 (C) of 2010. In that case, a subscriber base of 1915 had been entered into in November 2008 which in a subsequent agreement dated 04.11.2009 was determined at 1093. The respondent contended that the subscriber base of the petitioner therein was 4100 whereas according to the petitioner therein it was 3000. An allegation was made that the step to increase the subscriber base against the petitioner therein was taken at the instance of Mr. Sanjeev Narain, who was the authorised distributor of MSM Discovery, and was examined by the petitioner in this case also. It was stated that Mr. Sanjeev Narain was also the distributor of 'Star'.

19. Keeping in view the provisions of the Regulations, it was observed :-

> "*Quantum of higher subscription fee is determined not on the basis of number of subscribers of an MSO but on*

several facts like viewership which depends on the popularity of a channel for different segment of society in a particular area."

Even the said decision or for that matter any other decision was cited at the Bar.

20. In this case unlike Nirman (Supra), we are not concerned as to whether SLR should have been furnished at the time of signing the subscription agreement and, thus, a direction in mandatory form should be issued to the MSO for doing the same.

We would, however, have no hesitation to state that a mistake has been committed by us in taking note of the cross examination of Shri Tarun Saha in as much as the word "not" has not been reproduced but the same having been done even before the framing of issues, evidently the same had been considered only as a piece of evidence which having regard to the materials on record cannot be and infact has not been held to have resulted in an erroneous finding.

21. Mr. Srinivasan would submit that the rate of subscription fee of respondent is much higher than 'Star' and, thus, the negotiated subscriber base with the said broadcaster should not be taken into consideration. Reliance in this behalf had been placed upon the evidence of Shri Sanjeev Narain.

22. No such specific contention was raised before us. Had such a contention been raised upon drawing our attention to the materials on record, the same would have been dealt with on its own merits.

23. As the merit of the matter can not be entered into in the review application, we think it wholly un-necessary to consider the other submissions of the learned Counsel for the parties.

This Tribunal exercises a limited jurisdiction while exercising its power of review.

In ***Aribam Tuleshwar Sharma Vs. Aribam Pishak Sharma and Others*** reported in **(1979) 4 SSC 389**, the Supreme Court of India, it was held as under :-

> *" It is true as observed by this Court in Shivdeo Singh V. State of Punjab, there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of*

the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate powers which may enable an appellate Court to correct all manner of errors committed by the subordinate Court."

24. This Tribunal in R.A. No. 1 of 2010 passed in Petition No. 40 (C) of 2009 opined :-

"*A review is not an appeal in disguise. A petition for review would be maintainable inter alia when there is an error apparent on the face of the record. Even any other sufficient reason would mean a reason sufficient on grounds which is at least analogous to those specified in Rule 1 of Order 47 of the Code of Civil Procedure."*

Recently in R.A. No. 2 of 2011 in Petition No.205(C) of 2009 SCOD 18 Networking Pvt. Ltd. Vs. Sahara Sanchar Ltd. and Anr. and R.A. No. 1 of 2011 in Petition No.245 (C) of 2009 Hathway Cable & Datacom Ltd. Vs. Sahara Sanchar Ltd. & Anr, it was held :-

" 11. The learned Senior Counsel urged that a judgment and decree passed by this Tribunal in appeal lies before the Supreme Court of India only on a substantial question of law and in that view of the

matter, the Review jurisdiction should be exercised liberally. We do not agree. If by reason of a Statute, no provision for an appeal on fact has been provided for by the Parliament in its wisdom or a limited appeal has been provided for, the same by itself would not imply that the power conferred on a Court of Law and/or any other authority should be treated to be arbitrary or ultra vires Article 14 of the Constitution of India. It has been so held by the Supreme Court of India in Organo Chemical Industries Vs. Union of India 1979 Vol. 4 SCC page 573 in the following terms :-

> *"15. In this connection, it was also urged that the absence of any provision for appeal, leaves the defaulting employer with no remedy. The conferral of arbitrary and uncontrolled powers on the Regional Provident Fund Commissioner to quantify damages, it is said, without a corresponding right of appeal or revision makes the provision contained in Section 14-B per se void and illegal and it is liable to be struck down on that ground. We are afraid the contention is wholly devoid of substance. Mere absence of provision for an appeal does not imply that the Regional Provident Fund Commissioner is invested with arbitrary or uncontrolled power, without any guidelines. The conferral of power to award damages under Section 14-B is to ensure the success of the measure. It is dependent on existence of certain facts; there has to be an objective*

determination, not subjective. The Regional Provident Fund Commissioner has not only to apply his mind to the requirements of Section 14-B but is cast with the duty of making a "speaking order", after conforming to the Rules of natural justice.

