

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated : September 18, 2012

Petition No. 481(C) of 2011

Kable First India Pvt. Ltd.

...Petitioner

Vs.

Media Pro Enterprise India Pvt. Ltd.

...Respondent

BEFORE:

**HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON
HON'BLE MR.P.K. RASTOGI, MEMBER**

For Petitioner

: Mr.Ramji Srinivasan, Sr. Advocate
Mr. Vineet Bhagat and Ms. Neha Jain,
Advocates

For Respondent

: Mr.Tejveer Singh Bhatia, Mr. Upender
Thakur, Advocates

J U D G M E N T

1. A short but interesting question of law arises for consideration in this petition viz; as to whether the notices issued under Clauses 4.2 and 4.3 of the Telecommunication (Broadcasting & Cable Services) Inter Connection Regulations, 2004 can be waived?

The basic fact of the matter is not in dispute.

2. The parties hereto entered into a subscription agreement. The Respondent in terms thereof were to supply signals of its channels comprising of two bouquets, Bouquet-I and Bouquet-II.

According to the Petitioner, Bouquet-II was imposed on it by the Respondent as it never intended to subscribe the same.

3. The parties however, are ad idem that the channels contained therein were previously clubbed in Bouquet-III of the Respondent.

On or about 28.2.2011, the parties purported to have reconciled their accounts 31.12.2010.

We may notice the minutes of meeting of the said date.

"MINUTES OF THE MEETING HELD ON FEBRUARY 28, 2011 BETWEEN KABLE FIRST INDIA PVT. LTD. AND STAR DEN MEDIA SERVICES PVT. LTD. AT TRADE CENTRE OFFICE AT 4.00 P.M.

Members Present:

Mr. Kailasam P. Kable First India Pvt. Ltd.	Mr. Pradeep, Star Den Media Services Pvt. Ltd.
Mr. Sitaram Rao, Kabale First India Pvt. Ltd.	Mr. Ganesh, Star Den Media Services Pvt. Ltd.

Sub: **Reconciliation of Accounts till 31st of December, 2010**

As per the books of accounts of Star Den Media Services Pvt. Ltd. the total outstanding till 31st of December, 2010 is Rs.50,32,730/-. *

Prompt payment discount (PPD) Debit Note of Rs.16,62,305/- would be raised in the name of Star Den. The same amount would be cleared after realization of Star Den PPD payment.

The balance outstanding amount after the PPD adjustment would be Rs.33,70,425/- Against which Rs.29,12,816/- is being paid vide cheque No.0312817 dated 28th February, 2011, drawn on Axis Bank subject to all statutory deductions and TDS Certificates will be issued for the amount of Rs.3,97,217 TDS deducted, further a sum of Rs.60,392/- on account of cheque bouncing charges need to be waived off.

With this the entire outstanding up to December, 2010 will be cleared and the balance as on 31st December, 2010 would be NIL.

*Balance of Rs.50,32,730/- has been arrived by deducting Rs.50,16,096/- paid vide cheque no.031109 dated 31st Dec.2010 on the total balance of Rs.9,00,48,826/-."

4. The Respondent's predecessor in interest Star Den issued a notice on or about 23.12.2010 demanding a sum of Rs.1,00,48,825.48 only which was rounded up to Rs.1,00,48,826.00.

5. The Petitioner would contend that in terms of the said MoM while the payments of subscription fee with regard to Bouquet II were required to be made, the Respondent sought to compensate the Petitioner by increasing the carriage charges from Rs.36,00,000/- to 60,00,000/- .

The Respondent, however, denies and disputes the same and contends that the said fact had not even been pleaded.

6. A subscription agreement was entered into with M/s Star Den on 18.4.2011; some of the relevant clauses whereof are:

"V.TERM:

This Agreement is valid from 1st Jan, 11 to December 31, 2011 unless earlier terminated by either Party in term of this Agreement. However, if the Parties agree to extend the Term, a new agreement shall be executed upon such mutually agreeable terms and conditions.

