TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Petition No. 111 (C) 2011 & 176 (C) of 2011
and
Petition No.136 (C) of 2011

Dated 7th July, 2011

Petition No. 111 (C) 2011 & 176 (C) of 2011

Hotel Airlines International ... Petitioner

Vs.

Telecom Regulatory Authority of India ... Respondent

Petition No. 136 (C) of 2011

Gaylord Restaurant and Ors. ... Petitioners

Vs.

Telecom Regulatory Authority of India ... Respondent

BEFORE:

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

For Petitioner : Mr. Ramji Srinivasan, Sr. Advocate
Mr. Arjun Garg, Advocate
Ms. Rukhmani Bobde, Advocate
Mr. Debojyoti Bhattacharya, Advocate
Mr. Zeyaul Haque, Advocate
Mr. Sameer P Parekh, Advocate
Ms. Sonali Basu Parekh, Advocate

For Respondent (TRAI) : Mr. Saket Singh, Advocate

For Respondent (ESPN)	: Mr. N. Ganapathy, Advocate Mr. Kartik Yadav, Advocate
For Respondent (MSM Discovery)	: Mr. A.C. Mishra, Advocate Mr. Jasmeet Singh, Advocate Mr. Sheeva, Advocate Mr. Mazag Andrabi, Advocate
For Respondent No.3 (Novex)	: Mrs. Meenakshi Ogra, Advocate Ms. Kanika Sharma, Advocate Ms. Shilpi Chowdhry, Advocate

J U D G E M E N T

S. B. Sinha

Introduction

An important question relating to interpretation of some of the provisions of the Telecommunication (Broadcasting and Cable Services) (2nd) Tariff (7th) Amendment Order, 2006 and Telecommunication (Broadcasting and Cable) Services (3rd) (CAS Areas) Tariff (1st Amendment) Order, 2006 ('The Tariff Orders'), including that of the 'Explanation' appended to Clause 2 (f) thereof is involved in these petitions.

The Parties herein

2. The petitioners, in the first case who are six in number consist of 'Hoteliers' and the Hotel and Restaurant Association of Western India.

In the second case, three restaurants are before us as petitioners besides the Hotel and Restaurant Association of Western India.

The respondent No.1 is the 'Regulator' within the meaning of the provisions of the Telecom Regulatory Authority of India Act, 1997.

The respondent No.2 in each of the cases are Broadcasters.

The respondent No.3 in each of the cases are the distributor/agent of the broadcasters.

Background Facts

3. The Hotel Association of India has filed a petition before this Tribunal in the year 2005 questioning the demands of the broadcasters charging higher fees. The said matter was carried to the Supreme Court of India.

In its judgement and order dated 24th November 2006, the Apex Court opined that the issues raised by the parties thereto should be considered afresh by this Tribunal.

The decision of the Supreme Court of India is reported in (2006) 13 SCC 753.

In that case, the locus standi of the Association to represent their members before this Tribunal as also the Supreme Court of India was upheld.

Upon remand, the said Petition No. 80 (C) of 2005 was disposed of by this Tribunal by an order dated 10.09.2007, holding :-

"That remanded Petition No. 80 (C) of 2005 was finally disposed of by this Hon'ble Tribunal on 10.9.2007. Relevant extract is given below :-

> *"We make it clear that the members of the petitioner Association will be free to have arrangements for supply of signals with Cable operators whom they choose for which purpose they will be free to enter into fresh arrangements as they may be advised."*

4. A Review Application was filed thereagainst by ESPN, which was marked as R.A No. 16 of 2007. With some observations, the said Review Application was dismissed by this Tribunal.

The respondent No.2 in each of these cases filed appeals before the Supreme Court of India, which have been admitted for consideration but no order of stay has been passed.

5. We may, at the outset, notice that the respondent No.2-broadcaster had entered into internal arrangements for retransmission of channels to the Hotels and Restaurants belonging to petitioners herein (other than the Association), principally through two or three Multi Service Operators who have a Pan India presence.

The cause of action for these petitions are said to be the letters of demands issued by their broadcasters/their authorised representatives asking them to pay charges in addition to the subscription charges which

are being paid to the respective cable operators/MSOs by petitioners during 2009-2011.

They furthermore received notices from the distributors/agents of the broadcasters calling upon them to obtain licenses and payment of tariffs on mutually agreed terms.

By reason of the said notice, it was inter alia contended :-

> *"7. That my client further states that neither any cable operator, DTH/PTV service provider nor any person running hotel, restaurant, pub, bar and such other commercial establishment is authorized to receive and transmit signals of aforesaid Channels through any means in any hotel, restaurant, pub, bar and such other commercial establishment, without obtaining a licence in this regard from them.*
>
> *8. That it has been distressing to my client to find that despite knowledge, you have neither shown any interest to obtain licence nor have you stopped receiving and transmitting/communicating signals of aforesaid channels of my Client in your restaurant/premises.*
>
> *In the circumstances, I call upon you to*
>
> *(a) Immediately cease and desist from receiving and displaying signals of aforesaid Channels;*
>
> *(b) Immediately contact distributor of my client Novex for obtaining licence required to receive and display aforesaid Channels;*
>
> *(c) Give an undertaking that you shall not receive and display aforesaid channels in your restaurant premises without*

valid licence and payment of tariff (the terms of which can be mutually arrived at), and

(d) To pay for the illegally receiving and displaying aforesaid channels in your restaurant premises and acts of infringements committed by you, immediately on receipt of this letter, failing which my Client may be in painful necessity to initiate appropriate legal proceedings against you, directors and all other responsible persons of a company which is owner of said restaurant without any further notice and in that case you and your company shall be further liable for all cost and consequences thereof which may please be noted very carefully."

6. A public notice was also issued on or about 4th May 2010, stating :-

"ATTENTION : HOTELS & COMMERCIAL ESTABLISHMENTS
PLEASENOTE THAT ESPN SOFTWARE INDIA PVT LTD ("ESIPL") HOLDS THE SOLE AND EXCLUSIVE RIGHTS TO BROADCAST AND DISTRIBUTE ESPN, STAR SPORTS & STAR CRICKET PROGRAMMING ("CHANNELS") IN THE TERRITORY OF INDIA.
This is to caution all Hotels and Commercial establishments that broadcasting/distribution/reception/viewing of the Channels in India, without authorization from ESIPL is illegal. Further, please note that carriage/reception/distribution of the Channels by any MSO/Cable Operator/Sub-Operator/DTH Operator/IPTV operator without written authorization from ESIPL having its corporate office at 7th Floor, Tower-C, Infinity Towers, DLF Phase-II, Gurgaon-122002 and its registered office at S-405 (LGF) Greater Kailash Part-II, New Delhi-110048 is a violation of copyrights and hence an illegal activity. If any person(s), entitles are found to be resorting to such activities, legal action shall be initiated against such person(s)/entities.

ESIPL reserves the right to take all necessary and appropriate steps to prevent such unauthorized and illegal use of the Service."

Some of the respondents replied to the said legal notice denying and disputing the said demands contending that they form part of the protected category of subscribers in terms of the notification dated 21.11.2006 issued by the TRAI.

The petitioners, on the aforementioned premise, have filed these petitions.

7. We may notice the reliefs prayed for by them in the first matter :-

"(i) declare that all restaurants and all hotels except for the categories mentioned in the notifications dated 21.11.2006 are entitled to pay cable subscription charges as per the price ceiling fixed by the TRAI from time to time for CAS and Non CAS areas as the case may be;

(ii) Pass an order permanently restraining the respondents by themselves or through their agents/ authorized representatives from demanding cable subscription charges from the Petitioners higher than the price ceiling fixed by the TRAI from time to time;

(iii) Pass an order, permanently restraining the respondents by themselves or through their agents/ authorized from taking any coercive action against the Petitioners for non payment of cable subscription charges higher than the price ceiling fixed by the TRAI from time to time."

8. The petitioners, by their letter dated 16 September 2009, stated as under :-

> *"2. We fail to understand as to under what authority you are addressing the said letter under reference and in the absence of the same your said letter under reference has no legal value.*
>
> *3. You are well aware that pursuant to Order dated 10/09/2007 passed by the TDSAT, we are entitled to take cable feed from any cable operator/s of our choice. Therefore, the question of your authorized Cable operators does not concern us at all. However, by our letter dated 12th September 2009, we have already furnished to you the name address and contact no. of local cable operator. You may take up the issue with the Cable Operator of our establishment, and we deny you claim of alleged his/her right.*
>
> *4. Also please note that our Hotel consist of 27 rooms only and, therefore, having regard to the latest tariff order of TRAI, your letter under reference, demands are illegal.*
>
> *5. We deny that we have conspired with the Local Cable Operator, as is alleged or otherwise.*
>
> *6. So far as your threats of prosecution under Copyright Act is concerned, the same is in any event subject to you establishing your rights, which please note. As regards allegations of theft of signals is concerned, the same is totally baseless having regard to the fact that all the cable feed is provided to us by the local cable operator on payment of monthly subscription charges.*

7. Without prejudice to what is stated hereinabove, we have to state that you and or the Broadcasters may take up the issue of blocking the said channels, as mentioned in your letter under reference and ensure that the local cable operators does not give us the feed thereof. This is subject to you establishing your exclusive ownership of any Copyright alleged by you or at all."

9. It is pertinent to note that respondent No.3 issued a notice on or about 21.09.2009, the relevant portions whereof read as under :

"4. We would further like to draw your attention to our letter with regard to our status and to whom we represent. Your cable operator is authorized to distribute signals of aforesaid channels only to home viewers and does not have any authorization for commercial establishments.

