

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated: July 27, 2011

Petition No. 67(C) of 2009

M/s Guwahati Communications

...Petitioner

Vs.

R.B. Network & Ors.

...Respondents

BEFORE:

HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON

HON'BLE MR. G. D. GAIHA, MEMBER

HON'BLE MR.P.K. RASTOGI, MEMBER

For Petitioner : Ms.Kanika Agnihotri & Mr. Vaibhav Agnihotri,
Advocates

For Respondent No.1 : Mr. Navin Chawla & Mr. Sharath Sampath,
Advocates

For Respondent No.2 : Mr.Yoginder Handoo, Advocate

J U D G M E N T

S.B. Sinha

Introduction

Effect of Constitution of a new firm while the old one is in existence is one of the interesting questions which arises for consideration in this petition.

Factual Backdrop

The petitioner is a multi service operator consisting of seven registered Cable TV MSOs wherefor, an unregistered deed of partnership was allegedly executed on 1.11.2005.

The respondent No.1 is a proprietorship concern of Shri Taj Islam. It claims itself to be one of the constituents of the petitioner-firm which is, however, denied and disputed.

The second and third respondents are also multi service operators.

The petitioner contends that the relationship between it and respondent No.1 as supplier of signals and receiver thereof started in 2005 and continued upto 2008 .

The arrangement between the parties were said to have been based on mutual trust which allegedly started deteriorating as first respondent became a constant defaulter.

It is, however, the case of first respondent that although it had been a partner in petitioner firm, it had illegally been ousted therefrom, and was forced to enter into a subscription agreement with it on or about 1.4.2008 to operate as a franchisee.

It is, however, not in dispute that in terms of the said agreement, respondent No.1 was required to pay an amount of Rs.4.55 lakhs towards subscription fee per month.

The petitioner contends that in terms of the said agreement, invoices were being regularly raised and received by the first respondent from a

perusal whereof, it would appear that the said amount of Rs.4.55 lakhs was inclusive of taxes.

The first respondent, however, denies and disputes receipt of any invoice.

On the premise that respondent No.1 defaulted in payment of the subscription fees regularly, petitioner issued a public notice which was published in two newspapers on or about 24.10.2008.

It reads as under:

"This is to inform consumers of R B Cable n/w
Ulubari that their line will be dis-connected in two days
from today.

Assam Cable Communication"

The petitioner moreover issued letters to all the broadcasters of pay channels informing them that on the ground of default, respondent No.1's signals have been disconnected.

According to the petitioner, first respondent started its own operations in relation where to it made complaints to The Telecom Regulatory Authority of India (hereinafter referred to as 'TRAI') as also Greater Guwahati Cable TV Operators Association.

On or about 9.1.2009 One Mr.Utpal Kakoti and one Mr. Tarikuddin Ahmed lodged complaints against Shri Taj Islam, the proprietor of respondent No.1 alleging that he had made attempts to commit their murder.

On the premise that a law and order problem had arisen, the Deputy Commissioner requisitioned a meeting wherein respondent No.2, a multi service operator is said to have undertaken to pay the arrears due to petitioner from respondent No.1.

It may be placed on record that Mr. Sanjive Narain whose wife is one of the partners of the petitioner firm also purporting to act on behalf of the Association issued a letter to the Deputy Superintendent of Police, Paltan Bazar Police Station, Guwahati which is in the following terms:

“This is to state that according to my opinion, if Mr. Rana Saidur Jaman clears the dues of Taj Islam in Guwahati Communication, the members of Guwahati Communications, should not have any problem if they do their business abiding by the guidelines set by TRAI. Rest of the members will inform their decision by tomorrow.

Sd/- (Sanjeev Narain)
11/01/09”

In the meeting which was convened pursuant to the said letter by the said authority, a purported undertaking was given by the respondent No.2, which reads as under:

“I Rana Saidur Jaman, Director of M/s Nirman Associates Pvt. Ltd do hereby given an undertaking that Nirman & Associates Pvt. Ltd. will take responsibilities that whatever the outstandings as claimed by Shri Sanjeev Narain on behalf of Guwahati Communication subject to condition of genuineness of illegible.”

The respondent No.2 has been impleaded in this petition on the premise that by reason of the said undertaking, it admitted its liability to pay the alleged dues of petitioner.

The respondent No.3 has been impleaded as a party on the premise that it had issued a public notice contending that first respondent had sold its network to it.

It reads as under:

“It is to inform all concern that M/S M.N.R.B Cable Network, South Sarania, near Masjid, Guwahati being the absolute owner of operation Cable Network service in the area South Sarania, Lalmati, Gandhibasti area, Gandhimandap road, By lane 4 (Near Guwahati Timber) and Minakshi Complex Lane by virtue of sale purchase dated 26/6/2008 from R.B. Cable Network (Prime Cinema) i.e. Md. Taj Islam.

Any body deal with M/S R.B. Cable Network (Prima Cinema) i.e. Md Taj Islam treated as illegal and that will be own risk and cost.

Therefore customers of Cable Network in the area South Sarania, Lalmati Gandhibasti area, Gandhimandap Road, By lane 4 (near Guwahati Timber) and Minakshi Complex lane are hereby request to contact with M/S M.N.R.B. Cable Network. Phone No.9864788186.

Tarikuddin Ahmed, (Nitu)
PROPRIETOR
M.N.R.Cable Network”

The Present Proceeding

On the aforementioned premise, the petitioner has filed this petition praying, inter alia, for the following reliefs:

- (i) “Direct the Respondents to jointly and severally pay an amount of Rs.8,44,400/- (Rupees Eight Lacs Forty Four Thousand and Four Hundred only) as the amount due from the Respondent to the petitioner.
- (ii) Award pendente lite interest at the rate 18% per annum on the amount prayed for, in favour of the Petitioner and against the Respondent.
- (iii) Award future interest at the rate 18% per annum on the amount prayed for, till the date of actual payment.

- (iv) Award costs in favour of the Petitioner and against the Respondents.
- (v) Any other relief that this Hon'ble Tribunal deems fit and proper in the interest of justice."

In support of its claim, the petitioner had, inter alia, relied upon a statement of account purporting to be maintained by it in usual course of business.

We may notice the same:

To, M/s R. B. Network Prop. Mr. Taj Islam Ulubari, Guwahati-7				From, Guwahati Communication Ulubari, Guwahati-7		
Dated:- 31/01/2009						
<u>STATEMENT OF ACCOUNTS FOR THE F/Y 2008-2009</u>						
Given below is the details of your Accounts as standing in my/our Books of Accounts for the above mentioned financial year which is period from 2008-2009						
SL. NO	MONTH	INVOICE AMOUNT	RECEIVED AMOUNT	RECEIVED BY Cash/ Cheque No	OUTSTANDING AMOUNT	REMARKS
	Previous Balance	-	-		39,400.00	
1	Apr-08	455,000.00	100,000.00	Cash	394,400.00	
2	May-08	455,000.00	200,000.00	Cash	649,400.00	
3	Jun-08	455,000.00	500,000.00	Cash	604,400.00	
4	Jul-08	455,000.00	480,000.00	Cash	579,400.00	
5	Aug-08	455,000.00	100,000.00	Ch. No. 325829	934,400.00	
			100,000.00	Ch. No. 249230	834,400.00	
			400,000.00	Cash	434,400.00	
6	Sep-08	455,000.00	300,000.00	Cash	589,400.00	
7	Oct-08	455,000.00	100,000.00	Ch. No. 325838	944,400.00	
			200,000.00	Cash	744,400.00	
8	Nov-08	-	100,000.00	Ch. No. 325831	644,400.00	
			200,000.00	Ch. No. 325832	444,400.00	
9	Dec-08	-	-		444,400.00	

10	Jan-09	-	200,000.00 200,000.00	Ch.No. 201616 Ch. No. 201617	244,400.00 44,400.00	
	*Cheque Bounce	800,000.00			844,400.00	
				Net Balance	844,400.00	

For, GUWAHATI COMMUNICATION

Guwahati Communication

Note: Details of Bounce Cheques:

Sl. No	Cheque No.	Amount
1	249230	100,000.00
2	325831	100,000.00
3	325832	200,000.00
4	201616	200,000.00
5	201617	200,000.00
	Total Rs.	800,000.00

The respondent No.2 filed a petition against MSM Discovery Pvt. Ltd. For a direction upon it to supply signals to its network.

The petitioner on the premise that the said respondent has not cleared its dues in terms of the said undertaking and, thus, it should not have been favoured with such a direction preferred an appeal against the said judgment before the Supreme Court of India and obtained an order of stay.

It appears that the said respondent with a view to obtain vacation of the said order of stay deposited the amount in question.

For the said purpose reliance has also been placed upon an order of the Supreme Court of India dated 1.5.2009 passed in Civil Appeal (D)

No.13235 of 2009 whereby and whereunder the judgment of this Tribunal was stayed.

We would advert to the said contention a little later.

We may at this stage also notice the contention of respondent No.1 in this regard from its reply:

"It is submitted that document annexed by the petitioner as annexure P-XI itself says that the director of answering respondent has stated that subject to condition of genuineness of evidence, respondent No.2 will take responsibility of outstanding claimed by Mr. Sanjeev Narain. The said Sanjeev Narain or any other person never produced any genuine evidence to establish any claim of outstanding as alleged. It is denied that there is any admission of any alleged nexus between respondent No.1 and respondent No.2. It is denied that there is any admission by Mr. Rana Zaman. It is denied that respondent No.1 and 2 are the same entities or are/were acting in concert with each other. All contentions to the contrary are denied."

The respondent No.3 has not appeared before us.

The first respondent also has denied and disputed that it has sold its undertaking to respondent No.2.

According to it, it has closed its business. It contends that petitioner was bound to render accounts as it had to make various payments to its other partners as also to various broadcasters. It has also filed a counter claim, inter alia, for a decree for accounts.

Evidence

The first respondent in support of its contention that it was one of the partners of the petitioner firm has relied upon a registered deed of

Partnership executed on 21st day of March, 2006, which according to the petitioner is a forged and fabricated document.

The first respondent contends that it has made over payments to the tune of a sum of Rs.28 lakhs to petitioner.

The respondent No.2 has denied and disputed its liability to pay the said sum to the petitioner on the basis of the said undertaking as alleged by it or at all. It has explained the circumstances in which it was forced to deposit the amount in question before this Tribunal.