After the expiry of the Term and also the period of negotiations contemplated in Clause 8 of Telecom Regulatory Authority of India's (TRAI) the Telecommunication (Broadcasting and Cable

Services) Interconnection Regulation, 2004 dated 10.12.2004 (as amended) pending negotiations and execution of new agreement between the Parties distribution of the Subscribed Channels shall be governed on the basis of stipulations contained in this Agreement. The present Clause shall be deemed to be sufficient. Interim arrangement as contemplated in Paragraph 13 of Explanatory Memorandum to TRAI's the Telecommunication (Broadcasting & Cable Services) Interconnection (Third Amendment) Regulation, 2006 dated 04.09.2006. However, all stipulations; terms and conditions of the new agreement shall be applicable from the date of expiry of Term (mentioned above) of this agreement.

Affiliate agrees and accepts that the new commercial terms shall become applicable from the date of expiry of the Term of this Agreement and that if the Parties are not able to arrive at a mutually acceptable new Agreement then either Party may disconnect retransmission of the signals of the Subscribed Channels at any time after the expiry of this Agreement after giving notice in pursuance to the applicable Law. Provided however that in case of such disconnection the Affiliate shall be required to pay the Subscription Fee (on the basis of this Agreement) till the date of deactivation. Parties record that payment of Subscription Fee on the basis of this Agreement shall be in addition to and not in derogation of STAR DEN's right to claim rendition of accounts.

Clause 12:

"12. TERMINATION

- (a) This Agreement shall automatically terminate by efflux of time i.e. on the completion of the term.

- (b) Subject to Clause (c) below, either of the Parties may, terminate this Agreement by giving written notice of three weeks' to the other party.
- (c) Notwithstanding the provisions of Clause (b) above, STAR DEN shall have the right to disconnect/deactivate the distribution of signals to the Subscribed Channels and terminate this Agreement subject to Applicable Laws after giving appropriate notice, if required under Applicable Laws, and/or take any other action as may be appropriate, upon the occurrence of any of the following:
 - i. In the event of any material breach of the Agreement by the Affiliate.
 - ii. In the event the Affiliate fails to pay the Subscription Fee and/or the applicable taxes (including but not limited to service tax) and/or charges, as and when it becomes due and payable as set out in the Agreement;
 - iii. In the event of failure on the part of the Affiliate to provide the names, complete addresses areas served and subscriber numbers of the LCOs and also the subscriber numbers directly serviced by the Affiliate.
 - iv. In the event of non-disclosure /under-declare of LCOs and/or under-declaration or wrong disclosure of subscriber base catered directly or through LCOs."

Annexure-C appended to the said agreement read as follows:

“ ANNEXURE C

No. _____

Ref.Subscription Agreement No SA/11/1213 dated 18/04/11 (“Subscription Agreement”)

This Annexurs to the Subscription Agreement is executed on 18/04/11

Affiliate Name (M/s.): KABLE FIRST INDIA PVT LTD . Customer Reference No.: 10036049
 SUBSCRIPTION FEE-SUBSCRIBED CHANNELS: {Read with Article VI of the Subscription Agreement)

- (i) The Affiliate shall pay to STAR DEN the following Subscription Fee:

Bouquet Options	Effective Period	Subscriber Base	Rate(s)Per Subscriber Per Month (Rs.)	Monthly Subscription Fee (Rs.)*
Bouquet 1				
STER PLUS STAR GOLD STAR MOVIES STAR WORLD VIJAY TV NGC CHANNEL V	1 st JAN '11 TO 31 st DEC '11	30,129	50.08	15,08860.32
Bouquet 2				
FX Fox Crime ...Tv Geo Wild Geo Adventure Nat Geo Music STAR One MGM NDTV 24x7 NDTV GOOD Times NDTV India	1 st JAN '11 TO 31 st DEC '11	5,981	95.79	5,78,900.99
Bouquet 3				
STAR Ananda STAR Jalsha				
Suvarna(on stand alone basis)		22,459	12.00	269,508.00
Total Monthly Subscription Fee (Excluding Taxes)				

(ii) Payment Terms read with cause 2 of Schedule II of Subscription Agreement

Mode	Tick One	Subscription Fess in Rs.(excluding taxes)	Payable By
Monthly		23,57,269.31	By 5 th day of the beginning of the month
Quarterly			By 5 th day of the beginning of the Quarter
Half-Yearly			By 5 th day of the beginning of the Half-Year Term
Annually / Term			By 5 th day of the beginning of the Annual Term

For KABLE FIRST INDIA PVT. LTD

Authorized Signatory
For Affiliate “

Viewing Cards details as stated in Annexure D are as under:

“ANNEXURE D

No.