5. We further state that inspite of asking us to disclose our identify and/or authority to addressing notices to you, you better question your cable operator who admittedly distributing signals of channels of aforesaid company in your hotel premises has been authorized or not?

6. If your cable operator is of the view that he has got commercial licence or authorization them only we will take the matter with your local cable operator and till then it is you who is committing offence by receiving signals of channels of aforesaid company, contrary to the agreement with cable operator. Further, you have not asked your cable operator to reply to our letter dated 28.08.2009 addressed to you till today.

7. Hence, it is necessary for us to mention that we are authorized distributor of aforesaid M/s. ESPN Software India Pvt. Ltd. which has also published public notices from time to time in the leading news papers throughout India about our authority and warning to all those who are indulging in committing offences under The Copyright Act. A copy of the notice is enclosed herewith, which will show our bonafide representation for aforesaid company. Hence, before asking us, when you admit that you have been receiving signals of channels of aforesaid company from local cable operator after looking into our notices and in this reply please clarify from your cable operator about your unauthorized use of the signals of channels of aforesaid company for using them for commercial purpose and not home viewing purpose.

8. Further, with regard to TDSAT order, we admit that the said order authorizes you to take cable feed from any Cable Operator of your choice. Kindly point out where it is stated that you are authorized to take cable feed from an unauthorized cable operator and commit offence of infringement of broadcast reproduction right/copyright tor theft of signals in the said order.

10. Further, we have clearly furnished all the relevant documents to Mr. V.V. Godgil, Inspector of Police, Social Service Branch, Crime Branch, CID, Mumbai and established our rights.

11. We hope now the matter is clear to you and you will not indulge in infringement of broadcast reproduction right/copyright by receiving signals of channels of aforesaid company for commercial purpose and will also ask your local cable operator as to why he has not replied to our communication dated 16.09.2009, failing which we shall be constrained to initiate appropriate legal proceedings against you and your local cable

operator as per law entirely at your risks and to the costs and consequences, which please note seriously."

10. ESPN, one of the broadcasters before us, in its reply raised a contention that petitioner No.4 has more than 45 rooms. It was furthermore stated that the petitioner No.2 is a restaurant with a capacity of 200 when World Cup matches were being transmitted for viewing by their customers while drinking and dining.

The petitioner No.3 is said to be owner of a restaurant having a seating capacity of 98 and not 68 as claimed by it.

So far as petitioner No.4 is concerned, it is contended that it is having a restaurant with a seating capacity of 168.

It is furthermore contended that the petitioner No. 4 was subject to Entertainment Tax. The further contention of the said respondent is that as a commercial user the said petitioner was liable to pay the commercial charges for utilising the services of the answering respondent.

According to it, under the service contract entered into by and between the said respondent and the MSO, a prohibition exists so far as supply of signals to the commercial establishments is concerned as they are not specifically authorised therefor.

According to it, actions have been initiated to realise the broadcaster's share of revenue which have been denied by the commercial establishments. It is furthermore contended that the intention of respondent was to realise

the appropriate subscription fee from different consumers and not to cause any loss of business or reputation of petitioners.

11. 'MSM Discovery' in its reply contends that apart from 'Hathway' and 'In Cable" they had entered into an agreement with 'CR Cable' also for supply of signals in the concerned areas where petitioners are carrying out their business.

We may, however, notice the following :-

> *"13. That the contents of para 5 of the petition are admitted to the extent that the protected hotels and restaurants are only liable to pay tariff to the broadcasters/cable operators as fixed by TRAI from time to time and that under the notification dated 21.11.2006 the protected category of the hotels, restaurants, etc. are not required to pay anything over and above what is payable by any ordinary (non-commercial) subscriber to the broadcasters or their agents.*
>
> *14. That the contents of the para 6 of the petition are denied as incorrect. It is submitted that in the year 2009 it came to the knowledge of the answering Respondent that several commercial establishments such as hotels, restaurants, bars, hospitals, etc. were openly telecasting the channels of the Respondent herein without the requisite license. In pursuance thereof, the answering Respondent published a notice in the newspaper called 'Mid-Day' on 24.04.2009 informing all such commercial establishments about the requirement of the license. However, a number of commercial establishments ignored the said notice and continued to telecast the channels of the answering Respondent without the*

requisite license and this came to the knowledge of the answering Respondent recently. Thereafter, the answering Respondent, through its distributor 'Novex Communications Pvt. Ltd.', addressed letters to, inter alia, the Petitioners herein requesting them to refrain from indulging in unauthorized telecasting of the channels of the broadcasters and to obtain proper authorization/copyright license from the answering Respondent. It is denied that any threats were given to any of the commercial establishments.

17. The answering Respondent has initiated action to realize their revenues which was being denied to them by commercial establishments acting hand in glove with MSO's/LCO's. The answering Respondent has issued notices only to those establishments which despite being covered by the Tariff Notification of 21.11.2006 are resorting to avoiding the same. It is submitted that the notices were served upon the Petitioners, amongst others, solely with the intention of bringing to their knowledge the fact that they are required either to obtain a license from the answering Respondent or to get signals from an authorized MSO/LCO for the purpose of telecasting the channels of the answering Respondent."

12. It furthermore contended :-

1. All the petitioners belong to the category of 'Commercial Cable Subscribers' as laid down by the TRAI through its notification dated 07.03.2006 and as such were required to obtain supply of signals only

from a MSO duly authorized by a broadcaster therefor to the commercial subscribers.

2. The petitioners have continued to telecast its channels illegally and thereby causing huge loss of revenue and business to them despite being aware of the said public notice dated 20.04.2009.

3. It is implicit that 'Cable Operators' referred to in the Order of this Tribunal dated 10th September, 2007 in Petition No. 80 (C) of 2005 would only mean those cable operators who are duly authorized therefor by the broadcasters.

It is, however, admitted that the hotels and restaurants which come within the purview of the protected category as laid down by the TRAI in its notification dated 21.11.2006 are not required to pay anything over and above what is payable by any ordinary (non-commercial) cable subscriber to the Broadcasters or their agents.

It is further stated in the reply of 'MSM Discovery' that it had issued notices only to those establishments which despite being covered by the Tariff Notification of 21.11.2006 are resorting to avoiding the same and that they were issued solely with the intention of letting petitioners know that they were required either to obtain a license from respondent No.2 or to get signals from an authorised MSO/LCO for the purpose of telecasting the channels of the answering respondent.

13. The TRAI in its reply has categorically stated that need to amend the Tariff Order dated 24.03.006 arose when it came to know that some commercial establishments were exploiting the provisions of Clause 3A as inserted by the Amendment Tariff Order dated 07.03.2006 to receive and exhibit cable TV services without a valid license in an unauthorised manner. It was only to cover the said cable operators that the Amendment dated 07.03.2006 was carried out.

It, in no uncertain terms stated that for all commercial establishments other than the category of commercial cable subscribers consisting of Hotels with a rating of three star and above, the ceiling shall be the charges as prevailing as on 26.12.2003 and only for special events in the public viewing area, was to be as per mutual agreement. It has been stated that the Tariff Order dated 21.11.2006 are applicable to the present case.

Questions

14. The questions which arise for our consideration are :-

1. Whether the respondent No.2 can levy any additional charge on the petitioners who come within the purview of the protected category of commercial subscribers?

2. Whether the broadcasters are justified in taking action against the petitioners for receiving signals from LCO's/MSOs to whom the prescribed carriage charges are being paid?

3. Whether the broadcasters having admittedly been supplying signals to the MSOs/LCOs with full knowledge that the same are being transmitted to petitioners without taking any action against them were entitled to take any independent action against petitioners?

4. Whether keeping in view the statutory regime, the broadcasters should have informed the subscribers as to who were their authorised LCOs/MSOs in their respective areas?

5. Whether the restaurants, which are neither registered under the Entertainment Tax laws nor were charging their customers separately for view of the cable televisions in their premises, are liable to pay anything higher than the other protected category of customers?

Appreciation of Evidence Brought On Record

15. The respondents in support of their case examined witnesses.

Mr. Joel Nash was examined on behalf of ESPN and Mr Amar Trivedi was examined on behalf of 'MSM Discovery'.

We may notice the relevant statements from the cross-examination of Mr Joel Nash in extenso as his evidence in this regard is crucial :-

> *"Both Hathway and In Cable were appointed as MSOs for the first time in or around the year 1998.*
>
> *An annual agreement is signed which is renewed every year.*

Sometimes we sign a contract and sometimes we sign MOUs.

I do not know and need to check if a service contract was signed as per clause 9 of Ex. R-1.

Since 1998 there has always been a clause in our agreement with Hathway and In Cable excluding hotels and commercial and other establishment.

Broadly a commercial establishment referred to in our agreement is anybody who is not a domestic user but exploits the signals commercially.

Q: In your view, would hospitals, clubs, airports and restaurants constitute commercial establishment?

A: I need to check.

Q: When did you for the first time become aware that Hathway and In cable were supplying signals/feed to hotels/commercial establishments?

A: In the year 2003.

Q: Did you treat this as a breach of contract and did you send any notice of breach or notice of termination to Hathway or Incable?

A: Yes.

Q: Are you suggesting that you terminated the contract of Hathway and Incable in 2003 or thereafter when you found out that they are supplying feed to hotels and commercial establishment?

A: We did not terminate them and made separate agreements with them with a clause that hotels and commercial establishments would not be served in the same contract and they would have to pay separately.

Q: After that did Hathway and Incable continue to supply to hotels and commercial establishment despite such an agreement?

A: Yes, they have continued to and in certain cases they have paid for it."