Issues

In view of the rival contentions of the parties, this Tribunal has framed the following issues by an order dated 15.9.2010:

- (i) "Whether the present petition is maintainable?
- (ii) Whether the petitioner is entitled to the amount of Rs.8,44,400/-?
- (iii) Whether the respondents – jointly or severally – are liable to pay the petitioner an amount of Rs.8,44,400/- with interest?
- (iv) Whether the act of the respondent No.1 in forging a partnership deed and placing the same on record of this Hon'ble Tribunal merits strict note and consequent action against the respondent No.1?
- (v) Whether the act of Respondent No.2 in attempting to resile from its undertaking (dated 11.01.2009) is in violation of settled principles of law?
- (vi) Whether the respondents No.1 and 2 have acted in concert to deceive and defraud the petitioner?
- (vii) Whether the counter claims of the respondents

No.1 and 2 are maintainable in the facts and circumstances of this case?

- (viii) Whether court fee paid in support of the counter claim by the respondent No.1 is sufficient.
- (ix) Whether the respondent No.2 is bound to pay ad velorem court fee on the counter claim made by it. In the even counter claim of the respondent No.1 is allowed what other or further orders may be passed by this Tribunal so as to adjust the equities between the parties."

Preliminary Issue

The respondent No.2 filed an application contending that this petition should be rejected in terms of Order VII Rule 11 (d) of the Code of Civil Procedure, 1908 on the premise that petitioner firm was not registered with the Registrar of Firms as is required under Section 69(2) of the Indian Partnership Act, 1932.

The said plea was rejected by an order dated 22.1.2010 opining that equities between the parties have to be adjusted only in these proceedings.

The relevant portion of the said order reads thus:

"The respondent, however, pursuant to said directions, it is accepted at the Bar that all dues of the petitioner as has been claimed, have been paid. Mr. Handoo, the learned counsel appearing on behalf of the respondent, however, submits that keeping this view of the matter, this petition is not maintainable, as his client is entitled to refund of the amount in question. If that be so, equities have to be adjusted and this Tribunal may also consider, if so advised, to recall the aforementioned order in Petition No. 21(C) of 2009. In view of the aforementioned subsequent events and keeping in view of the contradictory stand taken by respondent herein, we are of the opinion that this petition cannot be rejected in terms of Order VII Rule 11 of the Code of Civil Procedure or otherwise ; in as much as in the event equities are required to be adjusted at a subsequent stage, such an

order can be passed only in this petition, which would not be possible if the petition is rejected. In this view of the matter application for rejection of the petition is dismissed."

Oral Evidence

The petitioner in support of its case has examined Mr. Tarun Saha one of its partners. It has also examined Mr. Sanjive Narain.

The respondent No.1 has examined its proprietor Shri Taj Islam. It also examined an 'Extra Writer' who has been working in the office of Senior Sub-Registrar, Kamrup, Metro, Guwahati), Mr.Mainul Hoque Chaudhary to prove the registered partnership deed dated 21.3.2006. The respondent No.2 examined Mr. Rana Saidur Zaman.

Submissions

Ms. Kanika Agnihotri, learned counsel appearing on behalf of petitioner, would urge:

- (i) The first respondent having not denied nor disputed the agreement dated 1.4.2008, the invoices issued and served upon it as also in view of the undertaking to pay the said amount by respondent No.2, petitioner must be held to have proved its case.
- (ii) From the statement of account filed by petitioner, it would also be evident that some of the cheques issued by respondent No.1 bounced, as a result whereof the dues upto May 2008 rose to a sum of Rs.6,49,400/-.
- (iii) From the cross examination of respondent No.1, it would furthermore appear that it admitted its liability for a sum of Rs.7.75 lakhs

and interest thereon as on 30.9.2008 but wrongly contended that it was entitled to a sum of about Rs.28 lakhs from the petitioner.

(iv) The purported partnership deed dated 21.3.2006 is a forged and fabricated document as would be evident from the following circumstances:

(i) The stamp paper had been purchased in the year 2002 but the partnership deed was executed by the parties in 2006.

(ii) The parties are said to have been identified by one Shri Recummudin Ahmed, Advocate who has not only been not examined, respondent No.1 clearly stated that he even did not know him.

(iii) From the statement of the 'Extra Writer', it would appear that no photograph of the executants was necessary to be affixed with the deed at the relevant point of time, but according to Shri Taj Islam, such photographs had been annexed with the deed.

(iv) A deed of partnership does not require registration in terms of the provisions of Indian Registration Act and in that view of the matter the petitioner having proved the unregistered partnership deed and the same having been acted upon, the counter claim of respondent No.1 must be held to have not been proved.

(v) Although according to respondent No.1, it had been paying the broadcasting charges to the broadcasters, from a perusal of the evidence of Shri Taj Islam it would be evident that such charges were also said to have been paid to ESPN, although the agreement dated 1.4.2008 related to other broadcasters and not ESPN.

(vi) A counter claim for rendition of accounts is not maintainable before this Tribunal as the partnership has not been dissolved.

Mr. Sharath Sampath, learned counsel appearing on behalf of the first respondent, on the other hand, submitted:

(a) The purported unregistered partnership agreement dated 1.11.2005 whereupon reliance has been placed by petitioner is a forged and fabricated document.

(b) The respondent at the material time was a partner of petitioner, wherefrom it was illegally ousted in 2008 and, thus, its counter claim must be allowed.

(c) Although the MSOs who were seven in numbers formed the petitioner firm, all partners including the first respondent having their own subscribers and cable operators, it, on the asking of the other partners had been paying directly to the broadcasters as also in the accounts of the other partners and, thus, accounts should be directed to be rendered.

(d) The purported admission of the first respondent for a sum of Rs.7,75,000/- relates to Karnatka Bank only and in fact the bank account of HDFC Bank had not been taken into consideration with regard thereto.

(e) This Tribunal should raise a presumption that a deed registered under the Indian Registration Act has correctly been executed and in that view of the matter the burden of proof has shifted to the petitioner herein for disproving the same and/or proving the unregistered deed of partnership dated 1.11.2005.

(f) The Respondent No.1 although had issued cheques which bounced but the proceedings initiated against him in term of Section 138 of the Negotiable Instrument Act having been dismissed for default, no reliance can be placed thereupon.

(g) From the statement of accounts filed by respondent No.1 (Pages 261 to 264) it would appear that receipts had been serially numbered which correspond to the cheques which have been filed by it, the genuineness whereof has not been denied or disputed by the petitioner.

(h) Mr. Tarun Saha having admitted in his cross-examination that Mr.Nitai Roy had not been a partner of the petitioner firm and furthermore having regard to the fact that no second party has been mentioned in the said purported deed of partnership, the purported unregistered deed of partnership must be held to be a forged and fabricated document.

(i) The petitioner having not filed its books of accounts despite having been called upon to do so, an adverse inference should be drawn against it.

Mr. Handoo, learned counsel appearing on behalf of respondent No.2, urged: -

(i) This petition is not maintainable as the petitioner is a partnership firm which is not registered in terms of Section 69 of the Indian Partnership Act, 1932 inasmuch as it claims a right under a contract as also has prayed for specific performance of contractual obligations on the part of respondent No.1.

(ii) From a perusal of the records it would be evident that the partnership deed dated 1.11.2005 consisted of seven partners of the firm known as M/s Guwahati Communications; whereas from the partnership deed dated 21.9.2008 it would appear that there are only six partners in the name of `Assam Cable Communication' wherein the name of Nitai Ray one of the partners in Guwahati Communications did not figure as a partner and as such it would be a new partnership firm which is also not registered with the Registrar of firms although purported to be registered under the Indian Registration Act.

Strong reliance in this behalf has been placed on Jagdish Chandra Gupta vs. Kajaria Traders (India) Ltd. reported in AIR 1964 SC page 1882 and U.P. State Sugar Corporation Ltd. vs. Jain construction Co. & Anr. reported in (2004) 7 SCC 332.

(iii) It is well settled that a suit for recovery of an amount in terms of the provisions of a contract would not be maintainable, if on the date of institution of the suit, the plaintiff firm is not registered and any subsequent registration would also not subserve the requirements of the Act.

(iv) From the pleadings of the parties and in particular the resolution dated 24.2.2009 authorising Shri Tarun Saha to file pleadings and also to appear in this case as a witness, it would appear that the real purpose and object of filing this petition was not recovery of any amount from the respondents herein but only to prevent respondent No.2 to enter into the market.

- (v) From the backdrop of events leading to respondent No.2's depositing a sum of Rs.8.00 lakhs and odd, it would be evident that it was compelled to do so having regard to the situation as obtaining at that time.
- (vi) The petitioner has failed to adduce even a streak of evidence to establish that respondent No.2 is the successor in interest of Shri Taj Islam or its agent or had otherwise taken over its network.
- (vii) The petitioner should not be permitted to rely on the undertaking purported to have been issued by respondent No.2 in the facts and circumstances of this case.

Core Questions

In view of the rival contentions of the parties, the core questions which arise for consideration are;

- (i) Whether this petition is maintainable; and
- (ii) Whether the petitioner and/or the respondent No.1 is entitled to grant of any relief.

Analysis of Factual Matrix

The subscription agreement dated 1.4.2008 between petitioner and respondent No.1 is not in dispute. It has also not been disputed that first respondent has made itself liable to pay a sum of Rs.4,55,000/- by way of subscription charges per month to petitioner firm.

Admittedly, the petitioner on the ground of default has terminated the supply of signal to respondent No.1's network, only on issuance of a public

notice of two days, although in terms of Clause 4.3 of the Regulations, 21 days' notice therefor is mandatorily required.

It is not in controversy that wife of Shri Sanjive Narain is a partner in the petitioner company. Inter alia, on the premise that first respondent has defaulted in payment of its dues, petitioner has sent a complaint against it also on the ground that the signals of Neo Sports, Zee TV, ETV Bangla were being transmitted from its network although no agreement was entered into by and between the said broadcasters with it.

The TRAI did not take any action on the said complaint on the ground that by reason thereof no specific violation of the Tariff Order/Regulations had been pointed out.

Admittedly a complaint was also filed before the Deputy Commissioner Kamrup Metro contending that he being a nodal officer under the Cable Television Network Act, 1995 stating that despite the fact that the network of respondent No.1 having been disconnected on the ground of default, it had been operating illegally.

He was asked to exercise his jurisdiction directing:

- "1. No Broadcasters or Operator provides signals/feed directly or indirectly to R.B. Cable Network, Ulubari Guwahati-7 until & unless all the outstanding and dues towards GCC are cleared.
2. No Broadcasters including Neo Sports is allowed to disconnect the signals of GCC for outstanding which include unrecovered dues of R.B. Cable Network.
3. No Broadcasters including Neo Sports is allowed to hike the present payout of operator since there is already a freeze in rates by TRAI, decrease of revenue of operators due to shifting of subscriber to DTH,

increasing maintenance cost due to advancement in Technology.

4. No subscriber of Cable TV is allowed to shift to DTH until & unless the dues of the Cable Operator are cleared, for which the DTH dealer should obtained a NOC from the local Cable Operator before installing the DTH.