Ref. Subscription Agreement No.SA/11/1213 dated 18/04/11
(Subscription Agreement)

This Annexure to the Subscription Agreement is executed on
18/04/11.

Affiliate Name (M/s) KABLE FIRST INDIA PVT. LTD.

Customer Reference No.10036043

CHANNELS & EQUIPMENT (Read with Article VII of the Subscription
Agreement and Clause 8 of Schedule II)

SUBSCRIBED CHANNELS	Viewing Card No.
STAR MOVIES	8667065
STAR WORLD	8659484
Star News	
Star Gold	8651986
Channel V	8660441
NGO	8544603
FHE	8496446
Vijay	30026021251
Suvarna	
Star One	8655839
NDTV 24X7	
NDTV Profit	
NDTV Good Times	
NDTV India	
MGM	41113269082
Star Pravah	

Star Jalsa	
Star Ananda	
Nat Geo Wild	8784902
Nat Geo Adventure	8778631
Nat Geo Music	41245712686
FX	8771966
Fox Crime	8772204
Baby TV	

8. The Petitioner contends that in terms of Clause 12 of the agreement as also Clause 4.2 of the Telecommunication (Broadcasting & Cable Services) Inter Connection Regulations, 2004 (The Regulations), a notice on 10.6.2011 was issued which is said to have been dispatched on 14.6.2011. It also published a public notice in two newspapers on 15.6.2011.

9. The contention of the Petitioner is that in view of the fact that the aforementioned notice under Clause 4.2 and the public notice in terms of Clause 4.3 of the Regulations have taken their effect, the Respondent could not have charged any subscription fee so far as the channels contained in Bouquet-II is concerned.

10. The Respondent, on the other hand, contends that after the said notices were issued and before the same could be given effect to, the Petitioner entered into a carriage agreement with NDTV Ltd. in respect of three of its channels; pursuant where to and in furtherance whereof invoices were issued. It had also issued invoices to

M/s Star Den towards the carriage of their channels, which included 'Star One' which is one of the channels contained in Bouquet-II.

11. We may, at the outset, notice that the Petitioner by a letter dated 14.7.2011 asked the representatives of the Respondent to collect its decoder boxes.

12. It is not denied or disputed that a carriage agreement with the NDTV had been entered into on or about 9.7.2011 with retrospective effect from 1.7.2011.

13. Mr. Ramji Srinivasan, learned senior counsel appearing for the Petitioner, would contend:

1. The carriage agreement having nothing to do with the subscription agreement, the Respondent's contention that by reason of entering into the said carriage agreement, the notices under Clauses 4.2 and 4.3 would have no legal implication must be held to be incorrect.
2. NDTV being a broadcaster and only because its channels are merely constituents of the Bouquet-II of the Respondent, it cannot be said that the legal implication of the aforementioned notices dated 10.6.2011 and 15.6.2011 had not taken place at all.

14. Mr. Bhatia, learned counsel appearing on behalf of the Respondent, on the other hand, submitted:

1. The Petitioner by its conduct must be held to have waived its right to give effect to its notices under Clauses 4.2 and 4.3 of the Regulations.
 2. The Petitioner having issued invoices in favour of the said NDTV and received payments therefor, it is estopped and precluded from contending that the carriage agreement had not been given effect to.
 3. The contention of the Petitioner that it had issued the aforementioned invoices upon the predecessor in interest of the Respondent by way of oversight is incorrect in view of the fact that no such plea has been raised in the pleadings.
15. Before, however, entering into the aforementioned controversies between the parties, we may notice that the Respondent, inter alia, on the premise that the Petitioner had been retransmitting the signals of Bouquet-II purported to have prepared a CD for the months of July and August, 2011.
16. The same has, however, not been produced by the Respondent's witness despite having been called upon to do so.

We would, thus, proceed on the basis (which has also not been denied or disputed by Mr. Bhatia) that the said CD has not been proved.

We, therefore, need not refer to the affidavit of the said witness and/or the cross-examination of the witness Mr. Kailasam P.