"Q: When did you become aware that Hathway and Incable were supplying feed to petitioner's no. 1 to 6?

A: Mid of 2010.

Q: Have you taken any action against Hathway and Incable for supplying signals to petitioner's no. 1 to 6 after you become aware of the same in the mid of 2010?

A: Yes, we have written letters to the same effect.

Q: What action did they take in response to your notice? Is it correct that they continued to supply the feed?

A: there was no action taken.

Q: Have you initiated any steps to terminate Ex. R-1 to R-6 after the two MSOs refused to take any action?

A: No.

I agree that petitioner no. 2 and petitioner no. 5 were respectively church Gate and Fort area are in CAS area and Ex. R-2 and R-5 do not relate to them since these are for non CAS areas.

I say that there are no cable operators in the areas where petitioner's no. 1 to 6 are located were authorized to supply signal to them.

VOL. We have authorized Hathway and Incable to authorize restaurants and hotels to view the channels in the areas where petitioner's no. 1 to 6 are located.

Q: Please tell us the basis for your statement in your affidavit that petitioner's No. 1 to 6 are subject to entertainment tax?

A: This is our feeling.

Q: Can you tell us the rate a two star hotel is required to pay you for getting signals for ESPN, Star Sports and Star Cricket in Non CAS areas?

A: Cable home rate. Its around Rs. 72/- for all the three channels.

Q: what is cable home rate and do you publish it?

A: IT is available on the website.

Q: Can you tell us the rate a five star hotel is required to pay you for getting signals for ESPN, Star Sports and Star Cricket in Non CAS areas?

A:Rs. 250/- uniformly.

Q: Can you answer the same question for two star and five star in CAS areas?

A: It is the same.

Q: If a two star hotel wishes to take the ESPN channel from a local cable operator, what is he required to do?

A: They would pay the LCO the service charges for providing the signals and pay to us for the subscription charges separately.

Q: For the subscription fees, do you enter into a separate agreement?

A: Yes."

"Q: Can you give us the names of all the commercial establishments who are not hotels or restaurants against whom you have taken action for taking feed without paying ESPN?

A: Off and on I do not remember but I assure that information will be provided.

Q: I suggest to you that ESPN has not taken action against any commercial establishment apart from hotels and restaurants?

A: I disagree.

Q: Is it correct that you do not charge subscription charges from domestic/residential viewers but you charge them from all commercial subscribers?

A: The statement itself is wrong. We charge both commercial subscribers as well as domestic subscribers.

Q: Are you suggesting that domestic/residential viewers pay service charge to the cable operator and subscription fee separately to ESPN by your last answer?

A: As far as the home subscriber is concerned, he pays inclusive to the operator.

Q: Can you explain why you do not charge a similar inclusive rate from commercial subscribers for both service charges and subscription fees?

A: As mentioned earlier, a commercial establishment exploits the services provided for profits unlike residential home and therefore there is a difference.

Q: Is it correct that you make no distinction as far as charges are concerned between hotels which are three star and above and those which are two star and below?

A: We go as per TRAI guidelines.

Q: So do you make a distinction or not between these two categories?

A: We do not make any distinction, we go by guidelines.

Q: Do you charge the same amount from these two categories of commercial subscribers? Please give the answer in rupees or in figures?

A: As per TRAI guidelines given to us we are charging the two star and below the cable home rate and a five star property we charge Rs. 250/-."

Mr. Trivedi, in his cross examination stated :-

"I do not remember when Hathway and Incable were originally appointed by us.

Incable and Hathway are MSOs who operate across Mumbai, within certain limitations.

They have been our MSOs for number of years and every year we sign a new contract with them.

It is correct to say that we have had agreements with Hathway. These agreements are for analog and not for commercial subscribers.

There is no reason why we have not filed any agreement with Hathway. However, we can provide the same.

(Ld. Counsel for the petitioner calls upon the witness to produce any agreement with Hathway.)

The witness states that he can produce the standard terms of agreement, short of commercial terms.

Hathway is also our MSO today."

"Please see Clause 3.1 of the agreement on page 5 of 12 where it states "Except as otherwise provided in this agreement….". I suggest to you that there is no absolute prohibition in this agreement against supplying signals to commercial establishments.

A. There is a prohibition. Affiliate cannot deliver signals to commercial establishments."

"Around mid of December 2010, we became aware that Hathway and Incable wee supplying feed to commercial establishments.

Q: Please see para 4 of your affidavit. Your notice dated 20.4.2009 did it relate to Hathway and Incable in any manner?

A: It was related to Hathway and Incable.

Q: Is it correct that prior to 20.4.2009, you were aware that Hathway and Incable were supplying signals to commercial establishments?

A: It is correct.

Q: Did you take any steps to terminate the agreements with Hathway and Incable if they were supplying feed to commercial establishments, after you found out about the same prior to 20.4.2009?

A: No, we did not take any steps.

Q: Is it correct that despite Incable supplying feed to commercial establishments which you say was contrary to your agreement, you signed a fresh agreement in the year 2010?

A: Yes, we have signed.

Vol. We are in negotiations with the MSO for getting into the

commercial agreement. This is an analog agreement and we are into negotiation for a commercial agreement.

Q: Please tell me the charges for CAS and non CAS areas for supplying your channels for say a Five Star and a One Star hotel?

A: It is available on TRAI website."

"Q: Do you charge anything for signing such a commercial agreement and can you produce a sample agreement?

A: Yes, we charge and I can produce a sample agreement without any commercials.

Q: Can you tell us how much do you charge for signing a commercial agreement?

A: We charge as per TRAI regulations.

Q: Between the cable operator and you, do you charge an aggregate figure as per TRAI Regulation or the sum of Local Cable Operator and your charges exceed the TRAI Regulation?

A: I am not aware as to how much LCO is charging and I deal only with MSOs.

Q: IS it correct that you have engaged NOVEX as a collection agent?

A: No, he is not an agent but a distributor.

Q: Is it correct that you pay carriage charges to Hathway and Incable for carrying your channels solely as part of Basic Services?

(Ld. Counsel for respondent no. 2 i.e. MSM Discovery objects being irrelevant.)

A: I am not aware of it.

Q: Can you give us any reason why you have not taken steps

to terminate the agreements with Hathway and Incable, if you believe that they are in breach of contract for supplying signals to commercial subscribers without your consent?

A: We are in negotiations with Hathway and Incable.

Vol. Whatever agreements we are signing with them, they do not relate to the present petitions.

Q: Do you make a distinction between hotels which are Three Star and above and below Three Star, while signing commercial agreements with such hotels, if so, can you tell us the distinction?

A: The distinctions are available on TRAI Website.

Q: I suggest to you that Hathway and Incable are entitled to supply feed to commercial subscribers?

A: I disagree.

Vol. We are in a process of negotiations with Hathway and Incable for commercial agreements for the specific list provided by them and approved by us."

Mr. Joel Nash, therefore, admitted that despite knowledge that 'Hathway' and 'In Cable' which have a Pan India operation that they, in relation to some circles at least, have been retransmitting signals to commercial consumers without any authority in this behalf but no action has been taken against them, although it was at one point in time, the same was contemplated.

16. The contracts with the said MSOs have been renewed without any demur, whatsoever. They have been continuing to do so since 2003.

Although the respondent's witnesses undertook to file relevant documents, they did not do so.

17. From their evidence it is clear that at least 'ESPN' has authorised 'Hathway' and 'In cable' to supply signals of its channels to Restaurants and Hotels in the areas where Petitioners are located.

In answer to a query as to on what basis the said witness had stated that Petitioner No.4 was subject to entertainment tax, Mr. Nash stated :-

"This is our feeling"

There is an admission on the part of the said witness that so far as petitioners are concerned, the cable home rate would be Rs. 72/- for all channels; whereas the rate for the five star hotels would be Rs. 250/- uniformly.

It is really surprising that despite his knowledge with regard to the 'Tariff Orders', he contended that petitioners are required to pay the service charges which, in turn, would be paid to the Broadcasters.

He has not filed any document to show that any action had been taken against the MSOs for supplying feed without paying to ESPN by the commercial establishments.

He, at a later stage of his evidence accepted that the home subscribers do not have to pay any service charges.

Mr Tiwari also accepted that the agreement with the MSOs had been entered into/renewed without any demur for analog subscribers although according to him they were not authorized to do so for commercial subscribers.

He, despite his assurance before this Tribunal, has not filed any agreement with 'Hathway'. Even the standard terms of agreement has not been filed.

He also accepted that no step has been taken against the MSOs for supplying feed to commercial establishments. Despite his knowledge, he also accepted that fresh agreements are also being entered into with the said MSOs.

According to him, negotiations had been going on for entering into commercial agreements.

He, however, evaded answers to many questions with regard to the rate and tariffs stating that they are on the website. He was unable to answer the question, when he was called upon, as to what are the figures of fixed charges so far as the 'ordinary consumers' and 'commercial consumers' are concerned.

He, did not answer a question as to the basis and condition of commercial agreements, which according to him, would be applicable to the Airports, Clubs, Malls, Hospitals etc., where signals of their channels are being transmitted.

He did not, despite an assurance, produce a sample copy of the agreement without any commercials.

When asked as to whether any step had been taken to terminate the agreement with 'Hathway' and 'In cable', he merely stated that they were having negotiations with 'Hathway' and 'In Cable'.

From the evidence of the witness of the respondent, it is therefore, clear that the petitioners were being asked to pay additional charges to which they were not liable to pay.

The Tariff Orders

18. The TRAI, while issuing an ad hoc tariff order as far back as on 01.10.2004, sought to make a distinction between an 'ordinary cable subscriber' and 'commercial cable subscriber'. Prior to making of the said order, the broadcasters were free to levy any charge subject to negotiations between the parties so far as the cable subscribers are concerned.

