WWW.LIVELAW.IN

BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

W.P.(Civil) No. of 2020
(Special Original Jurisdiction)

Petitioners:-

1.Mr. Joe Johnson (Subscriber ID BC 92000642),
Aged 56 years, S/o. P.J. Johnson,
Pallathu Grace Villa, Near Kennedy School, Ayani South, SVM PO,
Karunagappally, Kollam – 690573.

2.Mr. Vimal Mathew (Subscriber ID GA 91126719)
Aged 34 years, S/o. Mathew Antony,
Flat no:11C, RDS Flair, Raghavan Pillai Road,
Cochin – 682026.

3.Ms. Tanya Joy (Card ID: 81291611)
Aged 28 years, D/o. Joy,
Jaladarshini Apts, Golden Street Rod,
Vaduthala, Kochi – 682023.

Vs.

Respondents:-

1. Union of India,
Represented by the Secretary, Department of Telecommunications,
Sanchar Bhawan, 20 Ashoka Road,
New Delhi – 110001.

2. Telecom Regulatory Authority of India,
Mahanagar Doorsanchar Bhawan,
Jawaharlal Nehru Marg,
Old Minto Road,
New Delhi – 110002
Represented by its Secretary.

MEMORANDUM OF WRIT PETITION FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA

The Address for service of notice and process to the Petitioners is that of their counsel **M/s. Santhosh Mathew, Arun Thomas, Jennis Stephen, Vijay V. Paul, Karthika Maria, Anil Sebastian Pulickel, Divya Sara George, Jaisy Elza Joe, Abi Benny Areeckal & Leah Rachel Ninan, M/s. Ninan & Mathew Advocates, S1, 2nd Floor, Empire Building, High Court East End, Cochin-18**.

The address for service of notice on the respondents is as stated above.

WWW.LIVELAW.IN

STATEMENT OF FACTS

1. The petitioners herein are residents of Kerala and are consumer of Asianet Digital Network Private Ltd. and DEN Digital Cable Networks Ltd. This Writ Petition is being filed as the petitioners are aggrieved by the changes brought about with respect to network capacity fee, basic service tier and discounting offered by broadcasters to distributors through the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017, the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017, the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) (Second Amendment) Regulations, 2020 and the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff (Second Amendment) Order, 2020.These changes are arbitrary, illegal, effected without authority and manifestly opposed to the legal rights and interests of consumers such as the petitioners.

2. It is submitted that the Cable Television Networks (Regulation) Act, 1995 was enacted to regulate the operation of cable television networks in the country and for matters connected therewith or incidental thereto. The Cable Television Networks (Regulation) Act, 1995 initially dealt with only analogue cable television networks.

3. It is submitted that as per Amendment Act 2 of 2003, the Cable Television Networks (Regulation) Act, 1995 was amended. The Statement of Objects and Reasons of Amendment Act 2 of 2003 was as follows:

> "*The Cable Television Networks (Regulation) Act, 1995 (hereinafter referred to as "the Act") was enacted with a view to regulate the operation of cable television networks in the country so as to bring uniformity in their operations and* ***to avoid undesirable programmes from being made available to the viewers*** *as well as to enable the*

WWW.LIVELAW.IN

optimal exploitation of this technology which has the potential of making available to the subscribers a vast pool of information and entertainment.

2. *The Government has been monitoring the implementation of the Act and has been taking corrective measures as and when considered necessary. Amendments were made in the Act in the year, 2000, vide the Cable Television Networks (Regulation) Amendment Act, 2000.* ***In the recent months, there has been a great public outcry against frequent and arbitrary hike in the cable subscription charges. The subscription rates are being fixed arbitrarily by broadcasters and cable service providers in almost an area specific monopolistic distribution system and the subscriber has no choice to ask and pay for the channels he wishes to view. At present, there is no legal or administrative instrument by which the Government could intervene and regulate the subscription charges or ask the cable service providers to transmit/re-transmit television signals through any addressable system which would enable consumers to pay for only those channels which they wish to view****. Further, there is no reliable record of actual viewership leading to under-reporting of the number of subscribers by the cable service providers, Multi Service Operators (MSOs) and broadcasters, which, in turn, is also affecting revenues due to the Government. The public demand for Government intervention is such that it needs to be addressed on a priority basis.* ***Besides mandating the viewing of pay channels through an addressable***

WWW.LIVELAW.IN

system, the Government would notify from time to time and place to place, the subscription of the basic tier of free-to-air channels,since the primary objective is to ensure that every subscriber receives at least a minimum number of free-to-air channels at a reasonable cost.

3. *In view of the above, it is proposed to amend the Cable Television Networks (Regulation) Act, 1995 so as to provide for-*

(i) empowering ***the Government*** *to mandate through notification, in a phased manner, installation of addressable systems for viewing pay channels;*

*(ii) "****free-to-air" channels in the areas thus notified, to continue to be received by the subscribers in the existing receiver sets without having to go through the addressable systems****;*

(iii) ***a provision that the subscriber would not to be required to change the receiving set irrespective of the channels that he wishes to receive and to provide that he would be free to view the channels from amongst those offered by the cable service providers***

(iv) the flexibility for adoption of technological advancements and up-gradation in the addressable systems and to provide that the technical standards and performance parameters of the systems would be laid down by the Bureau of Indian Standards, from time to time;