17. Clauses 4.2 and 4.3 of the said Regulations read as under:

“4.2 No distributor of TV channels shall disconnect the re-transmission of any TV channel without giving three weeks notice to the broadcaster or multi system operator clearly giving the reasons for the proposed action.

4.3A Broadcaster/ multi system operator/ distributor of TV channels shall inform the consumers about such dispute to enable them to protect their interests. Accordingly, the notice to disconnect signals shall also be given in two local newspapers out of which at least one notice shall be given in local language in a newspaper which is published in the local language, in case the distributor of TV channels is operating in one district and in two national newspapers in case the distributor of TV channels is providing services in more than one district. The period of three weeks mentioned in sub-clauses 4.1 and 4.2 of this regulation shall start from the date of publication of the notice in the newspapers or the date of service of the notice on the service provider, whichever is later.”

18. The said notices, subject of course to the supervening circumstances, could be given effect to by 9.7.2011.

We have come across several cases where despite publication of public notices and the expiry of the period envisaged therein, the same has not been given effect to for a long time or the parties started/continued negotiations for renewal of the agreement even

thereafter. The intention of the parties may, therefore, be gathered from their conduct and/or subsequent events.

19. It has not been nor could it be contended that the franchisee is not entitled to surrender one of the bouquets upon issuance of a notice under Clause 4.2 and a public notice under clause 4.3 of the Regulations.

20. It has also not been disputed before us that even the parties reconciled their accounts as on 31.12.2010, and the subscription fee payable in respect of Bouquet-II of the Respondent had also been taken into consideration for the said purpose. Furthermore the question as to whether in lieu of the amount remained payable in terms of the said MoU, the carriage charges were enhanced from Rs.36,00,000/- to Rs.60,00,000/-, having not been pleaded, no credence can be given thereto.

21. The Petitioner does not deny the fact that:

- (i) It had entered into a carriage agreement with NDTV on 9.7.2011 with effect from 1.7.2011
- (ii) It had continued to receive the placement charges from the Respondent even after the expiry of 21 days from the date of issuance of the public notice dated 15.6.2011.

22. The following clauses of the carriage agreement may be noticed:

"A. NDTV is engaged in the business of, broadcasting of television channels in India namely "NDTV 24x7"

in English, "NDTV India in Hindi, NDTV Profit (business news channel)" NDTV Life (life style channel) hereinafter collectively referred to as the "channels).

.....

"3.1 KABLE FIRST agrees and undertakes to place the NDTV 24x7 on E 8, NDTV Profit on S 19, NDTV Good Times on S band (between S 2 & S 20 barring Y, Z, Z+1, Z+2, S 1)"

23. The stamp paper for the purpose of entering into the aforementioned agreement was purchased, albeit by NDTV Ltd., on or about 15.6.2011.

24. Apart from a letter dated 1.8.2011, which was alleged to have been sent by Speed Post by the Petitioner on 9.8.2011, there is no other or further document brought on record to show that the said carriage agreement with NDTV has not been given effect to.

25. With the said letter dated 1.8.2011 a cheque for a sum of Rs.17,42,801.00 was enclosed. By a letter dated 10.6.2011 only a reference was made that it had surrendered the channels.

26. A cheque for the aforementioned sum was also sent for the month of September.

In the aforementioned context, we may notice the impugned demand dated 21.11.2011.

"Please note that as per our statement of account your outstanding dues to Media Pro stands at Rs.1,19,08,149-00 (rupees one crore nineteen lakhs eight thousand one hundred and forty nine only) as on 18th November, 2011 against your head end. We

regret to state that you have been avoiding to clear your outstanding dues without any reason. You are hereby requested to clear the above said dues immediately along with an interest of 18% per annum.

We take this opportunity to once again reiterate contents of our letters dated 30.06.2011 whereby, vide said letters, you were time and again requested to execute fresh Subscription Agreements for the said channels with Media Pro effective, July 1, 2011.

Although the Subscription agreement have been expired on 31.03.2011 with Zee Turner, you have continued to avail the signals of channels distributed by Media Pro on assurance that you shall execute fresh subscription agreement with Media Pro.

