

STAR INDIA PVT. LTD.

v

SEA T.V. NETWORK LTD. AND ANR.

APRIL 3, 2007

[DR. ARIJIT PASAYAT AND S. H. KAPADIA. JJ.]

Constitution of India—Article 19(1) (g)—Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004—Regulations 2 (b), 2(j), 2(m) & 3—Appointment of a sole and exclusive Distributor by a broadcaster to transmit its satellite bouquet television channels in a particular city—Broadcaster directing another competing distributor to seek signals of its television channels from the sole distributor—Petition before Telecom Dispute Settlement and Appellate Tribunal filed by the distributor seeking a direction to the broadcaster to provide its signals directly was allowed—Correctness of—Held, the object of the Regulations to eliminate monopoly will be defeated if a distributor is directed to seek television signals from its competing distributor—On facts, there is no principal-agent relationship between the broadcaster and the sole distributor and hence the direction of the distributor by the broadcaster to obtain signals from its sole distributor is per se discriminatory.

Appellant-company, a broadcaster, entered into a Distribution Agreement appointing respondent no. 2-company, a Multi-System Operator (MSO), as its sole and exclusive distributor for transmission of its satellite bouquet television channels in a particular city. The Agreement stated that respondent no. 2 company will act independently and that the relationship between the parties is on principal to principal basis. Respondent no. 1, a competing MSO, approached the appellant to provide signals of its television channels for transmission in the same city. The appellant directed respondent no. 1 to receive the signals from respondent no. 2. Respondent no. 1 filed a petition before Telecom Dispute Settlement and Appellate Tribunal seeking a direction to the appellant to provide its television signals directly and not through respondent no. 2. The tribunal allowed the petition and held that the direction by the appellant to a distributor to seek signals from a competing distributor is per se discriminatory under the Regulations.

A In appeal to this Court, the appellant contended that under the
Telecommunication (Broadcasting and Cable Services) Interconnection
Regulations, 2004, a broadcaster is not prohibited to appoint a MSO as its
agent on exclusive basis for given territory; that such prohibition would be
hit by Article 19 (1) (g) of the Constitution of India; that the Distribution
B Agreement was in consonance with the Regulations; that the appointment of
a MSO as an agent *per se* is not prejudicial to competition and is necessary
to know the ground realities; that the Regulations itself recognizes overlap
functions between the agent and the MSO; that the Tribunal is in error in
holding that a distributor of TV channels cannot be an agent under the
C Regulations; that distributors, agents, MSOs and cable operators cannot be
treated as distinct categories since their different functions overlap each other;
that there is no functional difference between re-transmission of signals and
making available TV channels; that there is hardly any difference in the
quality of signals that can be received by a distributor through Decoders and
through a cable feed; and that the Tribunal is in error in holding that providing
D signals to a distributor through an agent who is also a distributor is *per se*
discriminatory.

Dismissing the appeal, the Court

HELD: 1.1. In the case of overlap of functions to be performed by each
entity under the Telecommunication (Broadcasting and Cable Services)
E Interconnection Regulations, 2004 like a Distributor, MSO, agent/
intermediary, one has to go by the facts of each case and the terms of
Agreement between the broadcaster and his agent-cum-distributor. In a
competitive world today, if under the Interconnection Regulations, an MSO,
who is entitled to receive signals directly from a broadcaster, if directed to
F approach his competitor MSO, then discrimination comes in. If that another
MSO has to depend on the Feed to be provided by the exclusive agent of the
broadcaster then the very object of the Interconnection Regulation stands
defeated. Even technically the quality of signals receivable through the
Decoders is different from the quality of signals receivable through cable feed.
Under the Interconnection Regulations, exclusivity of contracts stands
G eliminated. The object of Interconnection Regulation is to eliminate monopoly.
If respondent no. 1 carries on business in competition with respondent no. 2
and if it is to depend on the Feed provided by its competitor and if the quality
of the signals available through that Feed is poorer than the quality of the
signals available through Decoders, then the Tribunal is right in holding that
the above arrangement is *per se* discriminatory.