(v) the Government to prescribe, from time to time, the maximum amount to be paid by the subscriber to the cable service provider for the "basic service tier" consisting of the bouquet of notified "free-to-air" channels and to determine the number of channels to be included in this "tier" and the maximum cost for the same in different States/cities/areas of the country, from time to time*;*

WWW.LIVELAW.IN

(vi) effective enforcement of the amendments, violations of which would constitute a cognizable offence; and

(vii) other consequential amendments in the Act

4. The proposed amendments would enable the Government to take steps for protecting the interest of the consumers, as and when considered necessary"

4. It is submitted that S. 2 of the Cable Television Networks (Regulation) Act, 1995 includes the following definitions:

"*(aii)* ***"Broadcaster"*** *means a person or a group of persons, or body corporate, or any organisation or body providing programming services and includes his or its authorised distribution agencies.*

(aiii) ***"cable operator"*** *means any person who provides cable service through a cable television network or otherwise controls or is responsible for the management and operation of a cable television network and fulfils the prescribed eligibility criteria and conditions.*

(c) "***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.*

(i) "***subscriber"*** *means any individual, or association of individuals, or a company, or any other organisation or body who receives the signals of cable television network at a place [indicated by him or it] to the cable operator, without further transmitting it to any other person*"

WWW.LIVELAW.IN

5. It is submitted that S. 4-A of the Cable Television Networks (Regulation) Act, 1995 deals with transmission of programmes through digital addressable systems etc. and is as follows:

> *"(1) Where the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, make it obligatory for every cable operator to transmit or re-transmit programmes of any channel in an encrypted form through a digital addressable system with effect from such date as may be specified in the notification and different dates may be specified for different States, cities, towns or areas, as the case may be:*
>
> *Provided that the date specified in the notification shall not be earlier than six months from the date of issue of such notification to enable the cable operators in different States, cities, towns or areas to install the equipment required for the purposes of this sub-section.*
>
> *(2) The Central Government may prescribe appropriate measures and take such steps as it may consider necessary for implementation of the notification issued under sub-section (1).*
>
> ***(3) If the Central Government is satisfied that it is necessary in the public interest so to do, and if not otherwise specified by the Authority, it may direct the Authority to specify, by notification in the Official Gazette, <u>one or more free-to-air channels to be included in the package of channels forming basic service tier</u> and any one or more such channels may be***

WWW.LIVELAW.IN

specified, in the notification, genre-wise for providing a programme mix of entertainment, information, education and such other programmes and fix the tariff for basic service tier which shall be offered by the cable operators to the consumers and the consumer shall have the option to subscribe to any such tier:

Provided that the cable operator shall also offer the channels in the basic service tier on a la carte basis to the subscriber at a tariff specified under this sub-section.

(4) The Central Government or the Authority may specify in the notification referred to in sub-section (3) , the number of free-to-air channels to be included in the package of channels forming basic service tier for the purposes of that sub-section and different numbers may be specified for different States, cities, towns or areas, as the case may be.

(5) It shall be obligatory for every cable operator to publicise the prescribed information including but not limited to subscription rates, standards of quality of service and mechanism for redressal of subscribers' grievances in such manner and at such periodic intervals as may be specified by the Central Government or the Authority for the benefit of the subscriber.

WWW.LIVELAW.IN

(6) The cable operator shall not require any subscriber to have a receiver set of a particular type to receive signals of cable television network:

Provided that the subscriber shall use a digital addressable system to be attached to his receiver set for receiving programmes transmitted on any channel.

(7) Every cable operator shall provide such information relating to its cable services and networks in such format and at such periodic intervals to the Central Government or the State Governments or the Authority or their authorised representatives, as may be specified by them from time to time.

(8) All actions taken by the Central Government or the Authority in pursuance of the provisions of this section as they stood immediately before the 25th day of October, 2011 shall continue to remain in force till such actions are modified as per the provisions of this Act.

Explanation.—For the purposes of this section,—

(a) "addressable system" means an electronic device (which includes hardware and its associated software) or more than one electronic device put in an integrated system through which signals of cable television network can be sent in encrypted form, which can be decoded by the device or devices, having an activated Conditional Access System

WWW.LIVELAW.IN

at the premises of the subscriber within the limits of authorisation made, through the Conditional Access System and the subscriber management system, on the explicit choice and request of such subscriber, by the cable operator to the subscriber;

(b) "basic service tier" means a package of free-to-air channels to be offered by a cable operator to a subscriber with an option to subscribe, for a single price to subscribers of the area in which his cable television network is providing service;

(c) "encrypted", in respect of a signal of cable television network, means the changing of such signal in a systematic way so that the signal would be unintelligible without use of an addressable system and the expression "unencrypted" shall be construed accordingly;

(d) "free-to-air channel", in respect of a cable television network, means a channel for which no subscription fee is to be paid by the cable operator to the broadcaster for its re-transmission on cable;

(e) "pay channel", in respect of a cable television network, means a channel for which subscription fees is to be paid to the broadcaster by the cable operator and due authorisation needs to be taken from the broadcaster for its retransmission on cable;

WWW.LIVELAW.IN

> *(f) "subscriber management system" means a system or device which stores the subscriber records and details with respect to name, address and other information regarding the hardware being utilised by the subscriber, channels or bouquets of channels subscribed to by the subscriber, price of such channels or bouquets of channels as defined in the system, the activation or deactivation dates and time for any channel or bouquets of channels, a log of all actions performed on a subscriber's record, invoices raised on each subscriber and the amounts paid or discount allowed to the subscriber for each billing period."*

6. It is submitted that pursuant to S. 4-A of the Cable Television Networks (Regulation) Act, 1995, it is through digital addressable systems that cable television networks are made available to consumers today. Furthermore, it is clear from S. 4-A of the Cable Television Networks (Regulation) Act, 1995 that while a distributor was mandatorily required to offer a basic service tier package comprising of free-to-air channels of different genres, the subscriber had the option of subscribing or not subscribing to a basic service tier package.