5. Arrangement for issuing Identity Cards to our technicians who have to work round the clock as ours is an essential 24 hrs. Service and the present law and order situation have made it difficult to render the necessary service.

6. Immediate steps and measures are taken for implementation of conditional access system (CAS) in Guwahati which has been given deadline of 2011 by TRAI for Digital Transmission.

Last but not the least, we request you good self to take immediate steps for preventing the illegal activities of Neo Sports, whose unfair practices shall deprive thousands of Cricket lovers from viewing the coming India-England Test Match Series which is Exclusive in Neo Sports."

A first information report, as noticed heretobefore, had also been lodged by Shri Utpal Kakoti and Shri Nitu Ahmed.

It is on the aforementioned premise that a purported undertaking to pay the amount in question was given by respondent No.2. Various other first information reports and complaints had been lodged/made with which we are not concerned.

We may, however, notice that despite the said purported undertaking, respondent No.2 has issued a public notice denying any relationship between it and respondent No.1.

Mr. Tarikuddin Ahmed proprietor of respondent No.3 however, not only issued a public notice published in the Assam Tribune Guwahati on 5.3.2009 but also affirmed an affidavit contending that first respondent had been illegally operating a cable network despite the fact that a sale deed had been executed in his favour by it on 26.8.2008.

We may also notice the statement of accounts.

According to the petitioner from the entries thereof, it would appear that a sum of Rs.6,49,400/- was due from respondent No.1.

Two cheques for sums of Rs.1,00,000/- and Rs.2,00,000/- bounced in the month November and if the said amounts are deducted from the amount payable by respondent No.1 in November, 2008, it owed to petitioner a sum of Rs.7,75,000/-.

Mr. Taj Islam in his cross-examination stated as under:

“Q. Is it correct to suggest that as a Cable operator you would take feed from Guwahati Communications and on your own deposit the money in the HDFC account of Guwahati Communications?

A. Yes.

Q. Had you paid your entire monthly subscription until the date of disconnection to the tune of Rs. 4,00,000/- per month?

A. Yes.

Vol- If you total the receipts on record, they will reflect that amounts are payable by the Petitioner to me.

Attention of the witness is drawn to pages 144 of the original receipts folder.

Q. Is this document correct and does it bear your signature- marked E?

A. Yes.

Q. Is it correct that as per your own admission in this document, you had to pay the Petitioner an amount of Rs. 6, 49, 400/- in the month of May 2008?

A. Yes.

Q. Did you make any payments to the Petitioner after May 2008?

A. No.

Vol- They owe me money.

Attention of the witness is drawn to page 60 of the petition

Q. Is it correct that from this Statement of Account correctly reflects as an amount of Rs. 6, 49, 400/- as your outstanding for the month of May 2008?

A. Yes.

Q. Did you make any payments at all after the month of May 2008?

A. Yes. I made payments in cheque and cash both. I paid Rs. 6, 00, 000/- cash.

Q. Do the payments in the statement of account for the month of August 2008 reflect this payment of Rs. 6, 00, 000/- in cash?

A. No.

The witness points out to pages 142-146.

To a figure of Rs. 6, 00, 000/- at page 142 (bears signatures B3 next to it).

Q. Is this the Rs. 6, 00, 000/- in cash you are referring to?

A. Yes.

Q. Was this money not paid in April 2008?

A. Yes.

Q. Is the reconciliation accounts filed by you with your affidavit at pages 141-146 correct?

A. Yes. My monthly subscription was Rs. 4, 55, 000/. I had to pay them Rs. 7, 75, 000/- as reflected in the reconciliation sheets. The Petitioner has to pay me much more."

An admission is said to have been made by the first respondent. It is a hand written document.

It reads as under:

“04 JANUARY

2008

1ST WEEK 004-362

FRIDAY

Last Balance Till 31.03.2008	39,400/-
Billing April	4,55,000/-
Billing May	4,55,000/-
	<hr/>
	9,49,000/-
	<hr/>
Paid 30/4/2008	1,00,000/-
Paid 30/5/2008	8,49,400/-
	<u>2,00,000/-</u>
Bobby to be clarified & deduct two months	6,49,400/-

Final Settlement of TAJ A/c. on 5/6/2008 as accounts checked at office of Birvanhal Communications, where outstanding reflects Rs. 6,49,400/- in presence of the following:

- MD. IQUEBAL AHMED
- TAJ ISLAM
- MANU KALITA
- SANJIVE NARAIN”

However, from the statement of account filed by petitioner, it would appear that previous balance of Rs.39,400/- has been shown, the details whereof have not been produced before us. Why such a balance has been

shown in the said statement of account and what was the basis thereof has not been explained.

Re-Partnership

Both the parties hereto have denied and disputed the deed of partnership relied on by the otherside.

The partnership deed relied on by first respondent is a registered one. It carries with it a presumption. In the event such a presumption is drawn, the onus of proof shall shift on the other side to show that it is an outcome of fraud or is otherwise not a genuine document.

We have noticed heretobefore that respondent No.1 had summoned Shri Mainul Haq Choudhary who has been working as an `Extra Writer' in the office of Senior Sub Registrar, Kamrup.

He has produced the original registered partnership deed which was marked as Ex.A.

He testified that the partners have signed the said deed in presence of the officer of an Senior working in the office of Sub Registrar.

Our attention, however, has been drawn to the fact that the original partnership deed has not yet been returned to the `executants' thereof in view of the fact that the contents of such deeds could not be copied in the official registers of the Registration Department since 1999.

In response to a question as to whether the said document was signed before the concerned officer, the said witness stated as under:

"Q. Can you say for certain that this document was signed before the concerned officer?"

A. I cannot say for sure.

Volunteers: It must have been as it cannot be registered otherwise."

As regards identification of the executants he stated in the following terms:

"Q. What is the process of registering a partnership deed?

A. The parties who are the signatories to the document come and sign in front of the concerned officer and pay the requisite registration fee. Two or Three witnesses are required to witness the document and one person to identify the parties. There was no system of either affixing the photographs to the documents or the same being taken at our office way back in 2006. However this system later introduced though I can not say when.

Q. Did the party signing the document has to give any proof of their identity?

A. No. There was no such requirement then.

Volunteer: The signatories were identified by another person. In this deed an advocate has identified the parties.

Q. Did another party identifying the signatories have to give proof of their identity?

A. Yes. We would note all details of the person identifying the signatories, if this person was not an advocate.

Q. Is it possible that the people signing the document may not be the people they allege to be?

A. No. It is incorrect.

Volunteer: How would I know."

Our attention, however, has been drawn to the fact that PW1 claims himself to be a director of Petitioner Firm.

So far as execution of the partnership deed is concerned, Shri Taj

Islam stated as under:

“Q. Was the company incorporated or the memorandum or articles of association drawn up?

A. I am not aware.

Vol- Everything is done by Mr. Sanjive Narain.

Q. Did you visit the office of the Registrar to sign the documents- memorandum and articles of association, deed of incorporation?

A. Yes.

Q. Who all were there with you at the time of signing these documents?

A. Tarun Saha, Ripon Pathak, Rajesh Sharma, Dipendra Mitra, Kaushik Nath.

Q. Did Sanjive Narain accompany you?

A. No. Meghali Beruah Narain.

Q. Did anyone else accompany you?

A. No.

Q. When you went there, you must have signed the register, the stamp paper, have your pictures clicked, given thumb prints?

A. Yes all of this happened apart from thumb prints.

Q. Why did you not give thumb prints?

A. I was not told to do so. I was amongst the first to leave.

Q. Who informed you about the process?

A. Sanjive Narain.

Q. Did you sign upon his pointing out to you where to sign?

A. Yes.

Vol- No body would do anything in the Cable Business without Sanjive Narain.

Q. When was the partnership deed that you seek to rely on signed and registered?

A. they were two different dates however I do not remember at all.

Attention of the witness is drawn to pg. 12 of his affidavit of evidence.

Q. Please tell the dates now?

A. 24.03.2006.

Q. What does this date pertain to?

A. It is not clear. I cannot say it is 1 or 4.

Q. Please point out both the dates?

A. one is 21.03.2006 and the other is 24.03.2006

Q. Is it your case that the Partnership Deed that you seek to rely on was signed on 21.03.2006 and registered on 24.03.2006?

A. Yes.

Q. When and where did you purchase the stamp paper?

A. It was provided to us by Mr. Sanjive Narain.

Q. Are you aware that the stamp paper was not even purchased in the year that you allege the deed was signed?

A. I am not aware."

So far as obtaining of a copy of the said deed is concerned, he stated:

"Q. Why was a copy of the allegedly registered partnership deed given only to you and not the other partners?

A. I obtained from Sanjive Narain and not the Registrar. How do I know why he did not give to the others.

Q. When did you join Guwahati Communications?

A. We formed Guwahati Communications in 2004.

Q. Are there any documents that witness this formation?

A. No as none were signed. We were all operating on trust. There is no document to show the payments made by me or other directors."

Shri Tarun Saha admittedly is a partner of the petitioner-firm. However, as would be evident from his deposition, he did not state that he had not signed on the said partnership deed.

Mr. Sanjive Narain also in his evidence did not state that his wife had not executed the said partnership deed.

In view of the categorical stand taken in the reply, it was obligatory on the part of the witnesses examined on behalf of petitioner to deny their own as also the signatures of the other partners on the said registered document. It was also obligatory on the part of the said witnesses to offer their explanations to the claims of first respondent.

For the said purpose it was furthermore necessary to produce some essential documents to establish as to who were the partners of the firm from the very inception.

The petitioner for reasons best known to it did not do so. An adverse inference, therefore, should be drawn against it that had such documents been produced they would have run counter to their contentions in this petition.

We may notice a part of the terms of the alleged partnership deed dated 1.11.2005.

Before, however, we do so, it may be noticed that the petitioner in paragraph 4 of the petition contended that in November, 2005 the firm was constituted. The respondent No.1, however, in his evidence contended that although the partnership was constituted in 2005, the partnership deed was executed by reason of the said registered deed of partnership in 2006. We

may also notice that according to Mr. Taj Islam in his cross-examination, the partnership business started in the year 2004.

So far as the deed for partnership deed dated 1.11.2005 is concerned, Shri Tarun Saha's age was mentioned therein as 42 years. He in the said deed was described as first party of the first part; whereas in serial No.2 thereof the name of Shri Ripon Pathak is mentioned describing him as the third party of the third part.

It is difficult to conceive as to why no name was mentioned as a second party of the second part to the said deed.

On the other hand, the name Shri Nitai Ray figures describing him as the Eighth party of the Eighth part.

Mr. Tarun Saha moreover in his affidavit did not deny or dispute his signature in the registered deed of partnership. He only in answer to a question in the cross-examination volunteered as under:

"It is incorrect to suggest that the partnership deed of Guwahati Communication wherein Mr. Taj Islam was also a partner was registered on 21.03.2006 vide partnership deed no.1651 of 2006."