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[Para 8] [703-B, E-F; 704-B-C]

1.2. Under the Agreement, respondent no. 2 is a distributor of T.V. channels and not an agent. In fact, the Agreement indicates that the relationship between the appellant and respondent no. 2 is not based on principal-agent relationship. In other words, the appellant has given distribution rights exclusively to respondent no. 2 for the territory of a city. When signals are provided through Decoders, the matter comes under the expression 'make available T.V. channels' in terms of clause 2 (b) of the Interconnection Regulations. Clause 2 (b) is applicable because the broadcaster makes available the T.V. channels to its distributor-respondent no. 2. On the other hand between respondent no. 2 and respondent no. 1, clause 2 (j) would apply because after receiving signals through the cable from the broadcaster, the distributor respondent no. 2 re-transmits the T.V. channels through the Feed to the respondent no. 1. Therefore, there is a vital distinction between what is received by an agent-cum-distributor from the broadcaster and what is subsequently re-transmitted by that agent-cum-distributor to other MSOs/Cable Operators like respondent no. 1. Although a broadcaster is free to appoint its agent, such an agent cannot be a competitor or part of the network, particularly when under the contract between the broadcaster and the designated agent-cum-distributor exclusivity is provided for in the sense that the signals of the broadcaster shall go through the cable network owned and operated by such an agent-cum-distributor. [Para 9] [705-A-G]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5524 of 2005.

From the Judgment and Order dated 24.08.2005 of Telecom Dispute Settlement and Appellate Tribunal (TDSAT) in Petition No. 41 (C) of 2005.

Mukul Rohtagi, R.F.Nariman, C.S. Vaidyanathan, K.K. Venugopal, Arun Jaitely and Shyam Divan, R.N. Karanjawala, Prateek Jalan, Gopal Jain, Ruby Singh Ahuja, Nandini Gore, Manu Aggarwal, Manik Karanjawala, Amit Sharma, Anupam Lal Das, Shibashish Mishra, Indu Malhotra, Vikas Mehta, Arjun Suresh, Kunal Tandon, A. Ramesh, Tushar Rao, T.N. Rao, Gaurav Sharma, Tejveer Singh Bhatia, Yoginder Handoo, Ankur Talwar, Pratibha M. Singh, Biswajit Dubey, Maninder Singh, Manu Nair (for M/s. Suresh A. Shrof & Co.), Nikhil Goel, Sheela Goes, Navin Chawla, Kamini Jaiswal, Rajesh Srivastava, Dr. Kailash Chand, Guntur Prabhakar, T. Anamika, P.N. Puri, Narayan K. Sibal, Gouri Setia, Vikas chandel, Sumit Bhatia, Nitin Aggarwal and Sanjay Kapur for the appearing parties.

Ravi Shankar Prasad, Indu Malhotra, Arjun Suresh, Kunal Tandon and

A Vikas Mehta for the Intervenor.

The Judgment of the Court was delivered by

KAPADIA, J. 1. Being aggrieved by the direction issued by the Telecom Disputes Settlement & Appellate Tribunal on 24.8.2005 ordering Star India Pvt. Ltd. appellant herein to supply signals of its bouquet of channels by entering into an Agreement with Sea T.V. Network Ltd. (respondent No.1 herein) on such terms and conditions which are not unreasonable, Star India Pvt. Ltd. has come to this Court by way of this civil appeal.