16. This Court has repeatedly laid it down that where the discretion to apply the provisions of a particular statute is left with the Government or one of the highest officers, it will be presumed that the discretion vested in such high authority will not be abused."

12. It is, however, true that in terms of Section 16 of the Telecom Regulatory Authority of India Act, 1997, this Tribunal is not bound by the procedure laid down by the Code of Civil Procedure. Although this Tribunal can regulate its own procedure, it is now trite that ordinarily it would be governed by the principles contained in the Code. Even otherwise, the power of review, it is well known, cannot be equated with an appellate power.

…

14. This Tribunal in R.A. No. 1 of 2010 (Interconnection Cable Communications Pvt. Ltd. Vs. M/s. Zee Turner Ltd. & Others) opined :-

"A review is not an appeal in disguise. A petition for review would be maintainable inter alia when there is an error apparent on the face of the record. Even any other sufficient reason would mean a reason

sufficient on grounds which is at least analogous to those specified in Rule 1 of Order 47 of the Code of Civil Procedure.

In Sow Chandra Kante and Another Vs. Sheikh Habib – 1975(4) SCC 674, it has been held as under :-

> *"A review of judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial falliability. A mere repletion, through different counsel of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient."*

15. It is a trite law that the general principles laid down in the Code of Civil Procedure should be applied even by a Tribunal in the absence of special provision or circumstances. A departure can be made by this Tribunal only if an exceptional case is made out and not otherwise.

The Parliament by reason of Code of Civil Procedure Act (Amendment Act) in 1976 had added an 'Explanation' whereby the power of review has further been curtailed."

25. The conduct of a Review Applicant may although not be very relevant for the purpose of refusing to exercise the Tribunal's jurisdiction in its favour but the same in our opinion is relevant

for the purpose of considering the backdrop of events in which the judgement had been delivered and the review application has been filed.

26. The learned counsel for the parties have made detailed submissions on merit of the matter. We are however, not concerned therewith in this Review Application. Suffice however, it to notice that according to respondent which would also appear from the chart supplied by it that the review applicant has even not paid unto the respondent the amount of Rs.6.5 lakhs per month which it was directed to do.

27. Before us a story was presented as if petitioner, from the largest MSO operating in the State of Assam, has turned out to a small cable operator having a subscriber base of 849 only which having regard to its attempt to bring on records some other documents would make the subscriber base even lower. The review applicant never denied or disputed that its subscriber base with 'Star' was 30,000. There appears to be some controversy as to whether its universe exceeded 1,00,000 subscribers but the fact that negotiated subscribers base was 30,000 was not disputed in fact it is the contention of the review applicant that the same had come down to about 12,000 even in this application there is a discrepancy in the number of

subscribers i.e. whether it is more than 12,000 or less than the same. Faced up with the said situation, Mr. Srinivasan submitted in its M.A. the review applicant at least had stated that from May, 2010 onwards the subscriber base has reduced to less than 50% so far as the Star Den is concerned.

28. Mr. Singh would urge that even in the SLR furnished, so far as respondent is concerned, the subscriber base of the largest local cable operators who happened to be the partners of Assam Cable have not been shown. According to Mr. Singh, Dolly Cable itself had about 42,000 subscribers in its network besides others. So far as ESPN is concerned Mr. Singh submitted that it had entered into contract with some local cable operators directly.

29. While determining the question as to whether the review application should be entertained or not in our opinion, the said controversy need not be determined at present. We only intend to point out that there were sufficient legal and factual materials for arriving at the said conclusion.

30. The decision on the figure of 30,000 was only for the purpose of Restitution. The said figure has been arrived at keeping in view the conduct of the petitioner vis-à-vis its

contention that its subscriber base had come down to 849 and if that was to be considered alongwith its contention that some other LCOs had even then gone out of its network, its subscriber base would have become Zero.