What prevented him for making a positive statement is beyond any comprehension.

So far as the question of Nitai Ray being a partner of the petitioner firm is concerned, Mr. Saha stated as under:

"Mr. Nitai Roy is not a partner of the petitioner but a member.

As regards the constitution of Assam Cable Communication vis a vis Guwahati Cable Communication as also on the question as to whether Mr. Nitai Roy had ever been a partner of the petitioner, the said witness stated as under:

"The partnership deed of Assam Cable Communication was signed on 21.01.2010.

Vol- We initially wanted to enter into the partnership deed on 21.09.2008. However, we signed it only on 21.01.2010.

Attention of the witness is drawn to page 203 I

Q. Is this partnership deed is false?

A. We registered this in Court.

There are 6 partners in Assam Cable, namely Dipender Mitra, Rajesh Sharma, Ripon Pathak, Kaushik Nath, Meghali Baruah Narain and Tarun Saha.

I am the authorized representative of the petitioner and have been authorized to file the present evidence on behalf of the petitioner.

The authority is given by the other partners.

Q. Have you filed the authority letter?

A. Yes it is a page 156.

Q. Can you show from the authority letter where it is mentioned that you can depose evidence on behalf of the petitioner?

A. It is mentioned in the last paragraph of the document at page 156.

Mr. Nitai Roy is not a partner of the petitioner but a member.

I recognise the signatures of Mr. Nitai Roy in the document at page 156(Mark 'A').

Q. If as per you the partnership was entered into in September 2008 and there were only 6 partners named above, how could Mr. Nitai Roy authorize you on 24.02.2009?

A. He is a member and in that capacity he can authorise.

Guwahati Communication was formed in the year 2005.

There were six partners in Guwahat Communications namely, Dipender Mitra, Rajesh Sharma, Ripon Pathak, Kaushik Nath, Meghali Baruah Narain and Tarun Saha.

Q. When was the partnership deed for Guwahati Communication entered into between the partners?
(Objected to by the learned counsel for the petitioner being repetitive one)

A. There was no partnership deed entered into. It is correct that Mr. Nitai Roy was not a partner in Guwahati Communication."

It is difficult to accept the statement of the said witness.

A deed of partnership is a commercial document.

A document of such importance was to be carefully drafted. The said deed of partnership dated 1.11.2005 is an unregistered document. There is no concept of anybody being a `Member' or a `Director' of a partnership firm. If a person is not a partner, his authority to represent the firm must be explicitly stated in some documents. The original deed has not been produced. No documentary evidence has also been produced to show as to from which date the said partnership started working and who actually were the partners thereof. The petitioner firm must have documents with it to show as to who were entitled to share of profits. It was also obligatory on its part to show as to what was the status of a member vis-à-vis the partnership firm.

The petitioner being one of the biggest MSOs in the State of Assam which has also extended its activities to the other North-Eastern States must be paying Income Tax.

It has not produced its PAN Card number. There is nothing on record to show as to whether its books of accounts are audited.

Keeping in view the statements made by the respondent No.1 in its reply that although partnership started in the year 2005 but the same was evidenced by registered deed of partnership executed on 21.3.2006, in our opinion, the petitioner should have made endeavours to prove the said deed of partnership dated 1.11.2005 by producing the original document.

We may notice that the subsequent deed of partnership was executed in the year 2008 but registered in 2010.

The registered deed of partnership produced by the respondent No.1 (although not compulsorily registerable in terms of the provisions of the Indian Registration Act) was executed before an officer of the registering authorities.

The recitals in both the deeds dated 1.11.2005 and 21.3.2006 are almost identical (except some details as regards the operation of bank account etc.). At the foot of the last page of both the deeds seven parties have similarly been mentioned and only in place of Shri Taj Islam, the name of Shri Nitai Roy has been included.

At the foot of the said agreement there is a column of witnesses being three in number. The word `witnesses' was also mentioned in the aforementioned registered deed dated 21.3.2006. In the unregistered deed

dated 1.11.2005, no signature of any witness appears. The execution of the said deed, therefore, was not witnessed by any other person.

In both the aforementioned deeds, the age of Shri Tarun Saha and other partners are identically mentioned. Even in the partnership deed forming Assam Cable Communication which was executed in the year 2008 but registered in 2010, the age of Shri Tarun Saha has been mentioned as 42 years.

All the three deeds are almost on identical format. All the deeds, thus, subject to some minor changes, have been copied from a standard draft.

The names of the partners have been serially arranged except the discrepancies as noticed heretobefore.

It may be true that Shri Taj Islam accepted that the partnership business started in the year 2005, but then according to him the deed was executed in March, 2006.

As a presumption arises in favour of a registered document, the burden of proof that the same was fabricated was on the petitioner. It has failed to discharge its burden.

Moreover, the witness of the petitioner Shri Tarun Saha who had been authorized to sign the pleadings and depose on behalf of the petitioner by all other partners including Shri Nitai Ray has not made any statement whatsoever that neither he nor others have put their signatures on the said deed. It was expected that there will be a firm denial by Shri Saha as also other partners that their signatures appearing in the registered document were forged and fabricated.

In ordinary course the disputed signatures should have been sent to a handwriting expert for comparison of the signatures of the executants of the said deed with their admitted signatures. Mr. Sanjive Narain in his affidavit, as indicated heretofore, also did not deny or dispute the signature of his wife and/or the other admitted partners of the petitioner firm.

It has also not been explained as to why, although the name of Guwahati Communication was changed to Assam Communication with Nitai Roy going out of the partnership business in 2008, the document was registered only on 21.1.2010.

It may be true that the stamp paper for the partnership deed dated 21.3.2006 has been purchased in the year 2002. It may also be true that according to Mr. Taj Islam he was not aware of the identity of the lawyer concerned who had identified them but we have no hesitation to accept his explanation that everything was being managed by Mr. Sanjive Narain, keeping in view the factual circumstances of the case.

We, therefore, are of the opinion that the unregistered partnership dated 1.11.2005 is a got up document. The petitioner has not been able to disprove the execution of the registered deed of partnership dated 21.3.2006.

Role of Mr. Sanjive Narain in the affairs of the petitioner firm

Mr. Sanjive Narain had so many roles to perform. His wife is a partner and/or director of various firms or companies which are connected one way

or the other with the cable business and/or distributorship of various broadcasters.

Mr. Tarun Saha has gone to the extent of saying that he even maintains the books of accounts of the petitioner firm; although according to Shri Narain he had no direct connection with the petitioner firm.

He took up the issues with regard to the first information reports lodged by some other persons against the respondent No.1 with the police authorities. He wrote a letter to the Deputy Superintendent of Police on behalf of the Association. He only suggested that respondent No.2 should undertake to pay the dues of respondent No.1. but in what capacity he did so was not stated. According to him he is approached by the Cable Operators whenever any occasion arises therefor.

His affidavit makes an interesting reading.

1. "I state that I was present in the meeting dated 11th January, 2009, held between the Petitioner i.e. M/s Guwahati Communications and Respondent No.2 i.e. M/s R.B. Network as a representative of the Petitioner. I state that the meeting had been convened by Deputy Commissioner of Police, Kamrup to try and resolve the concerns raised by the Greater Guwahati Cable TV Operators Association (GGCTOA).
2. I state that in the said meeting the Respondent No.2 was represented by one Mr. Rana Zaman, who claimed to be the Director of Respondent No.2. I further state that, Mr. Rana Zaman in the said meeting had informed the Petitioner for the first time that it had taken over Respondent No.1. Responding to this contention of the Respondent, the Deputy Commissioner was of the view that if Respondent No.2 had taken over the Respondent No.1, then it had to be responsible for all liabilities of the Respondent No.1.
3. I state that I on behalf of the Petitioner, agreed to the suggestion made by the Deputy Commissioner and

agreed that if Respondent No.2 cleared all the dues of the Petitioner, than the Petitioner would not have grievance, if the Respondent carried on business activities. I further state that in the above facts and circumstances, Mr. Rana Zaman, had in my presence signed an undertaking that the Respondent No.2 would clear the outstanding of the Petitioner, on the verification of evidence. The original of the undertaking given by Respondent No.2 through Mr. Rana Zaman is exhibited herewith and marked as ANNEXURE PW1/1."

How Guwahati Cable TV Association was concerned with a private dispute between a Multi Service Operator and a Local Cable Operator is beyond our comprehension.

Why the respondent No.2 was asked to be present in the meeting through Mr. Rana Saidur Zaman has also not been explained. Particularly in view of the fact in his letter to the Dy. Superintendent of the police, Mr. Sanjive Narain did not state that the network of respondent No.1 had been taken over by respondent No.2.

On what basis the Deputy Superintendent of Police came to the conclusion that respondent No.2 had taken over the respondent No.1 and, thus, responsible for all the liabilities of respondent No.1 is not known.

If Mr. Sanjive Narain has nothing to do with the affairs of the petitioner firm, how he can produce the purported original undertaking of respondent No.2 is difficult to understand.

We have noticed heretofore that even in Petition No.21(C) of 2008 (Nirman Associates Ltd. vs. MSM Discovery Ltd.) such a contention was raised but not adverted to by this Tribunal.

The petitioner preferred an appeal against the judgment passed by this Tribunal before Supreme Court of India although directly or indirectly it had no concern therewith. On what basis a prayer for stay was made has not been explained. Shri Tarun Saha was not even aware of preferring the said appeal, although Mr. Sanjive Narain in his cross-examination clearly admitted that he was aware thereof.

It is, thus, evident that although Shri Tarun Saha was authorized to take all steps on behalf of the petitioner firm and on his own admission he looks after the litigation, when questioned, pleaded his ignorance of filing the said appeal; whereas Mr. Sanjiv Narain who, on his own admission, has nothing to do with the petitioner firm admittedly had the knowledge thereof.

We may notice the relevant portion of the evidence of Mr. Saha:

“It is incorrect to suggest that Mr Ahmad did not swear any affidavit as stated in para 27 of my affidavit.

I am not aware as to whether Guwahati Communications has gone to the Supreme Court in a matter.

Q: Is it correct that the Petitioner had filed an appeal in the Hon'ble Supreme Court , being CA No 13235/2009 titled Guwahati Communications .v. Nirman & Associates Pvt Ltd against an order of this Hon'ble Tribunal in Petition No 21 (c)/ 2009 –titled Nirman and Associates .v. MSM Discovery Pvt Ltd – to which the Petitioner herein was not a party?

A: I am not aware.

Q: Are you aware of all the activities regarding litigation of your firm?

A: I do not have all the information.

Q: Who knows?

A: In my absence , other partners used to look after the litigation. If I am present, I only look after the litigation.