7. It is submitted that as per S. 22 of the Cable Television Networks (Regulation) Act, 1995, the Central Government may, by notification in the Official Gazette, make rules to carry out the provisions of this Act. This includes rules relating to the appropriate measures under sub-section (2) of section 4A for implementation of the notification under sub-section (1) of that section.

8. It is submitted that the term 'authority' as used in S. 4-A of the Cable Television Networks (Regulation) Act, 1995 is defined in S. 2 (ai) of the same Act as "*"Authority" means the Telecom Regulatory Authority of India established under sub-section (1) of section 3 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997)*". It may

WWW.LIVELAW.IN

be noted that this definition was inserted into the Cable Television Networks (Regulation) Act, 1995 only as per Act 21 of 2011.

9. It is submitted that the Telecom Regulatory Authority of India Act, 1997 was enacted to provide for the establishment of the Telecom Regulatory Authority of India (hereinafter referred to as "TRAI") and the Telecom Disputes Settlement and Appellate Tribunal (hereinafter referred to as "TDSAT") to regulate the telecommunication services, adjudicate disputes, dispose of appeals and to protect the interests of service providers and consumers of the telecom sector, to promote and ensure orderly growth of the telecom sector, and for matters connected therewith or incidental thereto. As per S. 11 of the Telecom Regulatory Authority of India Act, 1997, the functions of the authority are provided for as follows:

> "*(1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to--*
>
> ***(a) make recommendations, either suo motu or on a request from the licensor, on the following matters, namely:--***
>
> *(i) need and timing for introduction of new service provider;*
>
> *(ii) terms and conditions of licence to a service provider;*
>
> *(iii) revocation of license for non-compliance of terms and conditions of licence;*
>
> *(iv) measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;*
>
> *(v) technological improvements in the services provided by the service providers;*

WWW.LIVELAW.IN

(vi) type of equipment to be used by the service providers after inspection of equipment used in the network;

(vii) measures for the development of telecommunication technology and any other matter relatable to telecommunication industry in general;

(viii) efficient management of available spectrum;

(b) ***discharge the following functions, namely****:--*

(i) ensure compliance of terms and conditions of licence;

(ii) notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000 (2 of 2000), fix the terms and conditions of inter-connectivity ***between the service providers****;*

(iii) ensure technical compatibility and effective inter-connection between different service providers;

(iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;

(v) lay-down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service;

(vi) lay-down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;

WWW.LIVELAW.IN

(vii) maintain register of inter-connect agreements and of all such other matters as may be provided in the regulations;

(viii) keep register maintained under clause (vii) open for inspection to any member of public on payment of such fee and compliance of such other requirement as may be provided in the regulations;

(ix) ensure effective compliance of universal service obligations;

(c) levy fees and other charges at such rates and in respect of such services as may be determined by regulations;

(d) perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act:

Provided that the recommendations of the Authority specified in clause (a) of this sub-section shall not be binding upon the Central Government:

Provided further that the Central Government shall seek the recommendations of the Authority in respect of matters specified in sub-clauses (i) and (ii) of clause (a) of this sub-section in respect of new licence to be issued to a service provider and the Authority shall forward its recommendations within a period of sixty days from the date on which that Government sought the recommendations:

Provided also that the Authority may request the Central Government to furnish such information or documents as may be necessary for the purpose of making recommendations under sub-clauses (i) and (ii) of clause (a) of this sub-section and that Government shall supply such information within a period of seven days from receipt of such request:

WWW.LIVELAW.IN

Provided also that the Central Government may issue a licence to a service provider if no recommendations are received from the Authority within the period specified in the second proviso or within such period as may be mutually agreed upon between the Central Government and the Authority:

Provided also that if the Central Government, having considered that recommendation of the Authority, comes to a prima facie conclusion that such recommendation cannot be accepted or needs modifications, it shall refer the recommendation back to the Authority for its reconsideration, and the Authority may, within fifteen days from the date of receipt of such reference, forward to the Central Government its recommendation after considering the reference made by that Government. After receipt of further recommendation if any, the Central Government shall take a final decision.

(2) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the Authority may, from time to time, by order, notify in the Official Gazette the rates at which the telecommunication services within India and outside India shall be provided under this Act including the rates at which messages shall be transmitted to any country outside India:

Provided that the Authority may notify different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid the Authority shall record the reasons therefor.

(3) While discharging its functions under sub-section (1) or sub-section (2), the Authority shall not act against the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.

(4) The Authority shall ensure transparency while exercising its powers and discharging its functions.*"*

WWW.LIVELAW.IN

10. It is submitted that initially, TRAI was entrusted with regulating only the telecommunication services. Later, by Notification dated 09-01-2004 issued by the Ministry of Communication and Information Technology, the Central Government entrusted to TRAI the additional functions in respect of **broadcasting services and cable services**. These additional functions were to make recommendation regarding the terms and conditions on which the "addressable systems" shall be provided to customers and the parameters for regulating maximum time for advertisements in pay channels as well as other channels and to specify standard norms for, and periodicity of, revision of rates of pay channels, including interim measures. A copy of the Notification dated 09-01-2004 issued by the Ministry of Communication and Information Technology is produced herewith and marked as **Exhibit P1**.