The TRAI, however, by reason of the said 'Tariff Orders' took an affirmative action by prescribing rates for the broadcasting and cable services and, thus, bringing them within the regulatory regime.

19. The 'Tariff Orders', as the names suggest, provide for control and/or Regulation over the tariff packages for Non-CAS and CAS areas respectively.

20. We may, however, notice the Tariff Order relating to Non-CAS areas. There is, however, one marked difference between the two orders viz. that preceding the 'interpretation section' insofar as in the Tariff Order applicable to the CAS areas is concerned, it provides, *'In this order unless the context otherwise requires'* which words do not appear in the 'Tariff Order' for the Non-CAS areas.

The Tariff Order was made on or about 1st October 2004, that is almost immediately after the 'Broadcasting and Cable Services' were notified by the Central Government as 'Telecommunication Services' within the meaning of the proviso appended to the Section 2(k) of the Telecom Regulatory Authority of India Act, 1997 ('the Act').

Whereas the first order applies throughout the territory of India except States, Cities, Towns and areas notified from time to time under section 4A (1) of the Cable Television Networks (Regulation) Act, 1995, the second order applies to CAS Areas which have been declared as such by the Central Government in exercise of the said provisions.

History of the Tariff Order

21. We may, at the outset, notice the 2004 order, the relevant provisions whereof are as under :-

> *"In exercise of the powers conferred by paras (ii), (iii) and (iv) of clause (b) of sub-section (1) and sub-section (2) of section 11 of the Telecom Regulatory Authority of India Act, 1997, read with*

the Notification No. 39 {S.O. No. 44 (E) and 45 (E) dated 09-01-2004} issued by the Central Government, the answering respondent made on 1.10.2004 a tariff order namely the Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order 2004 (6 of 2004) (hereinafter referred to as the 'principal tariff order')

Clause 3 of the said principal tariff order provided as follows:-

> *"…… 3.Tariff:*
>
> *The charges , excluding taxes, payable by*
>
> *(a) Cable subscribers to cable operator;*
>
> *(b) Cable operators to multi system operators/ broadcasters (including their authorised distribution agencies); and*
>
> *(c) Multi system operators to broadcasters (including their authorised distribution agencies) prevalent as on 26th December 2003 shall be the ceiling with respect to both free-to-air and pay channels.*
>
> *Provided that if any new pay channel(s) that is/are introduced after 26-12-2003 or any channel(s) that was/were free to air channel on 26-12-2003 is/are converted to pay channel(s) subsequently, then the ceiling referred to as above can be exceeded, but only if the new channel(s) are provided on a stand alone basis, either individually or as part of new, separate bouquet(s) and the new channel(s) is/are not included in the bouquet being provided on 26.12.2003 by a particular broadcaster. The extent to which the ceilings referred to above can be exceeded would be limited to the rates for the new channels. For the new pay channel(s) as well as the channel(s) that were free to air as on 26.12.2003 and have subsequently converted to pay channel(s) the rates must be similar to the rates of similar channels as on 26.12.2003:*
>
> *Provided further that in case a multi system operator or a cable operator reduces the number of pay channels that were being shown on 26.12.2003, the ceiling charge shall be reduced taking into account the rates of similar channels as on as on 26.12.2003…..".*

"On 7th March, 2006, an amendment was made to the said principal tariff order namely the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Fourth Amendment) Order 2006, (2 of 2006).

It reads as under :-

"…… 2 (i) In the Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order, 2004 (6 of 2004), under clause 2 after the existing sub-clause (d) and the entry relating thereto, the following sub clauses and the entry relating thereto shall be inserted as sub-clauses (dd) and (ddd), respectively, namely:-

"(dd) 'Ordinary cable subscriber' means any person who receives broadcasting service from a cable operator and uses the same for his/her domestic purposes.

(ddd) 'Commercial cable subscriber' means any person, other than a multi system operator or a cable operator, who receives broadcasting service at a place indicated by him to a broadcaster, multi system operator or cable operator, as the case may be, and uses such signals for the benefit of his clients, customers, members or any other class or group of persons having access to such place.

Explanatory note

The distinction between an ordinary cable subscriber and a commercial cable subscriber is in terms of the difference in the use to which such signals are put. The former would use it for his/her own use or the use of his/her family, guests etc. while the latter would over commercial and other establishments like hotels, restaurants, clubs, guest houses etc. which use the signals for the benefit of their

customers, clients, members or other permitted visitors to the establishment. "

(ii) In the Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order, 2004 (6 of 2004), under clause 2 the following shall be substituted for the existing clause (f)

"(f) 'Charges' means

(i) for all others except commercial cable subscribers, the rates (excluding taxes) payable by one party to the other by virtue of the written/oral agreement prevalent on 26th December 2003. The principle applicable in the written/oral agreement prevalent on 26th December 2003, should be applied for determining the scope of the term "rates"

(ii) for commercial cable subscribers, the rates (excluding taxes) payable by one party to the other by virtue of the written/oral agreement prevalent on 1st March 2006. The principle applicable in the written/oral agreement prevalent on 1st March 2006, should be applied for determining the scope of the term "rates"

"Clause 3 of the Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order 2004, (6 of 2004), the existing sub- clause (a) and the entries relating thereto shall be substituted with the following: -

"(a) Ordinary cable subscribers to cable operator."

In the Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order 2004, (6 of 2004), after the existing clause 3 and the entries relating thereto, the following clause and the entries relating thereto shall be inserted as clause 3A: -

"3A: the charges, excluding taxes, payable by commercial cable subscribers to cable operators, Multi system Operators or Broadcasters as the case may be, prevalent as on 1st March 2006 shall be the ceiling with respect to both free to air and pay channels.

Provided that if any new pay channel(s) that is/are introduced after 1-3-2006 or any channel(s) that was/were free to air channel on 1-3-2006 is/are converted to pay channel(s) subsequently, then the ceiling referred to as above can be exceeded, but only if the new channel(s) are provided on a stand alone basis, either individually or as part of new, separate bouquet(s) and the new channel(s) is/are not included in the bouquet being provided on 1-3-2006 by a particular broadcaster. The extent to which the ceilings referred to above can be exceeded would be limited to the rates for the new channels. For the new pay channel(s) as well as the channel(s) that were free to air as on 1-3-2006 and have subsequently converted to pay channel(s) the rates must be similar to the rates of similar channels as on 1-3-2006. Provided further that in case a broadcaster or multi system operator or a cable operator reduces the number of pay channels that were being shown on 1-3-2006, the ceiling charge shall be reduced taking into account the rates of similar channels as on as on 1-3-2006."

"On 24th March, 2006 made an amendment to the principal tariff order namely the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Fifth Amendment) Order 2006, (4 of 2006). The said amendment provides as follows:-

"After the existing 2nd proviso below clause 3A and the entries relating thereto, the following explanation and the entries relating thereto shall be added:

Explanation 1: For the purpose of clause 3A above the question whether commercial cable subscriber will pay the cable operator/MSO/the broadcaster will be determined by the terms of agreement(s) between broadcasters, MSO(s), Cable Operator(s) or between Broadcaster(s) and the Commercial Cable Subscriber(s) or between MSO / Cable Operator who have been authorized to provide signals to the Commercial Cable subscriber(s), on the one hand, and Commercial Cable Subscriber(s), on the other, as the case may be."

It is stated by TRAI that the need to make the above said provision in the said amendment tariff order dated 24.3.2006 arose from the fact that it was brought to the notice of the answering respondent, by a group of broadcasters, that certain commercial establishments were exploiting the provisions of clause 3A as inserted by the amendment tariff order dated 7.3.2006 to receive and exhibit cable TV services without a valid license and in an unauthorized manner. The spirit and intention of amendment tariff order dated 7.3.2006 was to cover those commercial cable subscribers who were/are provided television signals by those who were/are authorized to provide signals by virtue of agreements. The intention of the said amendment tariff order dated 7.3.2006 was not to promote illegal provision of broadcasting services. To bring clarity to interpretation of provisions of the said amendment

tariff order dated 7.3.2006, an explanation below the 2nd Proviso, of the said tariff order was issued."

"The Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Seventh Amendment) Order 2006 dated 21st November, 2006 made the following amendments to the principal tariff order:-

"….. 2. In the Principal Order, the existing sub-clause (f) of Clause 2 and the entries relating thereto shall be deleted and substituted by the following sub-clause (f) and entries relating thereto;

"(f) 'Charges' means and includes

(i) for all ordinary cable subscribers and commercial cable subscribers except those specified in (ii) below, the rates (excluding taxes) payable by one party to the other by virtue of the written/oral agreement prevalent on 26th December, 2003. The principle applicable in the written/oral agreement prevalent on 26th December 2003, should be applied for determining the scope of the term "rates".

(ii) for hotels with a rating of three star and above, heritage hotels (as described in the guidelines for classification of hotels issued by Department of Tourism, Government of India) and any other hotel, motel, inn, and such other commercial establishment, providing board and lodging and having 50 or more rooms, the charges specified in (i) above shall not be applicable and for these subscribers the charges would be as mutually determined by the parties.

Explanation: It is clarified that in respect of programmes of a broadcaster, shown on the occasion of a special event for

common viewing, at any place registered under the Entertainment Tax Law and to which access is allowed on payment basis for a minimum of 50 persons by the commercial cable subscribers, the tariff shall be as mutually determined between the parties."