It is disheartening to note that despite our repeated requests, you have till date failed to provide us with relevant information and documents/details of all subscribers/customers for completing formalities so as to enable the parties to execute Subscription Agreements for the period 2011-2012. Finally, we hereby call upon you to come forward for renewal of agreement with Media Pro Enterprise India Private Limited in the light of expiry of your erstwhile Subscription Agreement with Zee Turner by efflux of time on 31.03.2011 and pay the above said dues within 3 days from the date of this letter. Please note that in the event you fail to comply with the tenor of this notice we shall be constrained to deactivate our signals as per the applicable statute.

In view of the above we call upon you to forthwith clear the total outstanding amount of Rs.1,19,08,149-00 (rupees one crore nineteen lakhs eight thousand one hundred and forty nine only) towards subscription fees payable by you as on 18th November, 2011 along with the accrued Interest for the delayed period.

Your are requested to treat this communication as notice for deactivation of signals in terms of Clause

4.1 of Interconnection Regulation dated 4th September, 2006 issued by Telecom Regulatory Authority of India.”

27. The Respondent by a letter dated 22.8.2011 called upon the Petitioner to pay the sum specified therein in the following terms:

“In this regard, in order to put the records straight we would like to categorically state and remind you that the subscription charges payable by Kable First India Pvt. Ltd. to Star Den for the month of July 2011 was as below which you are well aware of:

10010934	KABALE FIRST INDIA PVT. LTD. HAVERI	Haveri	Haveri	2,04,737
10018395	KABLE FIRST INDIA PVT LTD	Tavarakere	Bangalore,Rural	19,653
10036043	KABLE FIRST INDIA PVT LTD.	Bangalore	Bangalore	26,00,068

After taking into account the above payment of Rs.18,90,700/- made by you towards three locations, it is pertinent to mention that an amount of Rs.9,33,758/- is still due to be payable by you for the month of July, 2011 towards these three locations. In view of the foregoing, we call upon you to forthwith clear the total outstanding amount by releasing the remaining outstanding balance of Rs.9,33,758/- towards subscription fees payable by you for the month of July, 2011.

We once again request you to effect the outstanding payment immediately and oblige.

In this regard without prejudice to rights and contentions of Star Den kindly note that in consideration for the provision of the service & subject to the terms of the erstwhile subscription agreement with Star Den you are paying the monthly subscription fee as per the negotiated terms. Further with reference to your letter dt. 19th July, 2011 you have mentioned that you will go with

the previous arrangement as far as for the purpose of subscription payment is concerned which is full proof of receiving all bouquet services of Star Den.”

28. On receipt of the said demand notice, the Petitioner, however, in its reply dated 30.8.2011 contended as under:

“We are in receipt of your letter dated 22nd August, 2011 and are perusing the same within the legal frame work. We will revert back to you with our detailed reply shortly.”

29. The Petitioner therefore, did not deal with the allegations contained in the Respondent’s letter dated 22.8.2011. It is not in dispute that thereafter it had not issued any other or further letter.

30. Immediately after issuance of the said notice, the aforementioned agreement was entered into. It is also not in dispute that the Petitioner had accepted the first payment in terms thereof.

31. Apart from the oral submissions, nothing has been brought on record to show that the said carriage agreement had not been acted upon and/or the amount accepted from the NDTV had been returned.

32. It may furthermore be placed on record that `Star One’ was one of the channels of Star Den Ltd., wherefor a carriage agreement had also been entered into.

33. An invoice was issued on 12.10.2011 for the period 15.11.2011 and 14.2.2012. Another invoice was also issued on 13.7.2011 for the period 15.8.2011 and 14.11.2011.

34. Perusal of the said invoices would go to show that the amount mentioned therein was a consolidated one being for a sum of Rs.12.00 lakhs.

It has also not been disputed that the Star Den had made payment of a sum of Rs.12,97,128/- towards carriage charges on or about 30.8.2011 which was accepted by the Petitioner without any demur whatsoever.

35. The Petitioner in paragraphs 31 and 32 of the petition stated as under:

“31. That, thereafter, on 09.07.2011 the Petitioner entered into a Placement Agreement with New Delhi Television Limited (NDTV) for placement of the channels of NDTV. Here it is submitted that till such time the Petitioner was sure that it will be able to deal with the issue of Bouquet-II. In so far payment under the Placement Agreement is concerned it is submitted that the Petitioner has received payments till the month of August 2011. A copy of Placement Agreement dated 09.07.2011 is annexed as **ANNEXURE-30** to this Petition.