11. **It is submitted that a perusal of the functions of TRAI would make it clear that it possesses powers** to regulate **the inter connection or the relationship between the service providers and that its powers do not extend and cannot be exercised to prescribe the imposition of any fee on consumers, making it compulsorily payable by such consumer.** This is so in the light of S. 2 (1) (j) of the Telecom Regulatory Authority of India Act, 1997 which defined "**service provider**" as meaning "***the Government as a service provider and includes a licensee***". A licensee, as per S. 2 (1) (e) of the Telecom Regulatory Authority of India Act, 1997 means **a person licensed for providing specified public telecommunication services**. Indisputably, a subscriber or a consumer availing broadcasting services is not a service provider under the Telecom Regulatory Authority of India Act, 1997.

12. It is submitted that S. 36 of the Telecom Regulatory Authority of India Act, 1997 deals with the regulation making power of the Authority and provides as follows:

> *"(1) The Authority may, by notification, make regulations consistent with this Act and the rules*

WWW.LIVELAW.IN

made thereunder to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:-

(a) the times and places of meetings of the Authority and the procedure to be followed at such meetings under sub-section (1) of section 8, including quorum necessary for the transaction of business;

(b) the transaction of business at the meetings of the Authority under sub-section (4) of section 8;

* * * * *

(d) matters in respect of which register is to be maintained by the Authority under sub-clause (vii) of clause (b)] of sub-section (1) of section 11;

(e) levy of fee and lay down such other requirements on fulfilment of which a copy of register may be obtained under sub-clause (viii) of clause (b) of sub-section (1) of section 11;

(f) levy of fees and other charges under clause (c) of sub-section (1) of section 11."

13. It is submitted that TRAI issued the Telecommunication (Broadcasting and Cable) Services Tariff Order 2004 dated 15-01-2004 whereby the charges payable by subscribers to distributors as prevalent on 26-12-2003 was fixed as the ceiling for both free-to-air and pay channels. A copy of the Telecommunication (Broadcasting and Cable) Services Tariff Order 2004 dated 15-01-2004 along with subsequent amendments is produced herewith and marked as **Exhibit P2**. It is submitted that TRAI thereafter issued various Orders whereby the maximum amount which a distributor could demand from a subscriber for receiving the programmes transmitted in the basic service tier was fixed initially at Rs. 72/-, then revised to Rs. 77/-, and

WWW.LIVELAW.IN

then revised again on multiple occasions. Since subscribing to the basic service tier was optional for subscribers all this while, the petitioners herein had no occasion to challenge the said prescriptions of amounts.

14. It is submitted that on 01-01-2017, TRAI issued the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations 2017. A copy of the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations 2017 is produced herewith and marked as **Exhibit P3**. Ext. P3 was issued by TRAI in exercise of the powers conferred by section 36, read with sub-clauses (ii), (iii) and (iv) of clause (b) of sub-section (1) of section 11 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997), read with Ext. P1 notification. It may be noted that Ext. P3 only came into effect from February/March 2019.

15. As per Regulation 1 of Ext. P3, it is stated that Ext. P3 shall cover commercial and technical arrangements, **among service providers** for interconnection, for broadcasting services relating to television provided through addressable systems throughout the territory of India. **Therefore, it is clear that the imposition of any fee on consumers, who are not service providers, is beyond the scope of Ext. P3**. This is especially so in the light of Regulation 2 (1) (kk) of Ext. P3 which defines a service provider as meaning the Government as a service provider and includes **a licensee as well as any broadcaster, distributor of television channels or local cable operator**.

16. As per Regulation 2 (1) (ee) of Ext. P3, **network capacity fee** is defined to mean **the amount, excluding taxes, payable by a subscriber to the distributor of television channels for distribution network capacity subscribed by that subscriber to receive the signals of subscribed television channels and it does not include subscription fee for pay channel or bouquet of pay channels, as the case may be**. It is pertinent to mention that

WWW.LIVELAW.IN

though the Regulations define network capacity fee, they do not contain any clause providing for levy of network capacity fee. Thus, network capacity fee is not being levied or extracted from a consumer on the strength of a subordinate legislation or under a rule-making power. It is not pursuant to any law or regulation that network capacity fee is being charged, and there is no clause in the Regulations empowering the extraction of network capacity fee.

17. It is submitted that Ext. P3 specifically defined and provided for carriage fee and distributor fee to be paid by a broadcaster to a distributor. It is submitted that these were provided for in Ext. P3 because TRAI took note of the cost incurred by the distributor in providing its services. As per S. 2 (1) (m) of Ext. P3, carriage fee was defined to mean "*any fee payable by a broadcaster to a distributor of television channels only for the purpose of carrying its channels through the distributor's network, without, specifying the placement of such channels onto a specific position in the electronic programme guide or, seeking assignment of a particular number to such channels*". As per S. 2 (1) (q) of Ext. P3, distribution fee was defined to mean "*any fee payable by a broadcaster to a distributor of television channels for the purpose of distribution of pay channel or bouquet of pay channels, as the case may be, to the subscribers and it does not include carriage fee*".

18. It is submitted that TRAI on 03-03-2017 issued the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017. A copy of the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017 is produced herewith and marked as **Exhibit P4**. Ext. P4 was issued in exercise of the powers conferred by sub-section (2) of section 11 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997), read with Ext. P1 notification. It may be noted that Ext. P4 only came into effect from February/March 2019.