C 2. Star India Pvt. Ltd. is a company under the Companies Act, 1956. On 8.2.2005 Star India Pvt. Ltd. entered into Distributor Agreement with Moon Network Pvt. Ltd. (respondent No.2). M/s Moon Network Pvt. Ltd. under the Agreement was a distributor. Under the said Agreement there was a recital. Under that recital Star India Pvt. Ltd. had stated that it was an authorized distributor of the Satellite T.V. channels namely Star Plus, Star Movies, Star **D** World, Star News, Star Gold etc. collectively referred to as New Channels Bouquet. Under the Agreement Moon Network Pvt. Ltd. a Multi-System Operator (for short MSO) was engaged in the *business of transmission* of TV channels *through cables*. Under the Agreement Moon Network Pvt. Ltd. was described as a distributor. Under the said Agreement Star India Pvt. Ltd. appointed Moon Network Pvt. Ltd. as the distributor on a sole and exclusive **E** basis. The distributor was required to distribute the subscribed channels in the territory of Agra. Moon Network Pvt. Ltd. was thus appointed as the *sole and exclusive distributor* of the subscribed channels *through the cable network owned by it and operated by it* in the territory of Agra. It is interesting to note that under the Agreement, Star India Pvt. Ltd. excluded the **F** distribution of the subscribed channels through DTH, CAS, Broadband or any medium other than through a ground cable network. The said Agreement came into effect from January 1, 2005. The Agreement is valid up to June 30, 2007, unless terminated in accordance therewith. Under the Agreement Moon Network Pvt. Ltd. could execute an affiliation agreement directly with its affiliate(s) in such form and manner to be approved by Star India Pvt. Ltd. **G** Under the Agreement Moon Network Pvt. Ltd. could use publicity material given to it by Star India Pvt. Ltd. Under the Agreement Moon Network Pvt. Ltd. agreed to employ competent staff and/or *independent contractors* for the purpose of the contract. Under the Agreement Moon Network Pvt. Ltd. was recognized by Star India Pvt. Ltd. as a MSO engaged in the business of **H** transmission of T.V. channels through ground cables. Under clause 6.3 of that

Agreement it was clarified that Star India Pvt. Ltd. made no representations and/or warranties relating to continuity, content and the reception quality of the programmes on the subscribed channels and that Star India Pvt. Ltd. will not be responsible if a Delivery Failure is caused by factors not directly within the control of Star India Pvt. Ltd. Under the Agreement Star India Pvt. Ltd. agreed to deliver the "Decoders" to the distributor Moon Network Pvt. Ltd. However, under the Agreement it was stipulated that Moon Network Pvt. Ltd. in turn would not re-sell or act as a dealer in respect of the said Decoders. Under clause 16 of the Agreement the parties agreed that Moon Network Pvt. Ltd. as a distributor will act as an independent contractor and that the Agreement shall not create principal-agent relationship between Star India Pvt. Ltd. and Moon Network Pvt. Ltd. That, neither party shall hold out to the rest of the world any such relationship.

3. To sum up, Moon Network Pvt. Ltd. was appointed as an exclusive agent of Star India Pvt. Ltd. in the territory of Agra. At the same time the Agreement recognized the status of Moon Network Pvt. Ltd. as an MSO engaged in the business of transmission of TV channels through ground cables. This aspect is important since in the present controversy one of the main issue which arises for determination is the difference between, "transmission" including re-transmission of signals, on one hand and the expression "providing TV channels" on the other hand which expression finds place under the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation, 2004 (hereinafter referred to as Interconnection Regulation).

4. At this stage we may state that although the above Agreement dated 8.2.2005 remains in force up to 30.6.2007 for some unknown reasons Star India Pvt. Ltd. has entered into a distributor Agreement on 4.1.2006 under which Moon Network Pvt. Ltd. are appointed as distributor. In the present case we are only concerned with the interpretation of the Interconnection Regulation 2004, and therefore, we are not required to go into any other aspect. However, it is made clear that in such cases the Appellate Tribunal ought to have called for the Distributor Agreement, if any, and not decide conceptually they do not go by the facts of the individual cases. In the present case at one stage it was argued vehemently by the appellants that Star India Pvt. Ltd. had entered into an Agreement with Moon Network Pvt. Ltd. and that Moon Network Pvt. Ltd. was therefore exclusive agent for the territory of Agra. It was argued that Star India Pvt. Ltd. was required to appoint an agent in different territories looking to the economies of scale of operations carried out

A by Star India Pvt. Ltd. throughout India. However, when the Court perused
the contents of the Agreement we find that the Agreement is a Distributor
Agreement. As stated above the Agreement expressly stated that Moon
Network Pvt. Ltd. was an independent contractor and that the relationship
between the parties was on principle to principle basis and that there was no
B relationship of principal and agent, as contended by the appellants before the
appellate Tribunal.