Vol: I am usually absent – as I am busy in religious activities.

Q: Are you aware of Petition No 21 © /2009 titled Nirman & Associates .v. MSM Discovery P Ltd and the orders passed therein by this Hon'ble Tribunal?

A: Yes, I am aware of the aforesaid case. I am a little bit aware of the orders passed in the said matter.

I am not aware whether in the said matter, this tribunal had directed MSM Discovery to give signals to Nirman Associates Pvt Ltd.

Objection by the counsel for the Petitioner :- Irrelevant for the purposes of this case.

It is incorrect to suggest that the present petition has been filed to prevent R2 from getting signals from broadcasters.

It is incorrect to suggest that the Petitioner filed the appeal before the Hon'ble Supreme Court to prevent the R2 from getting signals of MSM.

It is incorrect to suggest that the aforesaid appeal was filed in collusion with MSM Discovery.

It is incorrect to suggest that R2 has no liability/ dues towards the Petitioner or that false liability has been created by the Petitioner towards R2.

It is incorrect to suggest that no amount of Rs 8,44,400 is liable to be paid by R2 to the Petitioner or that the same has to be refunded to R2 with interest."

Mr. Sanjive Narain, however, in his cross-examination stated:

Q:-Who all were the partners of Guwahati Communications?

A: There were 6-7 partners.

Q: - Who all?

A: - Tarun Saha, Rajesh Sharma, Ripon Pathak, Meghali B Narian, Deependra Mitra, Kaushik Nath.

Q: When was Guwahati Communications formed?

A: - 2005 or 2006. I don't remember the exact date as I was not involved into all these things.

Q: - How well read is your wife?

A: - She is a graduate.

Q: - In and around 2005 -2009 , what was the market share of Guwahati Communications?

A: - Around 80% till October 2008.

Vol: That is till Nirman and Associates was formed.

Q: When did Nirman get signals of MSM?

A: Somewhere around April, May, June 2009.

Q: Is it correct that Nirman did not have signals of STAR before that?

A: - Yes.

Vol: - They never asked for it.

Q: - Was Purvanchal Communications in the distribution of ESPN as well?

A: Yes, earlier on.

Vol; - For a very short period.

Q: - how are you aware that Nirman did not ask for signals of STAR?

A: - I was the distributor.

Q: _ When did he first ask for the signals.

A: - Around July 2009 , after he got signals of SONY.

Q: - When did he get signals of STAR?

Objected to by counsel for the Petitioner :- As being irrelevant for the purposes of this case and the witness can not be called upon to answer these questions.

A: -I think in September 2009, only after the order of the Hon'ble Tribunal. As he was doing business with a defaulter.

Q: -Why did Guwahati Communications file an appeal before the Hon'ble Supreme Court against the order of this Hon'ble Tribunal passed in Petition 21 © /2009 ?

Objected to by the counsel for the Petitioner :- As being beyond the scope of the affidavit of the witness.

A: -I have heard that this Hon'ble Tribunal had passed an order directing MSM to give signals to Nirman. There was another order passed by this Hon'ble Tribunal directing no one to give signals to RB Network since he was a defaulter. Therefore, I have heard that Guwahati Communications filed an appeal in the Supreme Court in which a stay was granted. Thereafter, Nirman paid for R B Network in this Hon'ble Tribunal. After that they got boxes.

Vol: - Nirman and R B Network are the same.

Q: -Who informed you about this?

A: -The partners of Guwahati Communications informed me as we keep meeting them.

Q: -How many times do you meet them?

A: -I meet them and Nirman also, almost everyday, as they are my clients.

Vol: -Since we are in the same city, we meet each other quite often. Not everyday.

Q: -What is your role in Guwahati Communications?

A: -I have no specific role with Guwahati Comm. But all the operators of the North East States looks towards me if they have a problem.

Q: -They look upon you as a god father?

A: -May be. I keep advising them.

Vol: - They respect me.

Q: -Did you advise Guwahati Comm. to file an appeal in the Supreme Court?

A: - No. And I do not know who advised them.

It is incorrect to suggest that I advised Guwahati Comm. To file the appeal in the Supreme Court and the same was filed to prevent the R2 from getting signals and maintain the monopoly of the Petitioner.

The attention of the witness is drawn to his affidavit dated 18.10.2010 and to the one dated 01.04.2010."

The manner in which the affairs of the partnership have been conducted, to us, appears to be shoddy.

It is evident that Mr. Sanjive Narain for all intent and purpose had been conducting the affairs of the petitioner.

Mr. Tarun Saha is a partner of the firm. He has been specially authorized to represent the firm in all litigation.

As would appear from his deposition he was not aware of the most of the crucial affairs of the firm.

Undertaking of respondent No.2

The word undertaking in its ordinary sense would mean to take upon oneself. However, for the purpose of enforceability of such an undertaking in a court of law whether the same should be considered as an acknowledgement or not is the question.

In Black Law Dictionary, 9th Ed. Page 1665 the word 'Undertaking' is defined as "A promise, pledge or engagement."

In *Lakshmirattan Cotton Mills Co. Ltd. v. Aluminium Corporation of India Ltd.* (1971) 1 SCC 67, it was stated:

“9. It is clear that the statement on which the plea of acknowledgment is founded must relate to a subsisting liability as the section requires that it must be made before the expiration of the period prescribed under the Act.”

The term ‘acknowledgment’ has a definite connotation. It provides for an acknowledgment of the creditor’s debt and right of action that will revive the enforceability of debt barred by the statute of limitation.

Section 25 of the Indian Contract Act provides that an agreement without consideration is void unless, inter alia, a promise is made in writing and signed by the person to be charged therewith or by his agent generally or specially authorized in that behalf to pay fully or in part a debt which the creditor might have imposed payment but for the limitation of suits.

The petitioner in this case has not made out a case that the respondent No.2 was a debtor. It is also not a case where the respondent No.2 has been found to have taken over the assets and liabilities of respondent No.1. In fact the petitioner has failed to establish any fiduciary or contractual relationship between the two respondents.

For the purpose of enforcing a claim by way of a contract or otherwise, fulfillment of three essential elements namely promise, consideration and acceptance would be necessary. In the event the doctrine of ‘nudum pactum’ applies, there cannot be any contract.

In Brooms Legal Maxim, it is stated that a 'nudum pactum' is an agreement to do or pay something on one side, any compensation will not at law support an action and a man cannot be compelled to perform it.

We have noticed heretofore that the respondent No.2 had issued a public notice that it had not taken over the network of respondent No.1. The respondent No.1 also says so. The petitioner has not brought on record any evidence to the contrary.

An undertaking before a police officer in law would not also be treated to be a collateral term so as to make respondent No.2 a surety or a guarantor. The undertaking in question even otherwise does not fall within the purview thereof.

We may notice as to the circumstances in which the said undertaking was given.

- (a) The respondent No.2 filed a petition before this Tribunal which was marked as Petition No.21(C) of 2009 for a direction upon the MSM Discovery Pvt. Ltd. to supply signals wherein also a similar contention was raised that it had taken over the network of Shri Taj Islam.
- (b) From the judgment of this Tribunal dated 23.4.2009 it would appear that the said issue was not decided.
- (c) Although the petitioner herein was not a party to the said proceeding, it preferred an appeal against the said judgment

dated 23.4.2009 before the Supreme Court of India which was marked as Civil Appeal (D) No. 13235 of 2009 wherein an ex parte order of stay was granted.

- (d) Keeping in view the observations made by this Tribunal vis a vis the order of stay granted by the Supreme Court of India, respondent No.2 filed an execution application, wherein a direction was issued to the MSM Discoveries Ltd. to supply signals of its channels by an order dated 29.5.2009.
- (e) Only for the purpose of obtaining an order vacating the said order of interim stay passed by this Tribunal in terms of the said order of the Supreme Court of India, the respondent No.2 deposited the amount without prejudice to its rights and contentions which would be evident from his cross-examination which is to the following effect.

“ Why did you deposit the money in this matter when you have nothing to do with Respondent No. 1?

A. I had to deposit the money in this matter because the Petitioner had challenged an order of this Hon'ble Tribunal passed in Petition No. 21 (C) of 2009 in the Hon'ble Supreme Court wherein the Hon'ble Supreme Court had stayed the impugned order. After that the Respondent No. 2 filed an execution application for obtaining signals of MSM Discovery for which purpose the money had to be deposited in the present petition.

Q. What order was passed in Petition 21 (C) of 2009 which was impugned in the Hon'ble Supreme Court?

A. MSM Discovery was directed to provide signals to Respondent No. 2 not later than 48 hours from the date of payment of deposit of 3 months subscription.

Q. Was the Petitioner or the Respondent No. 1 a party to Petition No. 21 (C)/2009?

A. No.

(Attention of the witness is drawn to order dated 13.04.2009 of the present matter)

Q. How did this order affect the Respondent No. 2 to compel it to deposit an amount of Rs. 8, 44, 400/-?

A. the Petitioner filed a petition in the Hon'ble Supreme Court wherein the Petitioner tried to club my new entity with R.B. Network. The Hon'ble Supreme Court vide order dated 12.05.2009, had passed the order which is already on record I think, for getting signals of MSM Discovery I have deposited the money."

- (f) The petitioner has also relied upon a public notice issued by respondent No.3 notifying that it has taken over the network of Mr. Taj Islam.

In the facts and circumstances of this case the purported undertaking must be held to have been rendered on a mistaken notion of fact that the respondent No.2 was liable to pay the dues of the respondent No.1 as it has been operating in its area, although it had not taken over the undertaking of the first respondent.

No reliance even otherwise can be placed on an undertaking given before a police officer.

The undertaking given by the respondent No.2 is neither binding on the parties in law nor it is enforceable in a legal proceeding.

The respondent No.2 in fact in his reply has prayed for the refund of the said amount.

So far as the claim against the respondent No.2 is concerned, the petitioner does not plead that any consideration within the meaning of

Section 25 of the Indian Contract Act had passed. We have noticed heretofore that in absence of any consideration the undertaking itself is void.

If it is to be held that the right of the petitioner, if not otherwise enforceable in a Court of law for such an unilateral undertaking, we are of the opinion that the doctrine of 'Estoppel' will have no application.

It is well settled that there cannot be any estoppel against statute.

Ms. Agnihotri would submit that respondent No.2's defence vis-à-vis the claim of the petitioner against it does not arise out of a contract qua contract. According to the learned counsel the said respondent having undertaken to pay the dues owing to the petitioner for respondent No.1 is now estopped and precluded from raising any plea contrary thereto and/or inconsistent therewith.

We may at the outset place on record that no plea of estoppel has been raised. Although Ms. Agnihotri in her oral submissions contended that consideration for the said undertaking, on the part of the petitioner, was, having regard to the 'law and order' situation which had arisen, deferment of the legal proceedings as against the respondent No.1. admittedly no such plea has been raised.