19. It is submitted that Clause 4 of Ext. P4 which deals with **network capacity fee** provides as follows:

WWW.LIVELAW.IN

"(1) ***Every distributor of television channels shall declare network capacity fee, per month, payable by a subscriber for availing a distribution network capacity*** ***so as to receive the signals of television channels****:*

Provided that the network capacity fee, per month, for network capacity upto initial one hundred SD channels, shall, in no case, exceed rupees one hundred and thirty, excluding taxes:

Provided further that the network capacity fee, per month, for network capacity in the slabs of twenty five SD channels each, beyond initial one hundred channels capacity referred to in first proviso to sub-clause (1), shall, in no case, exceed rupees twenty excluding taxes:

Provided also that one HD channel shall be treated equal to two SD channels for the purpose of calculating number of channels within the distribution network capacity
subscribed.

(2) ***Every distributor of television channels shall offer all channels available on its network to all subscribers on a-la-carte basis and declare distributor retail price, per month,*** ***of each pay channel payable by a subscriber:***

Provided that the distributor retail price, per month, payable by a subscriber to a distributor of television channels for subscribing to a pay channel shall, in no case,
exceed the maximum retail price, per month, declared by the broadcasters for such pay channel.

(3) ***Every distributor of television channels shall offer to all subscribers each bouquet of pay channels offered by a broadcaster, and for which interconnection agreement has been signed with that broadcaster, without any alteration in its composition and declare the distributor retail price, per month, for such bouquet payable by a subscriber:***

Provided that the distributor retail price, per month, payable by a subscriber to a distributor of television channels for subscribing to a bouquet of pay channels offered by
the broadcaster shall in no case exceed the maximum

WWW.LIVELAW.IN

retail price, per month, declared by the broadcasters for such bouquet of pay channels:

Provided further that such bouquet shall not contain any pay channel for which maximum retail price per month declared by the broadcaster is more than rupees nineteen:

Provided further that such bouquet shall not contain any free-to-air channel:

Provided also that such bouquet shall not contain both HD and SD variants of the same channel.

(4) It shall be permissible for a distributor of television channels to offer bouquet(s) formed from pay channels of one or more broadcasters and declare distributor retail price(s) , per month, of such bouquet(s) payable by a subscriber:

Provided that such bouquet shall not contain any pay channel for which maximum retail price per month declared by the broadcaster is more than rupees nineteen:

Provided further that the distributor retail price per month of such bouquet of pay channels shall not be less than eighty five percent of the sum of distributor retail prices per month of a-la-carte pay channels and bouquet(s) of pay channels forming part of that bouquet:

Provided further that the distributor retail price per month of a bouquet of pay channels offered by a distributor of television channels shall, in no case, exceed the sum of maximum retail prices per month of a-la-carte pay channels and bouquet(s) of pay channels, declared by broadcasters, forming part of that bouquet:

Provided further that such bouquet shall not contain any free-to-air channel:

Provided also that such bouquet shall not contain both HD and SD variants of the same channel.

Explanation: For the removal of doubt it is hereby clarified that a distributor of television channels while forming bouquet under this clause shall not break a bouquet of pay channels offered by a broadcaster to form two or more bouquet(s) at distribution level.

WWW.LIVELAW.IN

(5) It shall be permissible for a distributor of television channels to offer bouquet(s) formed from free-to-air channels of one or more broadcasters.

(6) No distributor of television channels shall charge any amount, other than the network capacity fee, from its subscribers for subscribing to free-to-air channels or bouquet(s) of free-to air channels.

(7) Within the distribution network capacity subscribed, in addition to channels notified by Central Government to be mandatorily provided to all the subscribers, a subscriber shall be free to choose any free-to-air channel(s), pay channel(s), or bouquet(s) of channels offered by the broadcaster(s) or bouquet(s) of channels offered by distributors of television channels or a combination thereof:

Provided that if a subscriber opts for pay channels or bouquet of pay channels, he shall be liable to pay an amount equal to sum of distributor retail price(s) for such channel(s) and bouquets in addition to network capacity fee.

(8) Subject to sub-clause (1) of clause 4, a distributor of television channels shall not increase the network capacity fee for a period of six months from the date of such notification:

Provided that a distributor of television channels, before making any change in the network capacity fee, shall at least thirty days prior to the scheduled change --- (a) inform the Authority; and (b) inform the subscribers by running scroll on the channel."

20. It is submitted that Clause 5 of Ext. P4 retained the option of the subscriber to opt for the basic service tier, as envisaged under the Cable Television Networks (Regulation) Act, 1995.

21. It is submitted that Ext. P3 put a restriction on the discount that can be offered by a broadcaster on the bouquet of channels offered by it. Regulation 7 (4) of Ext. P3 sets a cap on the amount of discounting that could have been offered by broadcasters by providing as follows:

"It shall be permissible to a broadcaster to offer discounts, on the maximum retail price of pay

WWW.LIVELAW.IN

channel or bouquet of pay channels, to distributors of television channels, not exceeding fifteen percent of the maximum retail price.

Provided that the sum of distribution fee declared by a broadcaster under sub-regulation (3) and discounts offered under this sub-regulation in no case shall exceed thirty five percent of the maximum retail price of pay channel or bouquet of pay channels, as the case may be:

Provided further that offer of discounts, if any, to distributors of television channels, shall be on the basis of fair, transparent and non-discriminatory terms:

Provided also that the parameters of discounts shall be measurable and computable."