5. On behalf of the Star India Pvt. Ltd., Shri Mukul Rohtagi, learned
Senior Counsel submitted that the appellant Star India Pvt. Ltd. is a broadcaster
of TV channels and that Moon Network Pvt. Ltd. was an MSO for supply of
C TV channels for distribution in the city of Agra. He contended that when Sea
T.V. Network respondent No.1 herein approached Star India Pvt. Ltd. for
supply of signals in that territory; Sea T.V. was directed to approach Moon
Network Pvt. Ltd. However, Sea T.V. Network did not agree to take the signals
from Moon Network Pvt. Ltd. since Moon Network Pvt. Ltd. was also a
D competing MSO. According to the learned counsel under the Interconnection
Regulation framed by TRAI there was no prohibition on Star India Pvt. Ltd.
in the matter of appointment of any MSO as its agent on exclusive basis for
a given territory. Reliance was placed by learned counsel on Regulation 3.3
read with Explanatory Memorandum. He contended further that any such
prohibition would be hit by Article 19(1)(g) of the Constitution. It was further
E urged that the above Agreement/arrangement was in consonance with the
Interconnection Regulation since Star India Pvt. Ltd. was entitled to align its
business in a lawful manner under Article 19(2)(1)(g) of the Constitution. The
learned counsel further submitted that under Regulation 3.3 we get a
clarification of what is implicit in Regulations 3.1 and 3.2, namely that a
broadcaster is entitled to give signals through an agent, who can also be a
F MSO in a vertically integrated industry so as to reduce high distribution
costs. That, a broadcaster can enter into any business arrangement model
which protects its financial interest since there was no prohibition on such
arrangement. According to the learned counsel appointment of an MSO as an
agent *per se* is not prejudicial to competition and if at all it is prejudicial it
G should be established in each case by the complainant. According to the
learned counsel appointment of a MSO as an agent is necessary since he
knows the ground realities. He is not in a position to ascertain the number
of subscribers and that the Interconnection Regulation as themselves therefore
contemplate and permit an overlap between the agent and the MSO. It was
submitted that the cable industry in India has grown in an environment which
H has provided inadequate protection to broadcasters. It is, therefore,

disorganized ultimately having an adverse effect on the consumers. According to the learned counsel there is in the Indian market large-scale under declaration regarding number of subscribers which results in an inequitable sharing of subscription revenues. According to the learned counsel on a proper interpretation of the Interconnection Regulation it is clear that a broadcaster is obliged to provide its signals to all distributors of TV channels on non-discriminatory basis. But the manner of providing signals has been left to the discretion of the broadcaster. According to the learned counsel the Interconnection Regulation for establishing a "must provide" regime under which every distributor is entitled to the signals of every broadcaster on account of the heavy distribution costs widespread under-declaration of number of subscribers and the fragmented nature of the market the Regulations have given the broadcaster the flexibility to decide whether to provide signals directly or through an agent. According to the learned counsel therefore, there is no particular business model prescribed by the said Interconnection Regulation, and therefore, the Tribunal had fallen in error in holding that a distributor of TV channels cannot be an agent as provided for in Regulation 3.3. According to the learned counsel there is no such prohibition in the definition clauses nor in the pre-clauses of the Interconnection Regulations. According to the learned counsel the Tribunal has erred in regarding distributors, agents, MSOs and cable operators as entirely separate and distinct categories. According to the learned counsel under the said Interconnection Regulations there is a considerable overlap between each of the above categories because each of the above entities is capable of discharging different functions. The learned counsel, therefore, placed heavy reliance on the Explanatory Memorandum in support of his contentions particularly, in respect of his contention that the mode of providing signals by the broadcasters is left to an individual broadcaster who may provide its signals directly or through a designated agent/distributor or any other intermediary as long as such provision is fixed on non-discriminatory basis. According to the learned counsel the Tribunal has failed to consider the Explanatory Memorandum and the responses of the TRAI to the comments of the stake holders. According to the learned counsel the Tribunal has failed to appreciate that the term "Distributor of TV channels" includes all the entities involved in reaching the broadcasters signals to the ultimate consumer. It is urged that the impugned judgment has the effect of restricting the scope of clause 3.3 on the basis of an erroneous interpretation of the definition of the word agent in Interconnection Regulation 2(b). According to the learned counsel the impugned judgment is erroneous since it renders clause 3.3 meaningless since the said interpretation disallows a broadcaster from providing