3. In the Principal Order, the existing sub-clause (a) of clause 3 and the entries relating thereto shall be substituted with the following sub-clause (a) and entries relating thereto;

"(a) Ordinary cable subscribers and commercial cable subscribers (except hotels with a rating of three star and above, heritage hotels (as described in the guidelines for classification of hotels issued by Department of Tourism, Government of India) and any other hotel, motel, inn, and such other commercial establishment, providing board and lodging and have 50 or more rooms) to cable operators, multi system operators or broadcasters as the case may be"

4. In the Principal Order, after the existing clause 3(c) and entries relating thereto, the following explanations and entries relating thereto, namely

Explanation –1 and Explanation –2 shall be inserted:

"Explanation 1: for the purpose of clause 3(a) above the question whether the commercial cable subscriber will pay the cable operator/multi system operator/the broadcaster will be determined by the terms of agreement(s) between the concerned parties, namely

i) broadcaster(s)

ii) MSO(s) and cable operator(s) who have been authorized to provide signals to the commercial cable subscribers on

the one hand, and the commercial cable subscribers on the other.

Explanation 2 : for the purposes of clause 3(b) and (c) above the charges will be modified to take into account the payments to commercial cable subscribers where appropriate "

5. In the Principal Order, after the existing second proviso below clause 3(c) the following proviso shall be inserted

"Provided further that in the case of a commercial cable subscriber, the charges in respect of whom by virtue of clause 2(f)(ii) read with clause 3(a), is determinable as per mutual agreement between the parties, having facilities to get broadcasting services directly from the broadcaster, the later shall at the option of the commercial cable subscriber be obliged to provide channels on ala carte basis. For such consumers whenever bouquets are offered, these shall be subject to the following conditions:

I. The maximum retail price of any individual channel shall not exceed three times the average channel price of the bouquet of which it is a part;

Explanation: if the maximum retail price of a bouquet is Rs."X" per month and the number of channels is "Y" then the average channel price of the bouquet is Rs. X divided by Y II. The sum of the individual maximum retail prices of the channels shall not be more than 150% of the maximum retail price of the bouquet."

6. In the Principal Order, the existing clause 3A and entries relating thereto shall be deleted….".

22. By means of the said 'Tariff Orders', the Regulator defined separately the subscribers as 'ordinary cable subscribers' and 'commercial cable subscribers' although the parent Act, namely '1995 Act' or the 'Telecom Regulatory Authority of India Act, 1997' ('the Act') do not make any distinction between a 'commercial cable subscriber' and an 'ordinary cable subscriber'.

Interpretation of statutes - Some broad legal principles

23. It is a well settled principle of law that a statute must be read as a whole. It, in the event found to be ambiguous, is required to be given purposive interpretation. The interpretation of a statute should be with a view to find out the intent and object of the maker thereof.

Indisputably, while making the Tariff Orders, the TRAI intended to protect the consumers as a whole. It, although, made a distinction between a 'domestic cable subscriber' and 'commercial cable subscriber', while laying down the provisions of the charges therein, some commercial subscribers have been put at par with the ordinary cable subscribers.

Those, who are taken out of the statutory protection, are specified in 2 (f) (ii) thereof.

Explanation and Provisions

24. 'Explanation' appended thereto merely specifies as to who, apart from those who are in the excepted category, will fall within the purview thereof.

It is now a well-settled principle of law that 'Explanations' and 'Provisos' have more than one function.

In *S. Sundaram Pillai v. V.R. Pattabiraman* reported in (1985) 1 SCC 591 the Apex Court stated as under :-

> *"48. Bindra in Interpretation of Statutes (5th Edn.) at p. 67 states thus:*
>
> *"An Explanation does not enlarge the scope of the original section that it is supposed to explain. It is axiomatic that an Explanation only explains and does not expand or add to the scope of the original section... The purpose of an Explanation is, however, not to limit the scope of the main provision.... The construction of the Explanation must depend upon its terms, and no theory of its purpose can be entertained unless it is to be inferred from the language used. An 'Explanation' must be interpreted according to its own tenor."*
>
> *49. The principles laid down by the aforesaid authors are fully supported by various authorities of this Court. To quote only a few, in Burmah Shell Oil Storage and Distributing Co. of India Ltd. v. CTO a Constitution Bench decision, Hidayatullah, J. speaking for the Court, observed thus:*
>
> *"Now, the Explanation must be interpreted according to its own tenor, and it is meant to explain clause (1)(fl) of the Article and not vice versa. It is an error to explain the Explanation with the aid of the Article, because this reverses their roles."*
>
> *50. In Bihta Cooperative Development Cane Marketing Union Ltd. v. Bank of Bihar*[15] *this Court observed thus:*

"The Explanation must be read so as to harmonise with and clear up any ambiguity in the main section. It should not be so construed as to widen the ambit of the section."

51. In Hiralal Rattanlal case this Court observed thus: [SCC para 25, p. 225: SCC (Tax) p. 316]

"On the basis of the language of the Explanation this Court held that it did not widen the scope of clause (c). But from what has been said in the case, it is clear that if on a true reading of an Explanation it appears that it has widened the scope of the main section, effect be given to legislative intent notwithstanding the fact that the Legislature named that provision as an Explanation."

Ordinarily, an 'Explanation' is appended to a Section to explain the meaning contained therein. It becomes a part and parcel thereof.

In the event, however, it is ambiguous, construction thereof will be preferred which would fit in with the avowed purpose. An 'Explanation' is also added to include something within or to exclude something from the ambit of the main enactment or the connotation of some word occurring in it.

(See *CED v. Kantilal Trikamlal* , (1976) 4 SCC 643 : AIR 1976 SC 1935)

It is not in controversy that an 'Explanation' should be read in the main section for the purpose of harmonising it and clearing up any ambiguity. The main provision should not, however, be widened thereby.

We may, however, notice that in some of the decisions of the Apex Court, it has been stated that the meaning to be given to an 'Explanation' would really depend upon its terms and not on any theory of its purpose.

(See *Keshavji Ravji & Co. v. CIT* , (1990) 2 SCC 231 : AIR 1991 SC 1806 and

Aphali Pharmaceuticals Ltd. v. State of Maharashtra , (1989) 4 SCC 378 : AIR 1989 SC 2227)

The TRAI in its Explanatory Memorandum explained the reasons therefor.

Construction/Applicability of Clause 2 (i) (f) of the Order

25. Charges were sought to be levied by reason of the said Clause. The object of the Regulator, indisputably, was to protect the customers. That protection might have been taken away in respect of a category of subscriber which again was within the authority of the Regulator but the exception should not be carried too far. The Tariff Orders, thus, contain an exception in regard to the 'Hotels' with a rating of three stars and above. Another exception is contained in the 'Explanation' although it is stated to be a clarificatory in nature only.

They are, therefore required to be given a purposive meaning.

For the purpose of attracting the 'Explanation' appended to Clause 2(f) of the conditions precedent laid down therein should be fulfilled.

They are :-

(i) there has to be an occasion for a special event for common viewing;

(ii) such a special event must be at a place which is registered under the Entertainment Tax laws;

(iii) in the said place, access is allowed on payment basis;

(iv) such access can be given to a minimum of 50 persons;

(v) the place must belong to a commercial cable subscriber.

Only in the event the aforementioned conditions are fulfilled, the tariff as prescribed would be as may mutually be determined by the parties.

We have noticed heretobefore that according to petitioner they do not come within the purview of the said 'Explanation'.

Admittedly they take supply of signals from the MSOs who have entered into agreements with the broadcasters and, thus, are otherwise authorized to retransmit their signals. They have also a 'licence' to distribute the Copyright of the broadcasters.

26. The question, which arises for our consideration, is as to whether petitioners, who having regard to the definition of "charges" as contained in Clause 2 (f) of the Tariff Order as introduced by an amendment dated 21st November 2006 would come within the purview of the excepted category?

Thus, whether the respondents, who are 'Broadcasters' within the meaning of the provisions of Clause 2 (aaa) of the Tariff Order as also who are engaged in providing broadcasting services within the meaning of Clause 2 (b) thereof, are bound to treat petitioners as a sub class of the class of commercial cable operators?

By reason of the provisions of the said order, the protection granted to the subscribers were sought to be withdrawn so far as the Hotels rated as three star and above, Heritage hotels and the ones having the Boarding and Lodging facilities for 50 or more rooms are concerned.

Protection by way of tariff, however, evidently continued in respect of the commercial cable operators, which do not fall within the 'exception' as contained in 2 (f) (ii) of the said order.

Explanation appended to clause 2 (f) of the Tariff Order seeks to provide for a clarification so far as programs of a 'broadcast' screened on the occasion of a special event for common viewing is concerned.

Such common viewing should take place at any place registered under the 'Entertainment Tax laws' and to which access is allowed on payment basis and if the minimum number of viewers is 50 or more, the protection under the Tariff Order was also sought to be taken away.

The Regulator, however, did not contemplate a situation where the broadcasters would be supplying signals directly to the owners of the

restaurants for those special events in cases where agreements have been entered into by them with the Multi Service Operator/Local Cable Operator for a fixed period.

The Tariff Orders also did not clarify as to what would be effect of the supply of signals when such special events are screened as no consequence therefor was provided.

Additional Charge - Issue

27. The contention of the respondent that additional amounts can be charged from protected commercial consumers over and above what is permissible under the TRAI Regulations cannot be accepted as petitioners would come within the purview of the said orders framed by the TRAI. If that be so, the respondents cannot charge any other or further amount. The Regulations framed by the TRAI must be held to be protecting the subscribers.

In the light of the Tariff Orders and particularly the 'Charging Section', the claim of the respondents demonstrates *malafide* on their part.