22. It is submitted that TRAI on 01-01-2020 issued the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) (Second Amendment) Regulations, 2020. A copy of the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) (Second Amendment) Regulations, 2020 is produced herewith and marked as **Exhibit P5**.

23. It is submitted that TRAI on 01-01-2020 issued the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff (Second Amendment) Order, 2020. A copy of the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff (Second Amendment) Order, 2020 is produced herewith and marked as **Exhibit P6**. Clause 4 of Ext.

WWW.LIVELAW.IN

P6 retained the imposition of the network capacity fee on the subscribers, while bringing about certain amendments to the details of the network capacity fee to be levied. Clause 5 of Ext. P6, however, deleted Clause 5 of Ext. P4 entirely. **Thus, as per Clause 5 of Ext. P6, the provision of basic service tier as an option to the subscriber has been done away with.** Further, as per Clause 7 of Ext. P6, further restrictions have been imposed on the quantum of discount that could be offered by a broadcaster. It is submitted that curtailing the right of the broadcaster in this manner amounts to infringing the right of the petitioners herein to receive the benefit that the broadcaster was willing to give, and the same constitutes a violation of the rights of the petitioners under Article 19 (1) (a).

24. It is submitted that the TDSAT established as per S. 14 of the Telecom Regulatory Authority of India Act, 1997 does not have jurisdiction to entertain any challenges to regulations framed by TRAI under S. 36 of the Telecom Regulatory Authority of India Act, 1997, as held by the Hon'ble Supreme Court in **Union of India v. Association of Unified Telecom Service Providers of India** reported in **(2011) 10 SCC 543**. It is submitted that the petitioners herein, therefore, cannot approach the TDSAT since the present Writ Petition involves a challenge to the regulations issued by TRAI.

25. Hence, aggrieved by the steps taken to remove the provision of basic service tier as an option for subscribers, to impose a network capacity fee on subscribers and to restrict the ability of broadcasters to offer to distributors discounts, the benefits of which would have accrued to the subscribers, and also aggrieved by the steps taken to benefit the distributors at the cost and expense of the subscribers who are ordinary consumers and left with no other efficacious and alternative remedy than to approach this Hon'ble Court, on the following mainly among other:

GROUNDS

A. The removal of the provision of **basic service tier** as an option for subscribers **as per Clause 5 of Ext. P6**,the imposition of

WWW.LIVELAW.IN

network capacity fee on subscribers as per **Regulation 2 (ee) of Ext. P3 and Clause 4 of Ext. P4 as amended by Ext. P6**, and the **restriction on broadcasters on the extent of discount they can offer to the distributors** as per **S. 7 (4) of Ext. P3 and Clause 7 of Ext. P6** is arbitrary, illegal, violative of the petitioner's fundamental rights, and contrary to the legitimate expectations of the petitioner.

B. The option to subscribe to the basic service tier is a legal right granted to subscribers as per the Cable Television Networks (Regulation) Act, 1995. The provisions of the Cable Television Networks (Regulation) Act, 1995 granting this right have not been amended or deleted, and consequently, even today, the subscribers are entitled to have the option of subscribing to the basic service tier.

C. A clause in Ext. P6, which is an Order amending Ext. P4, cannot suffice to defeat the legislative mandate in the Cable Television Networks (Regulation) Act, 1995 to provide subscribers the option of a basic service tier. Ext. P6 is merely in the nature of an executive instruction and it cannot override or indirectly amend a statutory prescription.

D. In any case, TRAI while exercising power under the Telecom Regulatory Authority of India Act, 1997 cannot indirectly amend the provisions of an entirely different statute, namely the Cable Television Networks (Regulation) Act, 1995.

E. The objective behind the provision of a basic service tier as per the Cable Television Networks (Regulation) Act, 1995 was to ensure that no subscriber, irrespective of financial capacity, would be left without the option to receive at least a minimum number of free-to-air channels at a reasonable cost. The Explanatory Memorandum to Ext. P4 itself recognised the need for and legal obligation to provide subscribers the option of a basic service tier.

WWW.LIVELAW.IN

This objective is being defeated through the removal of the basic service tier through Ext. P6.

F. TRAI does not have the power under the Telecom Regulatory Authority of India Act, 1997 to direct the imposition of a network capacity fee on subscribers. There is nothing in the Act empowering the authority to permit one service provider to compulsorily collect money from a non-service provider. The Act only permits the regulatory authority to prescribe the rates that can be charged by a service provider from a person availing the services as a quid pro quo for the services rendered by it. The Act does not envisage any compulsory extraction, particularly when there is no service being provided by the service provider (i.e. distributor) and there is no public element involved in maintaining the distribution infrastructure. Furthermore, the distributor is already entitled to collect distribution fee in case of transmission/distribution of pay channels and carriage fee in case of transmission/distribution of free-to-air channels to defray its distribution cost. Therefore, the collection of network capacity fee from the subscribers is an arbitrary exercise of power and warrants judicial interference.

G. In any case, TRAI's power under S. 11 (1) (a) of the Telecom Regulatory Authority of India Act, 1997 in any case is a recommendatory power. Further, a perusal of the functions of TRAI would make it clear that its powers with respect to service providers cannot be exercised to prescribe the imposition of any fee on consumers, since the definition of service providers does not include subscribers.