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- A signals through an agent. According to the learned counsel clause 3.3 is a clarification to clauses 3.1 and 3.2 which states that the consumer must have access to every broadcaster's channel on a non-discriminatory basis, but the manner of achieving this object has been left to the broadcaster to decide. According to the learned counsel the definition of the word 'agent' in the Interconnection Regulations do not provide the manner in which the agent would make available the TV channels to the distributor. According to the learned counsel the words make available in Regulation 2(b) would include giving of Decoders and supply of signals through cable feed. According to the learned counsel there is no functional difference between re-transmission of signals and making available the TV channels. According to the learned
- C counsel there is hardly any difference in the quality of signals that can be received by a distributor through Decoders and through a cable feed. For a distributor to obtain TV channels through Decoders the distributor must possess a dish-antenna for downloading the signals from the satellite of the broadcaster and a divider which divides the signals into various channels. The distributor also requires separate Decoders for each channels with an activated viewing card. A distributor who obtains the signals through the cable amplifies it and distributes it to the other distributors and subscribers through the ground cable. That, the quality of signals transmitted through the cable is comparable to the quality of signals obtained through the Decoders. According to the learned counsel a distributor who obtains signals through
- E Decoders is required to invest in the infrastructure consisting of Decoders, dividers, modulators and amplifiers whereas a distributor who obtains signals through the cable has not to make such investments and at the same time the same quality of signals can be obtained through the cable feed which requires investments in amplifiers, splitter and cabling. According to the learned counsel the interpretation accepted by the Tribunal vide impugned judgment would require an MSO to invest huge amounts in the requisite infrastructure and obtain signals through Decoders, and therefore, the distinction made by the Tribunal between re-transmission and making available TV signals is not appropriate since the same definition applies to agents appointed by MSOs. Accordingly, it was submitted on behalf of the appellant that the Tribunal had
- G erred in holding that providing signals to a distributor through an agent who is also a distributor is *per se* discriminatory. According to the appellants discrimination in cases of overlap of functions should be established on case to case basis and if in a given case if it is found that the agent is conducting itself in a manner prejudicial to competition then clauses 3.4 and 3.6 which provides for redressal would apply.
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6. In order to consider the above arguments we quote hereinbelow the relevant provisions of the Interconnection Regulations dated 10.12.2004 : A

2. *Definitions*—In this regulation, unless the context otherwise requires:

(b) 'agent or intermediary' means any person including an individual, group of persons, public or body corporate, firm or any organisation or body authorised by a broadcaster/multi system operator to make available TV channel(s), to a distributor of TV channels; B

(h) 'cable service' means the transmission by cables of programmes including re-transmission by cables of any broadcast television signals;

(i) 'cable television' network means any system consisting of a set of closed transmission paths and associated signal generation, control and distribution equipment designed to provide cable service for reception by multiple subscribers; C

(j) 'distributor of TV' channels means any person including an individual, group of persons, public or body corporate, firm or any organisation or body re-transmitting TV channels through electromagnetic waves through cable or through space intended to be received by general public directly or indirectly. The person may include, but is not limited to a cable operator, direct to home operator, multi system operator, head ends in the sky operator; D

(m) 'multi system' operator means any person who receives a broadcasting service from a broadcaster and/or their authorised agencies and re-transmits the same to consumers and/or re-transmits the same to one or more cable operators and includes his/her authorised distribution agencies. E

(n) 'service provider' means the Government as a service provider and includes a licensee as well as any broadcaster, multi system operator, cable operator or distributor of TV channels. F

3. *General provisions relating to non-discrimination in interconnect agreements* G

3.1 No broadcaster of TV channels shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts with any distributor of TV channels that prevents any other distributor of TV channels from obtaining such TV channels for distribution. H

A 3.2 Every broadcaster shall provide on request signals of its TV channels on non-discriminatory terms to all distributors of TV channels, which may include, but be not limited to a cable operator, direct to home operator, multi system operator, head ends in the sky operator; multi system operators shall also on request re-transmit signals received from a broadcaster, on a non-discriminatory basis to cable operators.