Ordinarily a plea of 'Estoppel' within the meaning of Section 115 of the Indian Evidence Act can be raised by way of a shield. A substantive right under the said doctrine, however, can be claimed provided any promise is made relying on or on the basis of which, the promisee alters his position.

The purported promise made by respondent No.2 in terms of its undertaking was an unilateral act on its part and not on the basis of any representation made by the petitioner.

We are of the firm view that as the petitioner did not raise any contention that pursuant to or in furtherance of the terms made by respondent No.2 it has altered its position and thus, the question of invoking the said principle, thus, does not arise.

Strong reliance, however, has been placed by Ms. Aganihotri on B.L. Sreedhar & Ors. v. K.M. Munireddy (Dead) and others reported in AIR 2003 SC 578. wherein a Division Bench of the Supreme Court of India stated the law thus:

23. "Estoppel, commeth of a French word "(SIC)". from (SIC) the English word stopped, and it is called an estoppel, or conclusion, because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth; and Littleton's case proveth this description" (Co. Litt. 352 a, where it is said estoppel is of three kinds, i.e. matter (1) of record, (2) in writing i.e, semble, by deed, (3) in Pais). To the same effect is the definition in Termes de la Ley. (See Stroud's Judicial Dictionary, Fourth Edition, Page 943).

24. 'An estoppel," says Lord Coke, "is where a man is concluded by his own act or acceptance to say the truth." Mr. Smith, in his note to the Duchess of Kingston's case, characterizes this definition as a little startling but it nevertheless gives a good idea of what it is, by no means easy to include within the limits of a definition. (1 Smith L.C. 760)

25. Though estoppel is described as a mere rule of evidence, it may have the effect of creating substantive rights as against the person estopped. An estoppel, which enables a party as against another party to claim a right of property which in fact he does not possess is described

as estoppel by negligence or by conduct or by representation or by holding out ostensible authority.

26. Estoppel, then, may itself be the foundation of a right as against the person estopped, and indeed, if it were not so, it is difficult to see what protection the principle of estoppel can afford to the person by whom it may be invoked or what disability it can create in the person against whom it operates in cases affecting rights. Where rights are involved estoppel may with equal justification be described both as a rule of evidence and as a rule creating or defeating rights. It would be useful to refer in this connection to the case of Depuru Veeraraghava Reddi v. Depuru Kamamma, [MANU/TN/0099/1951](#) : AIR1951Mad403 where Vishwantha Sastri, J., observed:

"An estoppel though a branch of the law of evidence is also capable of being viewed as a substantive rule of law in so far as it helps to create or defeat rights which would not exist and be taken away but for that doctrine."

In that case the appellants therein, who were members of a Hindu Undivided Family questioned a grant which had been made by the Revenue Authorities in favour of the defendant No.3 therein. He sold the lands in question in favour of defendants No. 7 to 9.

As of fact it was found therein that the appellant was aware of the said transactions. He was conscious of the proceedings before the Assistant Commissioner, an occupancy right was claimed by defendant No.3 therein. His predecessor in interest had claimed occupancy right in respect of those lands. There were serious litigations between the parties. It was in the aforementioned situation the principle of 'Estoppel' was applied. Opining that 'Equity' was not in favour of the respondent, the Supreme Court of India held :

“37. If a man either by words or by conduct has intimated that he consents to an act which has been done and that he will not offer any opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that which they otherwise might have abstained from, he cannot question legality of the act he had sanctioned to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct.

The said decision, therefore, cannot be said to have any application whatsoever in the facts and circumstances of the present case.

Section 69(2) of the Indian Partnership Act, 1932 Issue

Mr. Handoo would contend that the petition for recovery of the amount from the first respondent shall be governed by the agreement dated 1.4.2008. The question with regard to maintainability of the petition was raised by Mr. Handoo by way of an application purported to be in terms of Order VII Rule 11 of the Code of Civil Procedure on the premise that the partnership firm was not registered in terms of Section 69(2) of the Indian Partnership Act, 1932.

The said application was marked as MA No.51 of 2009.

By an order dated 22.1.2010 the said application was rejected inter alia on the premise that as the respondent No.2 had deposited the amount in question namely Rs.8 lakhs and odd, equities were required to be adjusted between the parties at a subsequent stage which would not be possible if the petition is rejected.

This Tribunal, therefore, did not enter into the merit of the said contention.

Section 69 of the Partnership Act, 1932 provides for a bar in filing of a suit, in the event it is found that the petitioner is not a registered partnership firm.

Subsection (2) of Section 69 reads as under:

“69. Effect of non-registration

(2) No suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the register of firms as partners in the firm.”

The said provision prohibits enforcement of a contract. The exceptions which are carved out are contained in Subsection 3A thereof i.e.(i) a suit for dissolution of a firm (ii) accounts of dissolved firm (iii) if there was a bar to realize the property of a dissolved firm.

The object underlying the said provision indisputably is that the rights of the parties in case of dissolution will have to be worked out in terms of the contract of the partnership.

Ms. Agnihotri, however would, relying on or on the basis of a decision of the Supreme Court of India in *India Thermal Power Ltd. v. State of M.P. & Ors.* reported in AIR 2000 SC 1005, urge that the contract in question was a statutory one and in that view of the matter the provisions of Section 69(2) would not be applicable.

In that case the Apex Court was concerned with the determination of the amount of compensation for compulsory purchase of an Electricity

Undertaking in terms of Section 43A(1) of the Electricity (Supply) Act, 1949.

It was in the aforementioned situation, the law was stated in the following terms:

Section [43-A\(1\)](#) provides that a generating company may enter into a contract for the sale of electricity generated by it with Electricity Board. As regards the determination of tariff for the sale of electricity by a generating company to the Board, Section [43\(1\)\(2\)](#) provides that the tariff shall be determined in accordance with the norms regarding operation and plant load factor as may be laid down by the authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined from time to time by the Central Government by a notification in the official gazette. These provision clearly indicate that the agreement can be on such terms as may be agreed by the parties except that the tariff is to be determined in accordance with the provision contained in Section [43-A\(2\)](#) and notifications issued thereunder. Merely because a contract is entered into in exercise of an enacting power conferred by a statute that by itself cannot render the contract a statutory contract. If entering into a contract containing prescribed terms and conditions is a must under the statute than that contract becomes a statutory contract. If a contract incorporate certain terms and conditions in it which are statutory then the said contract to that extent is statutory. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of a mutual agreement between the parties. Therefore, the PPAs can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirements of Section [43-A\(2\)](#). Opening and maintaining of an Escrow Account or an Escrow Agreement are not the statutory requirements and, therefore, merely because PPAs contemplate maintaining Escrow Accounts that obligation cannot be regarded as statutory.
(Emphasis added)

The said decision, thus, is not an authority for the proposition that only because a contract can be entered into in terms of the provisions of the statute would ipso facto mean that the same would be a statutory contract.

The statutory terms would be those which are specified under a statute and not de' hors the same.

Reliance has also been placed by Ms. Agnihotri on Purushottam & Anr. v. Shivraj Fine Art Litho Works & Ors. 2006(12) SCALE page 232 wherein the law has been stated in the following terms:

"17. With respect, we find ourselves in complete agreement with the principles enunciated in *Haldiram Bhujjawala and Anr.* (supra). Having regard to the purpose Section [69\(2\)](#) seeks to achieve and the interest sought to be protected, the bar must apply to a suit for enforcement of right arising from a contract entered into by the unregistered firm with a third party in the course of business dealings with such third party. If the right sought to be enforced does not arise from a contract to which the unregistered firm is a party, or is not entered into in connection with the business of the unregistered firm with a third party, the bar of Section [69\(2\)](#) will not apply."

There is no quarrel with the aforementioned proposition of law being a well settled principle.

A Constitution Bench of the Supreme Court of India in *Jagdish Chandra Gupta vs. Kajaria Traders (India) Ltd.* reported in AIR 1964 SC Page 1882 held as under:

"The reason given by the Division Bench that as s.69 allows dissolution and accounts of unregistered partnership it cannot bar such an application appears to us to be not quite in point in our judgment, the words 'other proceeding' in sub-s.(3) must receive their full meaning untrammelled by the words 'a claim of set-off'. The latter words neither intend nor can be construed to cut down the generality of the words 'other proceeding'. The sub-section provides for the application of the provisions of sub-ss.(1) and (2) to claim of set-off and also to other proceedings of any kind which can properly be said to be for enforcement of any right arising from

contract except those expressly mentioned as exceptions in sub-s.(3) and sub s.(4).”

The said decision was applied in Smt. Premlata & Anr. v. M/s. Ishar Dass Chaman Lal & Ors. AIR 1995 SC 714 stating that the said provisions should be given their full meaning.

It was also held that an arbitration clause contained in the deed of partnership between the parties can be invoked in terms of Section 20 of the 1940 Act keeping in view of Subsection (3) of Section 69 of the Act.

We may, however, notice that in Firm Ashok Traders & Anr. vs. Gurumukh Das Saluja & Ors. (2004)3 SCC 155, a Division Bench of the Supreme Court of India held that the said provision has no application in a proceeding initiated under Section 9 of the Arbitration and Conciliation Act, 1996.

In U.P. State Sugar Corporation Ltd. vs. Jain construction Co. & Anr. reported in (2004) 7 SCC 332 the Supreme Court, however, held as under:

“5. Mr. Vinay Garg, learned counsel appearing on behalf of the appellant, would submit that as the respondent-firm was not a registered one, the application for appointment of an arbitrator both under the 1940 Act and the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the 1996 Act') was not maintainable. Reliance, in this connection, has been placed on Firm Ashok Traders and Another vs . Gurumukh Das Saluja and Others MANU/SC/0026/2004 : AIR2004SC1433 . It was also contended that in any event, the impugned judgment is unsustainable in law in view of the provisions contained in Section 85(2)(a) of the 1996 Act, as the arbitral proceeding was initiated as far back as on 1.5.1991, i.e. prior to coming into force of the 1996 Act.

.....

7. The question as to whether the respondent no.1-firm is registered or not is essentially a question of fact. It is true that the arbitral proceedings would not be maintainable at the instance of an unregistered firm having regard to the mandatory provisions contained in Section 69 of the Indian Partnership Act, 1932. It has been so held in OJagdish Chandra Gupta vs . Kajaria Traders (India) Ltd. MANU/SC/0047/1964 : [1964]8SCR50 . We may, however, notice that this Court in Firm Ashoka Traders (supra) despite following Jagdish Chandra Gupta held that Section 69 of the Indian Partnership Act would have no bearing on the right of a party to an arbitration clause under Section 9 of the 1996 Act. As correctness or otherwise of the said decision is not in question before us, it is not necessary to say anything in this behalf but suffice it to point out that in the event it is found by the High Court that the learned Civil Judge was wrong in rejecting the application for amendment of the plaint and in fact the respondent-firm was registered under the Indian Partnership Act, the question of throwing out the said suit on that ground would not arise. There cannot, however, be any doubt whatsoever that the firm must be registered at the time of institution of the suit and not later on. [See Delhi Development Authority vs . Kochhar Construction Work and Another - MANU/SC/1279/1998 : (1998)8SCC559].