We intend to deal with the *'malafide'* aspect of the matter in some details separately.

Shri Trivedi in his evidence stated that commercial arrangements were being worked out with the MSOs barring the petitioners.

28. Why a commercial agreement is likely to be signed with 'Hathway' and 'In cable' barring petitioners is not understood. If any agreement is being signed with the said MSOs, they cannot be barred to supply signals to petitioners.

29. Mr Mishra, however, would urge that the said word has been loosely used. We do not think so.

However, we need not consider this aspect of the matter in depth.

30. Mr. Ganpathy would contend that the commercial cable consumers having been placed in a separate category in terms of the provisions of Sections 30, 37, 39A and in particular Ss. 37 (3)(iv) of the Copyright Act, respondent No.2 cannot be held to have acted *malafide* in initiating criminal proceedings against petitioners.

The learned counsel would contend that the 'commercial cable subscribers' cannot be permitted to exploit the situation. They cannot act in a manner which would affect the revenue of the Broadcasters.

31. The impugned notice was issued by respondent No.3 because of the alleged necessity on the part of the broadcaster-ESPN on the anvil of the exhibition of the World Cup.

Indisputably, the broadcasters have entered into agreements with large MSOs.

Either the said MSOs were authorised to supply signals also to the 'commercial cable consumers' or they were not. The MSOs being not parties to these proceedings and having not questioned the said provisions in the contract, if any, this Tribunal is not required to go into the question as to whether the same was permissible in law.

32. There cannot, however, be any doubt or dispute that in the event it is held that the MSOs have committed breach of contract, the broadcasters will have two remedies.

1. Condone the breach and continue the contract or claim damages therefor;
2. Terminate the agreement and/or claim damages.

The provisions of the 1995 Act and the Tariff Orders as also the Regulations framed by the TRAI do not prohibit any consumer from receiving the supply of signals from LCOs/MSOs.

In fact, as indicated heretobefore, the TRAI has fixed rates for the pay channels in terms whereof, the broadcasters MSOs and LCOs are required to divide the revenue earned from the subscribers.

The broadcasters in their cases must be held to have elected to condone the lapses, if any, on the part of the MSOs by not terminating their contract. They have even been renewing the contracts without any demur.

The conduct of the broadcasters in making attempt to extract some additional amounts from the petitioners if they satisfy the conditions precedent therefor, must be deprecated.

No additional amount, in our opinion, could be charged from the protected category of commercial consumers.

33. There appears to be some dispute with regard to the seating capacities in the restaurants belonging to petitioner Nos. 1, 2 and 3 but we need not go into the said question as admittedly as the same is more than 50.

It is not disputed that so far as the 'Hotels' are concerned, they do not fall within the category of three stars or above or Heritage hotels or hotels having 50 rooms and above, except some controversy in one case which may be considered a little later.

34. Broadcasters, however, contend that the said MSOs were not specifically authorised to retransmit the signals of their channels to the 'commercial cable subscribers'. The commercial subscribers, indisputably, have been taking supply of the signals for viewing of television channels of their guests from the said MSOs. For the said purpose, indisputably all

subscribers including the 'commercial cable subscribers' would be bound by the terms of the agreements they enter into with the LCOs, MSOs, DTH operators, HITS operators or IPTV operators.

It is also not in dispute that the TRAI by its orders postulate different percentages from the revenue earned from the cable subscribers i.e. 45% thereof would go to the broadcasters, 30% to the MSOs and 25% to the LCOs.

35. In some cases involving those 'commercial cable subscribers' who do come within the purview of the 'exempted category', it is accepted at the Bar that the broadcasters might have entered into a direct agreement with them.

36. A public notice was issued, the text of which have been noticed by us heretobefore. Novex, which is said to be a distributor of respondent No.2, had issued letters to the hoteliers only informing them that they, with their local cable operators who were not authorised to transmit the signals of the channels in the premises have conspired having been continuously receiving and transmitting the signals without obtaining any licence.

37. The Tariff Orders or the Regulations do not provide for any license. Licence is contemplated only under the Copyright Act, 1952.

The said Orders/Regulations do not provide for payment of any sum in excess of the rate prescribed by the TRAI directly to the broadcasters although signals were being obtained from the LCOs/MSOs.

The Tariff Orders clearly provide that the charges for the ordinary cable subscribers and the protected category of the 'commercial cable subscribers' would be the same.

If that be so, actions could have been taken against the MSOs by the broadcasters and not against the petitioners.

38. One of petitioners in its reply to the said notice without prejudice to its right to defend any prosecution under the Copyright Act and subject to respondent No.3's establishing its exclusive right contended that the broadcasters may take up the issue of blocking the channels as mentioned in the letter under reference and ensure that local cable operators do not provide any feed in respect thereof. They did not do so.

39. The respondent No.3, in its letter dated 21.09.2009, placed the entire burden upon petitioners stating that it was for them to show that they had been taking supply of signals from the authorised cable operators. We fail to understand this logic.

This was stated despite respondent No.2's knowledge that petitioners had been taking supply from the MSOs with whom they had entered into agreements.

We really, therefore, fail to understand as on what basis the papers were handed over to the Police (Social Service Branch), Crime Branch, CID.

Strangely enough, the respondent No.3 has asked petitioners, in turn to ask the local cable operators/MSOs as to why they had not replied to its communication dated 16.02.2009 as if it was their duty as regards thereto also.

40. It now stands admitted that no action far less any criminal action was initiated against the concerned MSOs or LCOs.

Actions, including criminal actions were only initiated against petitioners.

It is not a case where the petitioners have been taking supply of signals from persons with whom respondents had not entered into any agreement at all.

It is, therefore, difficult to comprehend as to why, without taking any action against the MSOs concerned, petitioners were targeted.

41. In the legal notice issued by respondent No.3, again petitioners were asked to obtain a license.

It was asked to contact 'Novex' for obtaining licence to receive and display the said channels. Undertakings were also sought for so that petitioners would not receive and display the aforesaid channels without a valid license and payment of tariff, the terms of which were to be mutually arrived at.

42. If, we are correct in our opinion that for the purpose of attracting the 'Explanation' appended to Clause 2(f) to the Tariff Order, the conditions precedent mentioned therein were required to be fulfilled and if by reason of the materials brought on record and in particular the admission made by the witnesses examined on behalf of respondent it is clear that they were not entitled to any other or further charges apart from the rates prescribed by the Regulator, the logical corollary would be that respondents concerned have acted illegally.

43. It is difficult to perceive why there being other 'commercial cable subscribers' like airports, malls, clubs, hospitals etc., respondent No.2's agent, respondent No.3 had taken recourse to actions against petitioner only and that too even initiating criminal proceeding.

44. Rule of law, by which we are governed, does not contemplate a strong arm tactics. If 'Novex' was a distributor, it could realise the amounts specified in the respective agreements with the MSOs from them. If, under law petitioners were placed at par with the ordinary cable subscribers, there was absolutely no reason why they are asked to take a separate license and pay a fee higher than the one prescribed under the statute.

45. Shri Joel Nash in his evidence stated that the broadcasters were entitled to commercial charges. Such commercial charges are not contemplated under the provisions of the Copyright Act.

In their reply, they have categorically stated so in the following terms:-

> *"As such the Petitioner No.2 being a commercial user is liable to pay the commercial charges for utilizing the services of the answering Respondent."*

46. What would be the commercial charges for the 'commercial cable subscribers'?

Would it be Rs.250/- or Rs.72/-?

It must be Rs.72/- as has been accepted by him in his cross examination.

Although, in his cross examination he contended that the commercial establishments exploit the services for profits unlike residential homes and,

therefore, there exists a difference but in answer to the next question as to whether any distinction is made as far as charges are concerned between Hotels which are three star and above and those which are two star and below he categorically admitted that they go by the TRAI guidelines which demonstrates that his previous answer was wrong. Even he had not been able to lay any basis for his earlier statement.

It is also of some interest to notice that in answer to a question as to whether the charges between a restaurant and domestic residential consumers are the same or different, he stated that they are different which for a restaurant is Rs.25,000/- per annum and for residences it is Rs.72/- per month. He has not placed any material to substantiate his contention, nor can there be any, in view of the 'Tariff Orders'. In fact, his contention is contrary to and/or inconsistent with the Tariff Orders.

Nowhere in his evidence he stated about the license fee under the Copyright Act became payable. The demands made by respondent, therefore, must be held to be wholly illegal and without jurisdiction.

Notice by Respondent No.3 - Validity of

47. So far as the notice issued by respondent No.3 is concerned Ms. Ogra would contend that by reason of the said notice dated 28 August 2009, petitioners were called upon to stop receiving and transmitting signals of the channels of respondent through unauthorised local cable operators without

having obtained the necessary license from them forthwith and furnish the details of the local cable operators immediately on receipt of the said letter.

It is really unfortunate that the Copyright issue in this case has been invoked without any basis.

We have noticed heretobefore that one of petitioners, namely 'Hotel Airlines International' in its reply categorically stated that they have not violated the provisions of the Copyright Act nor have they committed theft of any signals as cable feed is provided to them by their local cable operator on payment of monthly subscription charges.

48. The respondent No.3 claimed itself to be the distributor of the broadcaster. It, therefore, was supposed to know with whom the broadcasters had entered into contracts having the requisite authority to supply signals. It was also supposed to know the areas of operation of the respective MSOs and the fact as to whether MSOs are authorised to retransmit signals to the commercial cable operators both under the Regulating Laws and/or Copyright Act or not. They were supposed to find out the names of the commercial cable subscribers to whom the MSOs were supplying signals of the broadcasters and their authority to do so.