B *Provided* that this provision shall not apply in the case of a distributor of TV channels having defaulted in payment.

Provided further that any imposition of terms which are unreasonable shall be deemed to constitute a denial of request.

C 3.3 A broadcaster or his/her authorised distribution agency would be free to provide signals of TV channels either directly or through a particular designated agent or any other intermediary. A broadcaster shall not be held to be in violation of clauses 3.1 and 3.2 if it is ensured that the signals are provided through a particular designated agent or any other intermediary and not directly. Similarly a multi system operator shall not be held to be in violation of clause 3.1 and 3.2 if it is ensured that signals are provided through a particular designated agent or any other intermediary and not directly.

D *Provided* that where the signals are provided through an agent or intermediary the broadcaster/multi system operator should ensure that the agent/intermediary acts in a manner that is (a) consistent with the obligations placed under this regulation and (b) not prejudicial to competition.

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F ANNEXURE A

EXPLANATORY MEMORANDUM

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Discriminatory Access

G 3. In India, competition for delivery of TV channels is not only to be promoted within the cable industry but also from distributors of TV channels using other mediums like direct to home (DTH), head ends in the sky etc. It is important that all these distribution platforms are promoted so that they provide consumers with choice. It would be very important that at this stage vertical integration does not impede

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competition. Vertically integrated broadcaster and distribution network operators would, in the absence of strong regulation, have the tendency to deny popular content to competing networks or to discriminate against them.

4. One method of checking these practices is to stop at the source any chance of anti-competitive behaviour by ruling that vertical integration will not be allowed. This route could, however, impede investments and in the long run adversely affect competition. The only DTH platform today has a degree of vertical integration. There is another pay DTH platform which is awaiting approval from the Government that also has a degree of vertical integration. DTH is the platform most likely to provide effective competition to cable operators. Restriction of vertical integration could therefore, lead to a situation where the DTH roll-out could be affected and hence competition. It is for this reason that the alternative route has been looked at; controlling anti-competitive behaviour wherever it manifests itself. These issues are dealt with in the following paragraphs.

5. Generally, TV channels are provided to all carriers and platforms to increase viewership for the purpose of earning maximum subscription fee as well as advertisement revenue. However, according to some opinions, if all platforms carry the same content, it will reduce competition and there will be no incentive to improve the content. Some degree of exclusivity is required to differentiate one platform from the other.

6. Exclusivity had not been a feature of India's fragmented cable television market. However, the roll-out of DTH platform has brought the question of exclusivity and whether it is anti-competitive to the forefront. Star India Ltd and SET Discovery Ltd do not have commercial agreements to share their contents with ASC Enterprises on its DTH platform and at present are exclusively available on the Cable TV platform. ASC Enterprises claims that the future growth will remain impacted by the denial of these popular contents. Space TV a joint venture of Tatas and Star, is also planning to launch its digital DTH platform. It has applied for licence to the Government for the same. The DTH services have to compete with Cable TV. If a popular content is available on Cable TV and not on the DTH platform, then it would not be able to effectively give competition to the cable networks.

A 'Must provide' through whom?

11. There is high cost involved in the distribution of TV channels if the market is fragmented. To reduce the distribution costs broadcasters/multi system operators should be free to provide access in the manner they think is beneficial for them. The must provide of signals should be seen in the context that each operator shall have the right to obtain the signals on a non-discriminatory basis; but how these are provided - directly or through the designated agent/distributor is a decision to be taken by the broadcasters/multi-system operator. Thus the broadcaster/multi system operator would have to ensure that the signals are provided either directly or through a particular designated agent/distributor or any other intermediary.

Quality of TV Channel Signals

13. Some cable operators had apprehended that in case TV channel, signals are provided through cable and not directly then the quality of transmission could deteriorate and accordingly it was suggested that agents must provide services through IRDs. The Authority through this regulation has framed the principle of non-discriminatory access, which also includes non-discriminatory access in terms of quality of signals. Operators can seek relief if it is found that the quality of their signals is being tampered with.