A similar view was taken in Delhi Development Authority v. Kochhar Construction Works & Anr. 1998(8) SCC 559 and Purushottam & Anr. v. Shivraj Fine Art Litho Works & Ors. 2006(12) SCALE page 232.

The Supreme Court of India held as under:

“It would thus appear that registration of a firm was conceived as a protection to third parties dealing with a partnership firm. Registration ensured the certainty of existence of the firm and its membership, so that later an unsuspecting third party contracting with the firm may not run the risk of being defeated on discovery that neither the partnership firm nor its partners existed in

fact. On the other hand, an unregistered firm could not bring a suit for enforcing its right arising from a contract.

16. In *Raptakos Brett & Co. Ltd.* (Supra) this Court after noticing Section 69 of the Act observed:

A mere look at the aforesaid provision shows that the suit filed by an unregistered firm against a third party for enforcement of any right arising from a contract with such a third party would be barred at its very inception. To attract the aforesaid bar to the suit, the following conditions must be satisfied:

(i) That the plaintiff-partnership firm on the date of the suit must not be registered under the provisions of the Partnership Act and consequently or even otherwise, the persons suing are not shown in the Register of Firms as partners of the firm, on the date of the suit.

(ii) Such unregistered firm or the partners mentioned in the sub-section must be suing the defendant-third party.

(iii) Such a suit must be for enforcement of a right arising from a contract of the firm with such a third party.

Relying upon the aforesaid analysis this Court in *Haldiram Bhujawala and Anr.* (supra) held that the contract contemplated by Section 69 of the Act is the contract entered into by the firm with the third party defendant. The contract by the unregistered firm referred to in Section 69(2) must not only be one entered into by the firm with a third party defendant, but must also be one entered into by the plaintiff firm in the course of the business dealings of the plaintiff firm with such third party defendant.

17. With respect, we find ourselves in complete agreement with the principles enunciated in *Haldiram Bhujawala and Anr.* (supra). Having regard to the purpose Section 69(2) seeks to achieve and the interest sought to be protected, the bar must apply to a suit for enforcement of right arising from a contract entered into by the unregistered firm with a third party in the course of business dealings with such third party. If the right sought to be enforced does not arise from a contract to which the unregistered firm is a party, or is not entered into in connection with the business of the unregistered

firm with a third party, the bar of Section 69(2) will not apply.

Subsection (2) of Section 69 creates an exception to the general law of the land, namely, all disputants have a right to get their grievances redressed in a Court of law. 'Ubi jus ibi remedium' is the rule.

Section 9 of the Code of Civil Procedure, 1908 provides for a right in the suitor to approach a civil court in relation to any civil dispute which may arise between it and another.

Section 69 of the Partnership Act bars a remedy. It may have a noble object but there cannot be any doubt that in terms of Section 9 of the Code of Civil Procedure, any bar created in the institution of a suit must be stated expressly or by necessary implication by a statute and must be construed strictly.

The original jurisdiction of this Tribunal is akin to a suit although stricto sensu, it may not be a civil suit. The jurisdiction of the civil court is, however, barred.

Recently in Nahar Industrial Enterprises Limited vs. Hong Kong and Shanghai Banking Corporation reported in 2009 (8) SCC 646, the Debts Recovery Tribunal was held to be not a 'Civil Court' for the purpose of Section 25 of the Code of Civil Procedure.

It may also be noticed that in Shree Balaji Steels vs. Gontermann-Peipers (India) Ltd. reported in 2003 (114) Comp. Cases 193 a Division Bench of the Calcutta High Court opined that for the purpose of maintaining an application for winding up of the company in terms of Section 433 of the

Companies Act, it is not necessary for the applicant to be a partnership firm registered in terms of Section 69 of the Indian Partnership Act.

Would the said decisions be applicable in this case is the question?

The jurisdiction of this Tribunal is governed by Section 14 and 14A of the Telecom Regulatory Authority of India Act 1997 to deal with a dispute between; (i) a licensor and a licensee, (ii) a service provider and another service provider, and (iii) a group consumers and a service provider.

By reason of a notification issued by the Central Government on or about 9th January, 2004, the Broadcasting and Cable Services have also been brought within the purview of the term `Telecommunication Services`.

The broadcasting and cable services are governed by the Cable Television Networks (Regulation), Act, 1995.

Section 2(e) of the said Act defines `person` to mean:

2. Definitions. In this Act, unless the context otherwise requires,-

(e) "person" means- an individual who is a citizen of India;

(ii) an association of individuals or body of individuals, whether incorporated or not, whose members are citizens of India ;

(iii) a company in which not less than fifty-one per cent. of the paid-up share capital is held by the citizens of India ;

Indisputably, the Telecom Regulatory Authority of India (TRAI) in exercise of its power conferred upon it under Section 11 (1)(b) of TRAI Act made Regulations known as The Telecommunication (Broadcasting & Cable

Services) Interconnections Regulations, 2004 (Regulations) as amended from time to time.

The term `service provider' has been defined in clause 2(n) of the said Regulations.

The parties hereto admittedly are service providers within the meaning of the aforementioned provision.

The contractual obligations of the parties although emanate from the agreement dated 1.4.2008, but are in fact governed by a regulatory regime.

The said Regulations, inter alia, govern not only the formation of the contract at the initial stage but also the rights and obligations of the parties arising thereunder including termination of such agreement. It, in clear departure from the ordinary law of contract, provides for an agreement to be entered into by a Broadcaster or a Multi Service Operator mandating it to supply signals to a `Distributor of TV channel' which would include a Local Cable Operator.

Despite contractual provisions, the mode and manner of supply of signals and/or receipt thereof are regulated by the aforementioned Acts and the Rules and Regulations framed thereunder.

A dispute between two service providers in terms of the provisions of the said Regulations would also be governed thereby. If the right of a party arises under a statute and not under a contract qua contract, Section 69(2) of the Partnership Act will have no application.

In M/s Haldiram Bhujawala & Another vs. M/s. Anand Kumar Deepak Kumar & Another reported in 2000 (3) SCC 250, the Supreme Court of India held as under:

“9. The question whether Section 69(2) is a bar to a suit filed by an unregistered firm even if a statutory right is being enforced or even if only a Common Law right is being enforced came up directly for consideration in this Court in M/s. Raptokas Brett Co. Ltd. v. Ganesh Property MANU/SC/0595/1998 : AIR1998SC3085 . In that case, Majmudar J speaking for the Bench clearly expressed the view that Section 69(2) cannot bar the enforcement by way of suit by an unregistered firm in respect of a statutory right or a common law right. On the facts of that case, it was held the right to evict a tenant upon expiry of the lease was not a right 'arising from a contract' but was a common law right or a statutory right under the Transfer of Property Act. The fact that the plaint in that case referred to a lease and to its expiry, made no difference. Hence, the said suit was held not barred. It appears to us that in that case the reference to the lease in the plaint was obviously treated as a historical fact. That case is therefore directly in point. Following the said judgment, it must be held in the present case too that a suit is not barred by Section 69(2) if a statutory right or a common law right is being enforced.”

We are, however, not oblivious of the fact that whereas in Nahar Industrial Enterprises (supra) and in Shree Balaji Steel (supra) the Supreme Court of India and the Calcutta High Court proceeded on the basis that the Tribunal constituted under the Debt Recovery Tribunal Act and/or the Companies Act do not pass a decree, this Tribunal in terms of Section 19 of the 1997 Act is empowered to execute its own decree.

We may notice Subsection (1) of Section 19 of the Act.

“19. Orders passed by Appellate Tribunal to be executable as a decree—(1) An order passed by the Appellate Tribunal under this Act shall be executable by

the Appellate Tribunal as a decree of Civil Court, and for this purpose, the Appellate Tribunal shall have all the powers of a Civil Court.”

Subsection (2) of Section 69 of the Act Indian Partnership Act, 1932 bars a suit. The word `Suit' would not only be an action as envisaged under Section 9 of the Code of Civil Procedure, it would also mean a `set off' and a `counter claim'.

There appears to be a controversy as to whether the said word should be given a conservative meaning or a liberal one.

We may notice that in Advanced Law Lexicon by Aiyar at page 4546 it is stated as under:

“The word “suit” ought to be confined to such proceedings as, under that description, are directly dealt with in the Code of Civil Procedure, or such as by the operation of the particular Act which regulates them are treated as suits. (22 C. 943)

‘Suit’ in its common parlance is a term of wide amplitude. Broadly a ‘suit’ is a proceeding in a Court of justice for the enforcement of a right denoting a legal proceeding of a Civil Kind. It is a proceeding in a Court according to the forms of law to enforce the remedy to which a party deems itself entitled. Lord Coke defines a suit to be *‘actio nihil aliud est quam jus prosequend in judico quonod licui debetur’* meaning “an action is nothing else than the right of pursuing in a Court of justice, that which is due to one.’ Blackstone simply says that a ‘suit’ is legal demand of one’s rights. In its generic sense, a ‘suit’ is the pursuit or prosecution of some claim. The term ‘suit’ in its comprehensive sense may be treated as applying to any original proceedings in a Court of justice by which a party pursues the remedy which the law grants him. The modes of proceedings may be various depending upon the different stages in the litigation, that is, proceedings in the original Court, Court of appeal, proceedings in the nature of review or revision and execution proceedings. The legal significance of the word ‘suit’ is very broad, and the term has also a much narrower meaning when it is

examined in the procedural sense as cited in *Madalsa International Ltd. V Central bank of India*, AIR 1998 Bom 247, 250-251."

Although may not be strictly necessary, we may also notice that the provisions of the Code of Civil Procedure are not applicable to the proceedings under this Act before this Tribunal. This Tribunal is entitled to regulate its own procedure. What is mandatory is to comply with the principles of natural justice.

There cannot, however, be any doubt or dispute that the order passed by this Tribunal is capable of being executed as if a decree has been passed by a civil court which would mean that the original petitions filed before this Tribunal would be akin to a suit.

As it is not necessary for us to delve deep into the matter, we refrain ourselves from doing so.

However, we may observe that in terms of Subsection (1) of Section 19 the powers of a civil court have been conferred upon his Tribunal only for the purpose of exercising its jurisdiction thereunder and not for any other purpose. It is of course a Court within the meaning of Section 3 of the Evidence Act.