32. That when no response from the side of Star Den was received the Petitioner, in order to give effect to its 4.1 Notice dated 10.06.2011 and Public Notice dated 15.06.2011, wrote a letter dated 14.07.2011 to Star Den to collect the Decoder Boxes of Bouquet-II and discuss the commercial terms at the earliest possible. A copy of letter dated 14.07.2011 is annexed as **Annexure-31** to this Petition.”

In its reply, the Respondent stated:

“31-32. The contents of para 31-32 are wrong and thus, denied in toto. It is respectfully submitted that the petitioner cannot blow hot and cold at the same

time. On one hand the petitioner alleges that it did not wish to supply signals of bouquet II channels of the respondent. On the other hand, after issuing 4.1 and 4.3 notice, it had entered into a placement agreement for certain channels of bouquet II. It is relevant to point out that such placement agreement was signed after expiry of 21 days of the public notice. It is further respectfully submitted that in a brazen display of malafide, the petitioner has received payment from the content owners of the said channels until November, 2011. Further more, the petitioner has also issued invoices dated 15.4.2011, 13.7.2011 and 12.10.2011 towards carriage fee for the said bouquet 2 channels. Thus, it is respectfully submitted that the petitioner has waived its notices by agreeing to place the channels of bouquet II on its network after expiry of 21 days of its own aforesaid public notice. The petitioner is only trying to mislead this Hon'ble Tribunal by making submissions which are false to its own knowledge. Needless to state, the said letter dated 14.7.2011 has been issued by the Petitioner only with dishonest intent to create paper trail for the purposes of the present petition."

36. In its rejoinder to the said reply, the Petitioner traversed the said contentions in the following terms:

"31-32. That the contents of Para Nos.31-32 are wrong and hence denied and the contents of corresponding Para Nos.31-32 of the main Petition are reiterated and reaffirmed as true and correct."

37. We may also notice the statements of the witness of the Petitioner Shri Kailasam P.

Paragraph 31 of his affidavit is in pari materia with paragraph 31 of the petition.

38. In his cross-examination the said witness stated as under:

“Q: Have you filed any document to substantiate your statement that you have not received any payment from NDTV or erstwhile Star Den towards placement of channels which are part of the bouquet 2 of erstwhile Star Den?

A: No.

Vol. While repeated reminders have been sent telephonically, no written reminder used to be sent to the above mentioned broadcasters.

Q. I put it to you that decoder boxes of channels of bouquet 2 of erstwhile Star Den were never returned by your company.

A: It is correct.

Vol. We have been requesting the respondent company to collect the decoder boxes several times while the attempt to handover the boxes to the respondent company has failed on couple of occasions.

Witness is confronted with page no.194 of the paper book.

Q. Have you received this letter dated 22.8.2011?

A: Yes.

Q. Did your company reply to this letter?

A: Yes vide letter dated 30th August, 2011.

Q: Did your company send any other communication in reply to letter dated 22.8.2011?

A: I do not recollect immediately.

Q. I put it to you that you had not sent any further reply to letter dated 22.8.2011 of the respondent as the contents of the said letter were correct.

A: I will check and revert back.”

39. The purported voluntary statement of the said witness with regard to return of the decoder boxes has neither been supported by any document, nor any pleading has been raised to the said effect in the petition.

So far as the issuance of notices are concerned, the said witness stated:

“Q. I put it to you that even after issuing notice under clause 4.2 on 10.6.2011 and notice under clause 4.3 dated 5.6.2011 petitioner continue to supply signals of the respondent’s channels in bouquet 2 of erstwhile Star Den.

A. It is incorrect.

Vol. We have in fact not received many of the decoders of bouquet 2.

Q. Can you please tell us which channels decoders boxes were not received by you from erstwhile Star Den?

A: Natgeo Adventure, Natgeo Music, FX, Fox Crime, Baby TV and MGM.”

41. However, from Annexure-D appended to the said agreement it clearly appears that the numbers of the decoder boxes as also the viewing cards have been mentioned therein.