Safeguards for Broadcasters

14. In this context it must be recognised that certain basic criteria must be fulfilled before a service provider can invoke this clause. Thus the service provider should be one who does not have any past dues. Similarly, provisions for protection against piracy must be provided. However, the content provider must establish clearly that there are reasonable basis for the denial of TV channel signals on the grounds of piracy.

Discrimination in providing TV channel signals

17. In case any distributor of TV channel feels he/she has been discriminated on terms of getting TV signals compared to a similarly based distributor of TV channel, then a complaint must be filed with the broadcaster or multi system operator, as the case may be. In case the complainant is not satisfied with the response, he/she may approach

the appropriate forum for relief.

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7. We do not find any merit in the civil appeal for the following reasons:

8. Firstly, we do not find any error in the judgment which has held that in providing signals to a distributor through an agent who is also in turn a distributor is *per se* discriminatory. We agree with the contention of Mr. Rohtagi learned senior counsel that in the case of overlap of functions to be performed by each entity under the Interconnection Regulations like a Distributor, MSO, agent/ intermediary, one has to go by the facts of each case and the terms of Agreement between the broadcaster and his agent cum distributor. Every contract under the Interconnection Regulations has two aspects. One concerns the commercial side whereas the other concerns the technical side. There is no difficulty for the commercial side. If the broadcaster appoints an agent on the commercial side to collect the statistics of the number of subscribers or for distribution of Decoders there is no dispute. On the commercial side when an agent is appointed by the broadcaster that agent need not be from the Operation Network. Such an agent normally is not a technical service provider. The difficulty arises when the broadcaster as in the present case appoints or enters into an agreement with a distributor, who in turn is an MSO and who in turn has his own business because in such a case such an agent-cum-distributor is also a competitor of the MSO who seeks signals from the broadcaster. We are living in a competitive world today. If under the Interconnection Regulations an MSO is entitled to receive signals directly from a broadcaster, if directed to approach his competitor MSO then discrimination comes in. The reason is obvious. The exclusive agent of a broadcaster has his own subscriber base. His base is different from another MSO in the same territory. If that another MSO has to depend on the Feed to be provided by the exclusive agent of the broadcaster then the very object of the Interconnection Regulation stands defeated. We are satisfied that even technically the quality of signals receivable through the Decoders is different from the quality of signals receivable through cable feed. In the present case the broadcaster has appointed Moon Network as its Distributor for the territory of Agra. In the present case the Agreement provides that Moon Network Pvt. Ltd. will operate on principle to principle basis and will not be an agent of Star India Pvt. Ltd. (Broadcaster). In that Agreement it is expressly provided that Moon Network Pvt. Ltd. would not be entitled to use any other medium except ground cable. Under the Distribution Agreement the Broadcaster has appointed the Moon Network Pvt. Ltd. as the sole and exclusive distributor of the subscribed channels. It is important to note that under the

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A Interconnection Regulations exclusivity of contracts stands eliminated. Notwithstanding such regulations the broadcaster in the present case has appointed Moon Network Pvt. Ltd., who is also an MSO, as the sole and exclusive distributor of the subscribed channels through the cable network owned and operated by Moon Network Pvt. Ltd. in the territory of Agra. (See clause 1.1). This is where the difficulty comes in The object of Interconnection Regulation is to eliminate monopoly. If Sea T.V. respondent No.1 carries on business in competition with Moon Network Pvt. Ltd. and if it is to depend on the Feed provided by its competitor and if the quality of the signals available through that Feed is poorer than the quality of the signals available through Decoders, then the Tribunal is right in holding that the above arrangement is *per se* discriminatory. It is important to bear in mind that Sea T.V. Network and Moon Network Pvt. Ltd. are in turn MSOs. When Moon Network Pvt. Ltd. is appointed as sole and exclusive distributor with a direction to distribute the signals through the infrastructure of Moon Network Pvt. Ltd. then the quality of the signals receivable by Sea T.V. Network may not be the same as the quality of signals through Decoders. In this connection fudging of data (voice and picture) is possible. Even the speed of data-transmission to Sea T.V. Network could get affected. In such cases it is the subscribers of Sea T.V. Network who would be adversely affected. The picture quality would be affected. The reason for this is also obvious. Let us say that Moon Network Pvt. Ltd. receives about 1000 signals from the broadcaster. Out of 1000 signals it is open to Moon Network Pvt. Ltd. to distribute the majority thereof to its own subscribers and the balance could be transferred through the cable to Sea T.V. Network. The quality of the signals receivable by Moon Network Pvt. Ltd. directly from the broadcasters would certainly be better than the quality, speed etc. of the signals receivable by Sea T.V. Network. It is for this reason that Sea T.V. Network refused to take signals through the feed. Therefore apart from competition, the business of Sea T.V. Network to the above extent is also likely to be affected because of the poor quality of signals through the feed. In such an event the subscriber base of Sea T.V. Network would shift and become part of the subscriber base of Moon Network Pvt. Ltd. in Agra.