H. Merely because TRAI is an authority constituted under S. 2 (ai) of the Cable Television Networks (Regulation) Act, 1995, the same does not confer any power on TRAI to levy network capacity fee under the powers vested in TRAI under the Telecom Regulatory Authority of India Act, 1997.

WWW.LIVELAW.IN

I. S. 11 (2) of the Telecom Regulatory Authority of India Act, 1997 does not confer any power on TRAI to prescribe any fee payable by the subscriber since the same empowers only prescription of rates of service providers and, therefore, it is to be declared that S. 11 (2) of the Telecom Regulatory Authority of India Act, 1997 does not confer power on TRAI to prescribe network capacity fee which is payable compulsorily by the subscribers.

J. TDSAT established as per S. 14 of the Telecom Regulatory Authority of India Act, 1997 does not have jurisdiction to entertain any challenges to regulations framed by TRAI under S. 36 of the Telecom Regulatory Authority of India Act, 1997, as per the law laid down by the Hon'ble Supreme Court.

K. As per the Tariff Orders issued by TRAI, the subscribers were earlier entitled to obtain the basic service tier for an amount not exceeding Rs. 100/- at their option. This affordable option has been taken away due to the removal of basic service tier as per Ext. P6 and the imposition of network capacity fee as per Exts. P3, P4, P5 and P6 which is now being charged in lieu of basic service tier package and compulsorily required to be paid, thereby depriving the subscribers the very option accorded to them by the Cable Television Networks (Regulation) Act, 1995.

L. Ext. P3 itself makes it clear that its scope is only with respect to arrangements between service providers. Since subscribers are not service providers, Ext. P3 cannot be used by TRAI to indirectly impose a network capacity fee on subscribers.

M. The discounting offered by broadcasters to distributors influences the price paid by subscribers. Hence, the restriction on the extent of discount that can be offered by broadcasters adversely affects the rights and interests of consumers. Prior to 2017, there was no restriction on the discount offered by the broadcasters on the subscription of their pay channels. For the first time, by Ext. P3, restrictions were imposed which prohibited them from offering a

WWW.LIVELAW.IN

discount of more than 15% on the bouquet price. By Ext. P6, this restriction has been made even more stringent. Consequently, the subscribers would be deprived of the discount which the broadcaster is otherwise willing to offer but for the restriction imposed on its discretion by the regulating authority. The restriction imposed by TRAI on the extent of discount that can be offered by broadcasters is arbitrary and not based on any valid considerations or relevant materials and thereby infringes the petitioners' right under Article 19 (1) (a). It amounts only to a mala fide step to benefit the distributors at the cost of the subscribers.

N. The subscribers have a fundamental right under Article 19 (1) (a) to obtain information through their cable television subscriptions. The same can only be restricted by the operation of a law. Exts. P3, P4, P5 and P6 are not in the nature of a law and hence, they cannot restrict the fundamental rights of subscribers. The fetters sought to be imposed on the subscribers in the guise of putting restrictions on broadcasters and conferring fiscal extraction rights on the distributors are without authority of law and amounts to infringement of the fundamental rights guaranteed under Articles 14, 19 (1) (a) and 21.

O. As per Exts. P3, P4, P5 and P6, the distributors are entitled to collect carriage fee and distributor fee from the broadcasters. These fees are significant. For instance, as per Ext. P3, carriage fee of Rs. 4 lakhs has to be paid per channel per month by broadcasters of free-to-air channels to distributors. Now, by virtue of Ext. P6, the number of free-to-air channels has been increased from 100 to 200, thereby benefitting the distributor and enabling them to collect a carriage fee of Rs. 4 lakh per month for each of the free-to-air channels. The distributors will have an assured income of 200 X 4 lakhs X 12 months = Rs. 96,00,00,000/- (Ninety six crore rupees). In fact, as per TRAI, there are a total of 579 free-to-air channels. For carrying each of these channels on

WWW.LIVELAW.IN

their network and making them available for viewing by subscribers, the distributor will get 579 X 4 lakhs X 12 = Rs. 277,92,00,000/- (Two hundred and seventy seven crores and ninety two lakh rupees). This amount is only the carriage fee that will be received by the distributors. In addition to this carriage fee receivable by a distributor for free-to-air channels, the distributor will also get an assured 20% distribution fee for every pay channel carried over its distribution networks. As per TRAI, there are 330 pay channels. Assuming that the subscriber base in Kerala is 1 crore, and the average subscription per subscriber for pay channels is Rs. 75/-, a distributor will get an assured income in the name of distribution fee of Rs. 15 crores per month. Furthermore, broadcasters offer a discount of 15% to the distributors for carrying their pay channels. This would translate to 11.25 X 1 crore = Rs. 11.25 crores per month. In the light of the significant fees that are already being earned by the distributors, which is well in excess of their investment and costs, no valid reason exists or has been provided by TRAI for the imposition of an additional network capacity fee.

P. The network capacity fee imposed by TRAI is in the nature of a fee on subscribers to be compulsorily paid by them. As per the law laid down by the Hon'ble Supreme Court, a statutory fee is to be levied only when there is some quid pro quo given in return and existence of a public purpose. Here, both are absent. For a subscriber who only wants to subscribe to a few select channels, the imposition of a network capacity fee amounts to a levy for which there is no quid pro quo rendered by the distributor, since the subscriber is effectively paying for more network capacity than he or she uses. Relatedly, the imposition of the network capacity fee on diverse subscribers who have differing subscriptions amounts to treating entirely different cases in an alike manner, thus violating Article 14.