It is absurd to suggest that respondent No.3 , being the agent of respondent No.2 was not aware of the names of the MSOs or local cable operators with whom such agreements have been entered into by

respondent No.2. In any view of the matter, it was obligatory on their part to ascertain the same for respondent No.2.

49. We may take judicial notice of the fact that LCOs/MSOs make allegations that the broadcasters do not supply copies of the agreement. It is, therefore, difficult for us to perceive that the MSOs/cable operators would supply copies of the agreement to the cable subscribers.

50. The question, which has been raised and required to be determined, is as to whether they are bound to take supply of signals from those who have been authorised for the aforementioned purpose?

51. On what basis, therefore, petitioners were called upon to supply the names of the cable operators, is difficult to visualize.

We, therefore, are of the opinion that the action of respondent No.3 was wholly *malafide* being not for authorised purposes but only to extract money from petitioners to which they were not entitled to.

Copyright Act Issue

52. Submissions of Mr. Ganpathy and Ms. Ogra that petitioners have violated the provisions of Copyright Act in terms whereof a license was required to be taken cannot be accepted for more than one reason.

53. Respondent Nos. 2 and 3 have not been asking for license fee stricto sensu in terms of the provisions of the Copyright Act.

Even for the said purpose, respondents were to establish that petitioners have been exhibiting their broadcasting products for consideration.

54. Mr. Ganpathy, as noticed heretobefore, has drawn our attention to the provisions of Sections 2 (ff), 30, 37(i), 37 (iii), 37 (iv), 39 (a), 51 of the Copyright Act.

We, however, are of the opinion that it may not be necessary for us to delve deep into the question of interpretation of the said provisions in this petition, having regard to the factual matrix involved herein.

55. The petitioners have contended that they have not been commercially exploiting the material over which copyright is being claimed by respondents by communicating the same to the public.

The respondents have not been able to show that there has been any commercial exploitation by petitioner in terms of the provisions of the Copyright Act.

If there has been no commercial exploitation, the question of invoking the provisions thereof does not arise.

It now stands almost conceded that the allegations of commercial exploitation by petitioners have not been established in as much as no direct or indirect evidence has been brought on record to show that petitioners have been charging any money for allowing the viewers to see the World Cup Cricket matches.

The respondent No.2, in each of these cases being broadcasters is governed by the provisions of the 1995 Act and the 1994 Rules. They would also be governed by the provisions of the Act.

56. The respondents No.2, indisputably, had entered into contracts with the MSOs who have every right to retransmit the channel. In some of the agreements, it is possible that a clause exists that the Multiservice Operators or Cable Service Operators are not permitted to retransmit signals to the commercial subscribers or cable subscribers. But in such cases, actions were required to be taken against the concerned MSOs and not against the subscribers.

Necessity to notify authorized MSOs/LCOs

57. Supply of signals by a broadcaster/content aggregators are governed by the Parliamentary Acts and the Rules and Regulations framed by the authorities specified thereunder.

Respondent No.1, in exercise of the power conferred upon it under Section 11(i)(b) of the 1997 Act, made Regulations known as the 'Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004'. In terms of the said Regulations, the broadcasters are statutorily obligated to provide signals of its channels to the MSOs/LCOs in terms of Clause 3.2. The 2004 Regulations also postulate that with a view to protect the interest of the general public, the broadcasters/MSOs must not only issue notices to the respective MSOs/LCOS, as the case may be, as contemplated under Regulation 4.1 but also issue a public notice in terms of Regulation 4.3.

58. It is well settled that if any public notice is issued, the viewers can make an alternative arrangement for the purpose of continuing to receive the signals of channels. It is also beyond any doubt that they can approach this Tribunal or take any other action.

The players, thus, being governed by the Regulations must abide by the provisions thereof.

If only some of the MSOs are authorised to supply signals to the commercial cable viewers, it is difficult to understand as to why respondent

No.2 are not placing their names in the public domain. It is furthermore difficult to understand as to why despite demand, the MSOs with whom separate arrangements are being entered into are not being identified so as to enable petitioners to take supply of signals from the authorised cable operators/MSOs. It is also not understood as to on what basis taking benefit of a special event, respondents have been asking for commercial charges from petitioners to which they were not otherwise entitled to.

59. It may be placed on record that Mr. Srinivasan contended that petitioners would be ready and willing to take supply of signals from those who are notified as the authorised MSOs to supply the signals to commercial subscribers like petitioners.

60. Apart from the fact that in some of the areas, as would be noticed hereinafter that MSOs are authorised for supplying signals even to the commercial cable subscribers, the broadcasters themselves were required to notify the names of those who were authorised therefor.

61. We, in this connection, may notice that after the 2006 Amendment was made by the TRAI, the broadcasters themselves approached it for protecting their interests so far as the commercial cable subscribers are concerned vis-a-vis the MSOs who would be authorised therefor.

The representation made by the broadcasters was as under :-

"2. As a part of initial step towards detailed examination a process of seeking inputs from groups representing hotels and broadcasters was initiated. During this process the group of broadcasters made a representation in which it was pointed out inter alia as under :-

> *" .....The Order (Tariff Amendment Order dated 7.3.2006) has in effect nullified / reversed the order (TDSAT order) dated 17.1.2006. (emphasis in italics added). TDSAT recognized that the services to the hotels should be only through authorized means. A vast majority of the Hotels and Commercial establishments who obtain service through cable operators without requisite authorization from the broadcasters. In our view, the current arrangements through which Hotels and Commercial Establishments obtain supply is tantamount to piracy of signals. There is a clear danger that Hotels /commercial Establishments shall misuse the TRAI Tariff Order to legitimize the present unauthorized arrangements. A hotel or a commercial establishment needs to obtain a license from the respective broadcaster to receive and exhibit the service. However, clause 4 3(A) is being exploited by the Hotels to continuously receive service and exhibit the services without a valid license and in an unauthorized manner...."*

The said representations are contained in the Explanatory Memorandum annexed to the notification dated 24th March 2006 and marked as Annexure A.

Keeping in view the spirit and intention behind the provisions of extending the protection to a group of commercial cable consumers as also the judgement of this Tribunal dated 17.01.2006, an explanation has been appended to the existing second proviso to the newly added clause which reads as under :-

> *"Explanation1: For the purpose of clause 3A above the question whether commercial cable subscriber will pay the cable operator/MSO/the broadcaster will be determined by the terms of agreement(s) between broadcasters, MSO(s), Cable Operator(s) or between Broadcaster(s) and the Commercial Cable Subscriber(s) or between MSO / Cable Operator who have been authorized to provide signals to the Commercial Cable subscriber(s), on the one hand, and Commercial Cable Subscriber(s), on the other, as the case may be"*

62. The respondent No.3 admittedly does not possess any headend for the purpose of supplying signals to the commercial cable subscribers. If that be so, it is not an authorised agent/authorised MSO/LCO of respondent No.2 broadcasters within the meaning of the provisions of the said order, although would come within the purview of the term 'distributing agency'.

63. By reason of the 'Explanation' appended to clause 3(a) of the Tariff Order, a duty has been cast upon the broadcasters to notify the names of

authorised MSO/LCO for the said purpose. Such a notification, admittedly, has not been issued.

It is difficult to appreciate a situation, where the broadcasters would not authorise any MSO/LCO, on the one hand, and would insist on the other, that they may enter into separate agreements with the broadcasters and/or its distributor as they form a separate class.

The MSOs appointed by the broadcasters are distributors of TV channels within the meaning of Clause 2 (j) of the Regulations.

The broadcasters, in their representations before the TRAI had contended that those distributors of TV channels would be committing piracy if they are not authorised for the purpose of supply of signals to the commercial cable operators.

The broadcasters had two options.

1. Condone the lapses and terminate the agreement
2. Or terminate the agreement on the ground of piracy

It has another remedy of claiming damages.

They, in any event, could not have charged a higher amount. The respondents were aware that their operations were regulated and, thus, their rights, duties and obligations emanate only therefrom.

They had not questioned the validity or otherwise of the 2004 Regulations or the Tariff Orders.

The rights and obligations of the broadcasters vis-a-vis the MSOs are governed by the special statutes.

Jurisdiction Issue

64. Ms. Ogra would urge that so far as the violation of provisions of the Copyright Act is concerned, the Madras High Court in *M/S. Jak Communications Pvt. Ltd v. M/S. Sun TV Network Limited and Ors.* reported in [2010] 2 L.W. 936 has clearly held that 'Civil Court' has the requisite jurisdiction in relation thereto and not this Tribunal.

We need not go into the said question in details as it appears that in a Special Leave Petition filed by the Appellant therein, M/S. Jak Communications Pvt. Ltd against the said order being, SLP (C) No. 2407-2408 of 2010, the Supreme Court of India by an order dated 20/09/2010 disposed of the said appeal stating :-

> *"At the outset we may note that the dispute before the TDSAT no more survives. As far as the point of law involved in this case is concerned, the matter is still at the preliminary stage. In the circumstances, the Civil Court will proceed to decide the pending civil suit. All contentions on merits as also on law are kept open."*

65. So far as the jurisdiction of this Tribunal is concerned, no issue has been raised by respondent. Respondent No.2 has submitted itself to the jurisdiction of this Tribunal. If no issue has been framed, the question of challenging the jurisdiction of this Tribunal does not arise unless we inherently lack in it. More so, it is now well settled that when the question of implementation/interpretation of the Act vis-a-vis other provisions of the

other Acts arises for consideration, this Tribunal alone would have jurisdiction.