G 9. Secondly, keeping in mind what is stated above, we may examine the scope of the said Interconnection Regulations. There is a basic difference between making available T.V. channels and re-transmission of T.V. channels. We have quoted the definition and provisos from Interconnection Regulation. Under clause 2(b) an agent is a person authorized by a broadcaster to make

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available T.V. channels to a distributor of T.V. channels. In that definition we have a broadcaster, an agent of the broadcaster and a distributor. Under the Agreement between Star India Pvt. Ltd. and Moon Network Pvt. Ltd. (which Agreement was not placed before the Tribunal) Moon Network Pvt. Ltd. is a distributor of T.V. channels. It is not an agent. In fact, the contract indicates that the relationship between Star India Pvt. Ltd. and Moon Network Pvt. Ltd. is not based on principal-agent relationship. In other words the Star India Pvt. Ltd. has given distribution rights exclusively to Moon Network Pvt. Ltd. for the territory of Agra. This was never disclosed to the Tribunal. Before the Tribunal it was argued that Moon Network Pvt. Ltd. was the agent of Star India Pvt. Ltd. It is for this reason that Sea T.V. Network is asked to approach Moon Network Pvt. Ltd. as a distributor. It is for this reason that Sea T.V. Network is made to depend for the signals on the feed to be provided by Moon Network Pvt. Ltd. Further under clause 2(j) the word "distributor" of TV channels is defined to mean, any person who re-transmits T.V. channels through electromagnetic waves through cable. When signals are provided through Decoders the matter comes under the expression "make available T.V. channels" in terms of clause 2(b) of the Interconnection Regulations. Clause 2(b) is applicable because the broadcaster makes available the T.V. channels to its distributor namely Moon Network Pvt. Ltd. On the other hand between Moon Network Pvt. Ltd. and Sea T.V. Network clause 2(j) would apply because after receiving signals through the cable from the broadcaster the distributor (Moon Network Pvt. Ltd.) re-transmits the T.V. channels through the Feed to Sea T.V. Network. Therefore, there is vital distinction between what is received by an agent-cum-distributor from the broadcaster and what is subsequently re-transmitted by that agent-cum-distributor to other MSOs/Cable Operators like Sea T.V. Network. In our view the Tribunal, has therefore, correctly drawn a distinction between what is called as "making available of T.V. channels" and re-transmission of T.V. channels under the above two clauses. Keeping in mind the above distinction it is clear that although a broadcaster is free to appoint its agent under the proviso to clause 3.3 such an agent cannot be a competitor or part of the network, particularly when under the contract between the broadcaster and the designated agent-cum-distributor exclusivity is provided for in the sense that the signals of the broadcaster shall go through the cable network owned and operated by such an agent-cum-distributor which in the present case happens to be Moon Network Pvt. Ltd.

10. In the circumstances there is no merit in this civil appeal.

11. Before concluding we may once again reiterate that the Appellate

- A** Tribunal in the present case has correctly interpreted the scheme of Interconnection Regulations. However, in cases of functional overlap we are of the view that in every matter the Tribunal will examine the written contracts between the parties and ascertain actual prejudice/discrimination and not decide the matter on conceptual basis. In the present case we insisted on the appellants for producing the written Agreement with which clarity has emerged.
- B** But for examination of such contract it would not be proper to decide matters on *per se* basis.

12. For the aforesaid reasons we find no merit in this civil appeal and the same is accordingly dismissed with no order as to costs.

C B.S.

Appeal dismissed.