31. Even in the said M.A. No. 234 of 2010, the petitioner did not provide for the exact subscriber base vis-à-vis its new numbers even in this petition. It contended that for Bouquet-I of 'Star' its subscriber base was 12,462. Moreover, it had not complied with even the interim order passed by this Tribunal.

32. This Tribunal, however, while directing Restitution did not leave the petitioner at the mercy of respondent. It was allowed to bring any subsequent event to the notice of respondent for the purpose of entering into a fresh negotiation. It was on that premise only respondent was asked to enter into a negotiation with open mind and keeping in view the ground realities, its only with that intend and view the parties had met when the petitioner's representative had assured the representative of the respondent to pay the entire amount. It is interesting to note, however, that before Hon'ble Supreme Court of India, a statement was made that it had no money to pay. An offer was made for payment of a sum of Rs. 20 lacs only.

33. Mr. Srinivasan would contend that this Tribunal had taken into consideration the subsequent application filed by the respondent. The said application was filed after the judgment was reserved. A copy of the said agreement had been served upon the counsel for the petitioner. Nobody had appeared on behalf of the petitioner. Be that as it may, only the contentions of the respondent have been noticed by this Tribunal without considering the effect thereof. The amount payable to the respondent is yet to be worked out. It is not stated before us that the calculation made by the respondent is wrong.

A specific ground has been raised and in fact a comment was made by Shri Ramji Srinivasan that this Tribunal has not considered the evidence of Shri Raghvendra Singh which might not have been done keeping in view the other materials which were on the record and in any event we cannot go into the merit of the matter. The same does not constitute an error apparent on the face of the record.

We really fail to understand as to how in a review application some other new materials can be brought on record which is sought to be done by the petitioner as for example that the network of Nirman Associates having taken over by some of the LCOs of the petitioner without even stating that those facts were not known to it earlier.

34. Be that as it may, a Review Application may be entertained interalia on the ground of existence of other sufficient reasons. While determining the question, the Tribunal may take note of the hardship which may be faced by the applicant as a measure of doing complete justice to the parties.

Moreover, review of a judgment need not be kept confined to the error apparent on the face of the record or discovery of new and important matter or evidence which despite due diligence was not within the knowledge of the petitioner.

In this case this Tribunal has not refused to consider the difficulties of the petitioner in the matter of entering into a new agreement, which would be evident from the concluding part of the judgment.

The only question which would arise is as to whether we should allow the decree to remain operative so as to bind the petitioner to pay a sum of about Rs. 6 Cr. 45 Lacs (exclusive of taxes) from April, 2010 till further orders despite observations made in our Judgement dated 28.4.2001.

We, therefore, are of the opinion that an opportunity should be granted to the petitioner on the limited question of its subscriber base during pendency of the petition.

35. We are, however, of the opinion that the petitioner must pay unto the respondent the arrears of subscription fee in terms of the interim order(s) of this Tribunal. The respondent must comply with the interim orders passed by this Tribunal and furthermore also deposit a sum of Rs. One Crore within two weeks from date.

It will be open to respondent keeping in view the fact that the petition has been dismissed to discontinue supply of signals to the network of the petitioner's network. In the event, however, respondent continues to supply signals of its channels to the petitioner's network, petitioner must pay up to the respondent at least a sum of Rs. 10 lakhs per month.

36. This order is being passed by us in exercise of our jurisdiction under Section 151 of the Code of Civil Procedure without prejudice to the rights and contentions of the parties and subject to any other or further order that may be passed by this Tribunal.

It is made clear that in the event this review application is dismissed, the petitioner would be bound by the directions of this Tribunal and/or any other or further order which may be passed.

37. Keeping in view a binding decision has been rendered in terms whereof the petitioner would be bound to pay a huge amount, we are of the opinion that a limited notice of review viz. the subscriber base of the petitioner to 30,000 during pendency of the petition may be issued.

Let reply on the said issue be filed within two weeks. Rejoinder thereto two weeks thereafter.

Put up the matter for hearing on 02.9.2011.

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(S.B. Sinha)
Chairperson

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