42. It is, therefore, difficult to believe that decoders of some channels and/or viewing cards have not been received by it. Mr. Srinivasan, moreover, did not press the said issue.

43. We may also place on record that the Petitioner did not question the validity of Clause 12 of the aforementioned agreement, the relevant portion whereof is as under:

“12.TERMINATION

- (a) In the event of termination of the Agreement, the Affiliate expressly represents, warrants, certifies and confirms that it shall return the DSR(s). In the event of the Affiliate failing to return the DSR(s) within a period of 7 (seven) working days from the date of disconnection of service/termination whichever is earlier, the Affiliate shall be liable and responsible to make subscription payments as per the last applicable monthly subscription fee, for the period during which time the DSR(s) is not returned by the Affiliate to STAR DEN.”

We may also notice Clause 13 of the agreement.

“13. EFFECTS OF TERMINATION:

- (b) Upon the termination of the Agreement, the Affiliate shall immediately pay to STAR Den all outstanding payments and/or, other sums (including but not limited to costs/charges/fees, damages, claim for rendition of accounts, if any, accrued hereunder or prior to expiration/termination of this Agreement), whatsoever, that may be due to STAR DEN under the Agreement including the Subscription Fee given in the Article VI together with interest @ 24% p.a. as reduced by amounts already paid by the Affiliate towards such Subscription fee up to and including the effective date of such termination. The Affiliate shall also promptly return the DSR(s) and the Viewing Card(s) and remote, to STAR DEN or its duly authorized representative in a good working condition immediately upon the termination of the Agreement.

Upon the termination of the Agreement by STAR DEN in accordance with the terms hereof, the Agreement shall come to an end, STAR DEN shall be entitled to disconnect/deactivate the distribution of signals of the Subscribed Channels in accordance with applicable law.

Further, the Affiliate shall be deemed to be unauthorized to distribute the Subscribed Channels.”

44. It is not in dispute that the Petitioner did not act in terms of Clause 12 of the Agreement.

45. Clauses 4.2 and 4.3 of the Regulations, indisputably lay down the procedure as regards the mode and manner in the event the channels under the agreement are to be surrendered.

The parties can make and unmake a contract.

46. Mr. Srinivasan contends that an agreement could have been novated and/or varied only by way of a document in writing. Although, learned counsel is correct, we are of the opinion that such a contention need not be considered herein having regard to the factual matrix involved in this case.

47. The Petitioner did not act upon the notices. It is now a well settled principles of law that even a statutory right can be waived. The implication of issuance of the said notice on the part of the Petitioner would be that if the contract was validly terminated, it was not required to pay any subscription fee. The law, however, is that despite such a notice, the parties to an agreement can continue to abide by the terms of the earlier agreement. Issuance of the notices does not have a sun-set effect.

48. We have noticed heretobefore that the parties had reconciled their accounts on 28.2.2011 upto 31.12.2010.

When a party alleges that a channel has been imposed upon it, it is obligatory to raise the requisite pleadings. In absence of such a plea having been raised, the contention of that nature cannot be allowed to be urged particularly, when Mr. Srinivasan himself pointed out that a subscription agreement and a carriage agreement stand on different footings.

49. If a person enters into a carriage agreement wherefor it receives consideration, it must carry the channel. Once the Petitioner agreed to carry the channels of NDTV and continued to raise invoices in respect of Star One, the same would constitute strong evidence to show that the notices had not been given effect to.

50. The Respondent has not produced the CD but the Petitioner also did not file some important documents.

51. The Petitioner having admitted that the channels were carried from 1.7.2011, it would imply that its act of surrender of Bouquet-II channels were not complete. Moreover it will bear repetition to state that even in terms of the agreement it was for the Petitioner to return the decoders.

52. Having bestowed our anxious consideration to the entirety of the facts and circumstances, we are of the view that having regard to the doctrine of preponderance of probabilities, it is difficult to accept the contentions of the Petitioner.

It was taking recourse to both approbation and reprobation.

It took contradictory and inconsistent stands.

If it was so serious about bringing to an end the contractual relationship between the parties, it should have been acted in terms of the agreement in returning the decoders.

53. For the reasons aforementioned there is no merit in this petition, and is dismissed accordingly. However, there shall be no order as to costs.

(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

September 18, 2012
`anu'