It was so held in *Sea T.V. Network Ltd. v. Star India Pvt. Ltd.* printed in 2005 Cable Petitions 90. A Bench presided over by Santosh Hegde, J. stated the law thus :-

> *"For deciding this question, we will have to first examine the provisions of the MRTP Act and TRAI Act bearing in mind the objectives of the two enactments.*
>
> *The preamble to the MRTP Act shows that it is an Act to provide that the operation of economic system does not result in the concentration of economic power to the common detriment and for the control of monopolies, prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto. Thus, it is seen that the MRTP Act is enacted to control economic system, to prevent concentration of economic power and to control monopolistic and restrictive trade practices. Thus, these restrictive trade practices are general in all sectors and not specific to any particular trade or commerce.*
>
> *Whereas the preamble to the TRAI Act shows, among others, this Act is enacted to adjudicate disputes, dispose of appeals and to protect the interests of service provides and to promote and ensure orderly growth in three specified sectors only. They are the telecom, broadcasting and cable sectors. From this preamble it is seen that the TRAI Act is a special enactment wherein a provision is made specifically for settlement of disputes between the categories of persons mentioned in Section 14(a)(i), (ii) and (iii) that too only in the limited sector. Therefore, while MRTP Act in regard to monopoly and restrictive trade practices generally applies in all sectors. TRAI Act is a special Act covering*

the areas of disputes in the three sectors, referred to hereinabove, that too between the parties mentioned in the TRAI Act.

Under Section 36 of the TRAI Act, Telecom Regulatory Authority of India is empowered to make regulations consistent with the said Act and rules made thereunder. Under Section 37 of the TRAI Act, the Regulations made by the TRAI have to be placed before the Parliament to seek its approval. Thus, there can be no dispute that the Regulations framed by the TRAI have the force of law having been made through the process of subordinate legislation provided they are consistent with the Act and Rules.

The relationship of the parties and their commercial interest in the three sectors to which TRAI Act applies, is thus statutorily controlled and any dispute arising in such relationship will be a dispute which will have to be adjudicated under Section 14 of the TRAI Act by this Tribunal so long as it is a dispute between a licensor and a licensee, between two or more service providers, between a service provider and a group of consumers."

66. The Supreme Court of India also opined that this Tribunal has wide jurisdiction in Union of India v. Tata Teleservices (Maharashtra) Ltd. reported in (2007) 7 SCC 517 in the following terms :-

"16. The Act is seen to be a self-contained code intended to deal with all disputes arising out of telecommunication services provided in this country in the light of the National Telecom Policy, 1994. This is emphasised by the Objects and Reasons also."

"17. Normally, when a specialised tribunal is constituted for dealing with disputes coming under it of a particular nature taking in serious technical aspects, the attempt must be to construe the jurisdiction conferred on it in a manner as not to frustrate the object sought to be achieved by the Act. In this

context, the ousting of the jurisdiction of the civil court contained in Section 15 and Section 27 of the Act has also to be kept in mind. The subject to be dealt with under the Act has considerable technical overtones which normally a civil court, at least as of now, is ill equipped to handle and this aspect cannot be ignored while defining the jurisdiction of TDSAT."

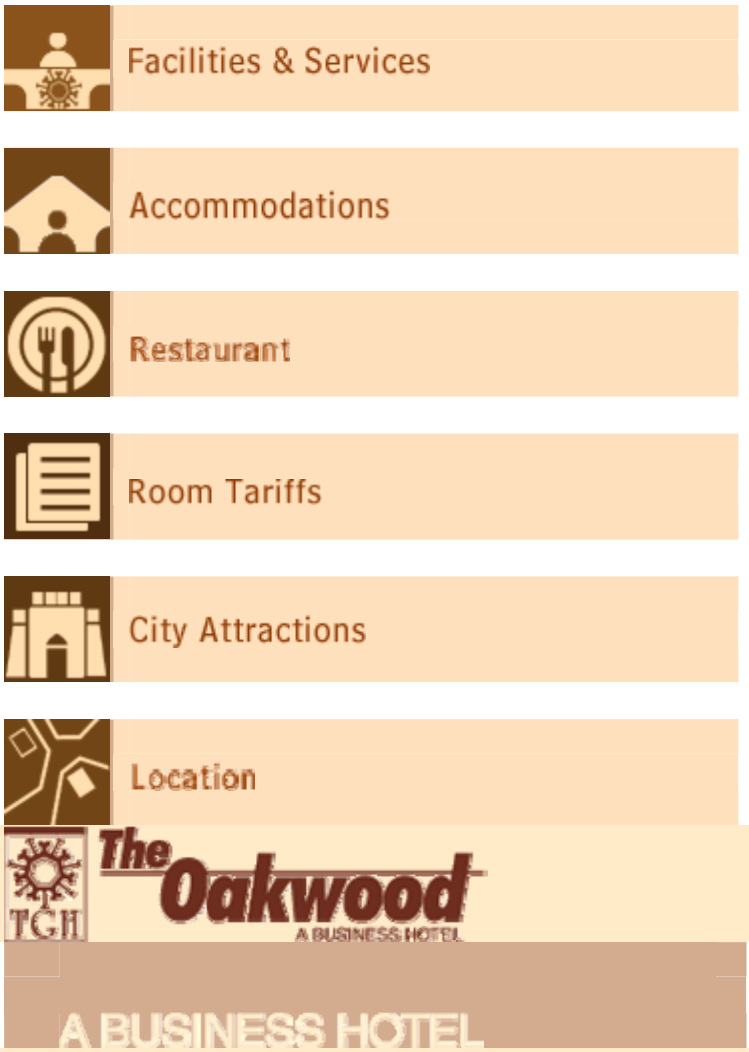
It noticed:

"24. In Cellular Operators' Assn. of India v. Union of India [(2003) 3 SCC 186] this Court had occasion to consider the spread of Sections 14 and 14-A of the Act. This Court held that the scope of Sections 14 and 14-A are very wide and is not confined by restrictions generally imposed by judge-made law on the Tribunal exercising an appellate jurisdiction. Of course, Their Lordships were considering in particular, the case of appellate jurisdiction. But this Court further said that the Tribunal has the power to adjudicate on any dispute but while answering the dispute, due weight had to be given to the recommendations of the authority under the Act which consists of experts. This decision, though it did not directly deal with the power of TDSAT as the original authority but was dealing with the power of TDSAT as an appellate authority and the power of this Court in appeal, clearly gives an indication that there is no need to whittle down the scope of Sections 14 and 14-A of the Act."

We, therefore, hold that we have jurisdiction to determine the issues before the parties hereto.

RE: <u>Misrepresentation of Petitioner No.4</u>

67. We must, however, before parting notice that Mr. Ganpathy has rightly drawn our attention to a copy of the website in respect of Petitioner No.4, which is to the following effect :-



68. Mr. Jayesh Shah, the witness for petitioner No.4 in his evidence admitted that the said advertisement has been issued by it stating :-

> *"I deny the suggestion that the petitioner No.6 is a four star hotel. (Witness is shown page 290 of the paper book, Annexure-R8).*
>
> *It is correct that what is shown to me at page 290 is a print out of our website. The name of our cable operator is Hathway. Upon*

receiving the notice from Novex, we made inquiries from our cable operator and were informed by them that they were authorized to provide our establishment with ESPN channels. Our hotel has 45 rooms. Our hotel did not have 84 rooms at any time."

Thus, on the one hand, in its website said petitioner has been showing its hotel to be a four-star one, it has denied that it is so.

69. We would request the Ministry of Tourism to take appropriate step in this behalf so that Respondent No.4 is either treated as a four-star hotel or it stops issuing such misleading advertisements in its website.

Conclusions

70. For the reasons aforementioned, we hold :-

1. These petitions are maintainable.

2. The Associations have locus standi to be parties so far as the legal question involved in these petitions are concerned. However, the Associations cannot represent its members in the matters which would require determination of factual dispute between the parties.

3. The respondent No.3 is not an authorised distributor within the meaning of the provisions of the Tariff Orders.

4. The respondent(s) No.2, for the purpose of enforcement of its rights vis-à-vis the MSOs/LCOs, must act in accordance with law. The broadcasters and/or respondent No.3 could not have taken any action against petitioners as it has been found as of fact that they

do not come within the purview of the 'Explanation' appended to Clause 2 (f) of the Tariff Orders and they belong to the protected group.

5. For the alleged acts of piracy on the part of the MSOs/LCOS of respondent No.2, the broadcasters are not entitled to any commercial charges and the subscribers cannot be proceeded against for payment of any charges which would be more than the rates prescribed under the 'Tariff Orders'.

6. The petitioners are also not bound to obtain any separate licence from the broadcasters in terms of the provisions of the Regulatory laws.

7. The broadcasters are hereby directed to notify their authorised distributors of TV channels within four weeks from date. On such notification, petitioners would take supply of signals only from the authorised distributors of TV channels of the broadcasters.

8. The notices issued by respondent No.3 to petitioners being *mala fide* are liable to be set aside.

9. It is clarified that this Tribunal has not expressed any opinion with regard to the violation of Copyright Act, if any. But, it is held that petitioners have not violated the provisions of any of the laws forming the regulatory regime. In fact, they are entitled to protection in terms of the Tariff Orders.

10. The broadcasters may proceed against petitioners only when it is found that they come within the purview of the 'Explanation' appended to Clause 2 (f) of the Tariff Order and not otherwise.

71. These petitions are allowed with the aforementioned observations and directions.

72. In the facts and circumstances of this case, respondents No.2 and 3 must pay and bear the costs of petitioners in both the petitions separately in equal proportions.

73. Advocate's Fee assessed at Rs.50,000/- in each of the petitions.

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

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

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

//Shree/rkc//