The proceedings are judicial in nature. It may also be a `court' within the ordinary meaning of the said term as opposed to the term `Tribunal'. It, however, would not be a court subordinate to the High Court within the meaning of the provisions of Section 115 of the Code of Civil Procedure.

There exists a distinction between a litigation and a suit. In K.K. Ramachandran Master vs. Dr. K. Jyothilal & Ors. reported in 2008(1)KLJ Page 659, the Kerala High Court articulated the meaning as:

"10. The term "litigation" has not been defined in the Conduct Rules. It has, therefore, to gather its meaning, in the context in which it is placed and from the manner in which the said term is commonly understood. Black's Law Dictionary reads the term "litigation" as meaning: A lawsuit - legal action including all proceedings therein - contest in a court of law for the purpose of enforcing a right or seeking a remedy - a judicial contest, a judicial controversy, a suit at law. The term "lis" implies the conception of an issue joined between two parties and the decision of a lis is the decision of that issue, (per Lord Greene M.R., in B. Johnson & Co. (Builders) v. Minister of Health (1947) 2 All E.R. 395 - See Stroud's Judicial Dictionary, which also notices yet another shade of the concept of lis with reference to the decision in Butler v. Mountgarret 7 HL Cas. 64 1that a suit is not necessary to constitute lis. "To litigate" is to claim or dispute by action: to test or try the validity of a claim by action. It amounts to bring into or engage in litigation: to make the subject of a law suit, to contest in law: to prosecute or defend by pleadings, evidence and debate in a court. Bbuvier's Law Dictionary states that "litigation" is a contest, authorised in law, in a court of justice, for the purpose of enforcing a right. Therein, quoting Brown J. in Tyler v. Judges of Court of Registration 179 U.S. 406, it is noticed that the prime object of all litigation is to establish a right asserted by the plaintiff or to sustain a defence asserted by the party pursued. Looking into the general dictionaries, one would find that New Webster's Dictionary of the English Language states that "litigation" is the act or process of litigating: the proceedings in a suit at law: a lawsuit. The Chambers's Twentieth Century Dictionary notices "litigation" as the noun referable to the verb "litigate" which means to dispute, especially by a lawsuit and a litigant is one contending at law: engaged in a lawsuit."

So far as respondent No.2 is concerned, admittedly the petitioner has impleaded it on the premise that it had undertaken to pay the dues of the first respondent before the Deputy Superintendent of Police. Such an

undertaking is de hors any contract. If enforceability of an undertaking does not arise under a contract qua contract, and, thus, subsection 2 of Section 69 of the Indian Partnership Act would not have any application. An unilateral undertaking is not a contract within the meaning of the provisions of Section 7 of the Indian Contract Act. In that view of the matter, we are of the opinion, that the plea raised by the respondent No.2 so far as the maintainability of the petition is concerned, must be held to be without any substance and is rejected accordingly.

Maintainability of Petition

We may deal with the supplementary issue raised by Ms. Agnihotri in this behalf, namely, Assam Cable Communication being for all intent and purport a reconstituted firm of petitioner herein and the same having been registered, under the Indian Partnership Act in January, 2010, this petition would be maintainable.

Reliance in this behalf by Ms. Agnihotri has been placed on the decision of a Division Bench of the Supreme Court in Raptakos Brett & Co. Ltd. Ganesh Property Reported in (1998) 7 SCC 184 wherein a contention had been raised that in the event the registration of a firm was effected during pendency of the suit, the date of suit may be treated to be the date of grant of registration.

We may at the outset notice the observations made by the Bench which was in the following terms:

“29. We, prima facie, find substance in what is contended by Dr. Singhvi for the respondent. It is obvious that even if the suit is filed by an unregistered partnership firm against a third party and is treated to be incompetent as

per Section 69 sub-section (2) of the Partnership Act, if pending the suit before a decree is obtained, the plaintiff puts its house in order and gets itself registered, the defect in the earlier filing which even though may result in treating the original suit as stillborn, would no longer survive if the suit is treated to be deemed to be instituted on the date on which registration is obtained. If such an approach is adopted, no real harm would be caused to either side."

It may, however, be noticed that the said question has not been finally answered and the view of the Bench was prima facie in nature. It was very clear in its view that in the fact of the said case it was not necessary to reconsider the correctness of the decision of the Supreme Court of India in Shreeram Finance Corporation Ltd. v. Yasin Khan & Ors. AIR 1989 SC 1769.

In Purushottam & Anr. (supra) the Supreme Court of India has approved the ratio laid down in U.P. State Corporation Ltd. (supra) stating:

"The same view was also reiterated in U.P. State Sugar Corporation Ltd. v. Jain Construction Co. & Anr. AIR 2004 SC 4335. These decisions squarely answer the first submission of Shri V.A. Mohta. The submission must therefore be rejected."

In view of the ratio of a decision of the Supreme Court which has consistently been followed, no reliance can be placed on a mere observation of a Bench which had not culminated in a ratio.

We, therefore, are of the opinion that Section 69(2) of the Partnership Act would not be a bar for maintainability of a petition before this Tribunal.

Dissolution of firm

It has been rightly contended that there exists a distinction between a dissolution of a partnership firm and reconstitution thereof. If a firm

continues with one partner going out of the partnership or if by reason of death of one partner his widow is substituted, it does not stand dissolved.

Only because some minor changes have taken place which have nothing to do with the carrying on of business of the partnership, the same would also not result in dissolution of firm but would merely amount to reconstitution thereof.

Strong reliance has been placed by Ms. Agnihotri in Commissioner of Commissioner of Income Tax, West, Bengal-III v. M/s Pigot Champan & Company (1982) 2 SCC 330 wherein the Supreme Court held:

“It cannot be disputed that 'dissolution' and 're-constitution' are two distinct legal concepts, for, a dissolution brings the partnership to an end while a reconstitution means the continuation of the partnership under altered circumstances but in our view in law there would be no difficulty in a dissolution of a firm being followed by the Constitution of a new firm by some of the erstwhile partners who may take over the assets and liabilities of the dissolved firm.”

The said decision has been followed in Sharad Vasant Kotak & Ors. v. Ramniklal Mohanlal Chawda & Anr. reported in (1998) 2 SCC 171, stating:

“20. The second Deed of Partnership was drawn on 20.10.86. By reason of the second Deed of Partnership, can it be said that the existing firm dissolved or ceased. It is relevant here to note that in both the deeds it was expressly made that the death, insolvency or retirement of any partner shall not dissolve the partnership firm. On the other hand, the partner shall be entitled to carry on the partnership business on the terms and conditions mutually agreed upon by the said partners (vide Clause 11). Therefore, it cannot be contended by the appellants that by reason of death of one of the partners, the existing firm stands dissolved.

.....

According to the appellants, by reason of Clauses 4 and 5 in the second Deed of Partnership, it must be deemed that the old partnership ceased and entirely a new partnership firm was found under the second Deed. We are unable to agree with the contention of the learned senior counsel for the appellants on this aspect. Clauses 4 and 5 relate to commencement of the partnership and accounting year."

In support of the said conclusion reliance was also placed on Tyresoles (India) v. CIT reported in India 1963(49) ITR 515 and The Commissioner of Income Tax, West Bengal, v. Messrs. A.W. Figgis & Co. and others. reported in AIR 1953 SC 455 and also on Sharad Vasant Kotak & Ors. v. Ramniklal Mohanlal Chawda & Anr. (1998) 2 SCC 171 by the Apex Court, to hold:

"21. Likewise, this Court in A.W. Figgis & Co. and Ors. (supra) at page 177 observed on a construction of two documents of partnership as follows :-

"To all intents and purposes the firm as reconstituted was not a different unit but it remained the same unit in spite of the change in its constitution."

We are, therefore, of the view that the existing firm continued.

22. The contention of the learned counsel for the appellants that the induction of the new partner will result in dissolution of the firm is not also acceptable. Reliance placed on the language of Sections 31 and 32 of the Act to support the said contention will be of no avail if we look into Section 17 of the Act. Section 17(a) of the Act (extracted above) suggests only reconstitution of the firm where a change occurs in the Constitution of the firm. Otherwise, the old firm remains the same. Here we can usefully quote the passages from the judgments of this Court and other High Courts.

The Apex Court even proceeded on the basis to hold that a reconstituted firm did not even require a fresh registration under the Partnership Act.

In *Sharad Vasant Kotak (supra)* minor changes occurred in commencement and accounting. In place of a deceased partner, his widow was substituted.

In this case, however, the so called reconstituted firm viz Assam Communication has not taken over the assets and liabilities of petitioner firm.

According to Mr. Tarun Saha, the authorized representative of the partnership firm, Mr. Nitai Rai was never a partner. If Mr. Nitai Ray was never a partner, composition of the petitioner firm becomes doubtful.

The reconstitution of the firm was also not done in terms of the Indian Partnership Act. A new partnership firm was constituted under a new name from a new date of commencement.

Even the terms of partnership did not remain the same. The reconstituted firm in any event is not before us. No application for amendment of the petition has been filed. Even no application for substitution has been filed. If the name of the firm has been changed, the firm could not have initiated the proceedings.

If Nitai Ray had gone out of the old firm, he could not have been a party to the resolution authorizing Mr. Tarun Saha to be the representative of the firm in any of the legal proceedings.

The matter relating to the dissolution for firm is governed by provisions of the Indian Partnership Act, 1932.

Section 40 of the said Act reads as under:

CHAPTER VI : DISSOLUTION OF A FIRM

40. Dissolution by agreement.- A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners.

Keeping in view the order proposed to be passed by us, it may not be necessary to deal with into the said question. Suffice it to say, that the question as to whether the firm has been dissolved and/or reconstituted vis-à-vis the counter claim of respondent No.1 must be determined in an appropriate proceedings, if and when the Assam Cable Communication files a claim against respondent No.1 or it does so against the petitioner.

Indisputably the rights and liabilities of the parties are required to be gone into in an appropriate proceeding.

Ms. Agnihotri would, however, contend that the counter claim of respondent No.1 against the firm cannot be the subject matter of dispute.

We do not agree as the right to enforce a partnership firm to render accounts would be against it only and not against an individual partner.

It may not be necessary for us to say a final word on the status of the two firms being different and the new firm having not taken over the assets and liabilities of the whole firm, as we are of the opinion that this petition is not maintainable at the instance of the present petitioner. If this petition is

not maintainable against Guwahati Communication the counter claim filed by the respondent No.1 would also not be maintainable.

Conclusion

For the view we have taken both the petition as well as the counter claim are dismissed without any order as to costs. The respondent No.2 shall, however, be entitled to be restituted the amount deposited by it from the petitioner together with interest @9% per annum from the date of deposit till realization.

(S.B. Sinha)
Chairperson

(G.D. Gaiha)
Member

(P.K. Rastogi)
Member

July 27, 2011
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