WWW.LIVELAW.IN

Q. Even if it assumed without conceding that TRAI has the power to remove basic service tier, impose network capacity fee and restrict the extent of discounting, it is submitted that the same must be exercised in a fair and transparent manner, especially in the light of S. 11 (4) of the Telecom Regulatory Authority of India Act, 1997. That requirement has been violated in the present case. Not only has TRAI not provided transparent and clear reasons for the steps it has taken in Exts. P3, P4, P5 and P6, it has specifically refused to engage with or consider the objections raised by subscribers to the same. A compilation of some comments and objections raised by consumers and consumer organisations during a consultation process conducted by TRAI in August 2019 is produced herewith and marked as **Exhibit P7**. A perusal of Ext. P7 will reveal that none of the concerns raised by subscribers have been addressed by TRAI while issuing Exts. P5 and P6. For a subscriber base of 1 crore, the total collection under the head of network capacity fee would be Rs. 130 crores per month. This would be in addition to the carriage fee of Rs. 277.92 crores per year (i.e. Rs. 23.16 crores per month) and distribution fee of Rs. Rs. 15 crores per month and discount of Rs. 11.25 crores per month mentioned in Ground O above. Therefore, the gross earning per subscriber per month would be Rs. 179.41. None of these aspects have been considered by TRAI.

On these and other grounds to be urged at the time of hearing, it is most humbly prayed that this Hon'ble Court may be pleased to allow this Writ Petition by granting the following:

RELIEFS

1. Issue a writ of mandamus or any other writ, order, or direction, declaring that S. 11 (2) of the Telecom Regulatory Authority of India Act, 1997 does not empower TRAI to impose any fee compulsorily payable by subscribers who do not come within the definition of service provider.

WWW.LIVELAW.IN

2. Issue a writ of mandamus or any other writ, order, or direction declaring that Regulation 2 (ee) of the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017 in so far as it defines a network capacity fee to be payable by the subscriber is arbitrary and illegal and violative of Articles 14, 19 (1) (a) and 21.

3. Issue a writ of mandamus or any other writ, order, or direction declaring that Clause 4 of the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017 as amended by the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff (Second Amendment) Order, 2020 in so far as it obligates the subscriber to pay network capacity fee to the distributor is without authority and arbitrary and illegal.

4. Issue a writ of mandamus or any other writ, order, or direction, declaring that the prescription of network capacity fee of Rs. 130 as per the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017 is irrational and without taking into consideration the carriage fee, distribution fee, and discounting already permitted to be payable by the broadcaster to the distributor under the regulations.

5. Issue a writ of mandamus or any other writ, order, or direction, declaring that the prescription of an upper limit for the discount offered by the broadcaster is an infringement on the fundamental right guaranteed to the consumer under Article 19 (1) (a).

6. Issue a writ of mandamus or any other writ, order, or direction, declaring that the discontinuance of basic service tier package envisaged under S. 4-A of the Cable Television Networks

WWW.LIVELAW.IN

(Regulation) Act, 1995 by TRAI as per the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff (Second Amendment) Order, 2020 is without authority and hence violative of Article 14.

7. To issue such other appropriate writ order or direction which this Hon'ble Court may deem fit and just under the circumstances of the case.

INTERIM RELIEF

1. Restrain the 1st and 2nd respondents from permitting collection of network capacity fee as provided under Regulation 2 (ee) of the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017 read with Clause 4 of the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017 as amended by the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff (Second Amendment) Order, 2020, pending disposal of the Writ Petition.

2. Direct the 1st and 2nd respondents to permit the consumers of all distribution platform operators to exercise the option to avail the free-to-air channels without making it compulsorily payable by the consumers, pending disposal of the Writ Petition.

3. Direct the 2nd respondent to make available the details of the carriage fee, distribution fee, discounting and the network capacity fee which is presently being collected by the distribution platform operators based on which they arrived at the figure of Rs. 130/- as network capacity fee per subscriber per month, pending disposal of the Writ Petition.

4. Direct the 2nd respondent to instruct all distribution platform operators to maintain separate account regarding collection of network capacity fee in case this Hon'ble Court is not inclined to

WWW.LIVELAW.IN

stay the operation of further collection of network capacity fee, pending disposal of the Writ Petition.

Dated this the 14th day of February, 2020.

PETITIONERS :-

Sd/-
Mr. Joe Johnson

Sd/-
Mr. Vimal Mathew

Sd/-
Ms. Tanya Joy

Sd/-
COUNSEL FOR THE PETITIONERS

WWW.LIVELAW.IN

BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

W.P.(Civil)No. of 2020
(Special Original Jurisdiction)

Mr. Joe Johnson and others : Petitioners
v.
Union of India and another : Respondents

AFFIDAVIT

I, Mr. Joe Johnson, Aged 56 years, S/o. P.J. Johnson, Pallathu Grace Villa, Near Kennedy School, Ayani South, SVM PO, Karunagappally, Kollam – 690573, do hereby, solemnly affirm and state as follows:-

1. I am the 1st petitioner in the above Writ Petition (Civil) and I am fully conversant with the facts of the case. I am swearing to this affidavit for and on behalf of the petitioners 2 and 3 as duly authorised by them.
2. The averments contained in the above Writ Petition (Civil) are true to the best of my knowledge, information and belief.
3. The Exhibits produced along with the above Writ Petition (Civil) are true copies of its originals.
4. I have not filed any other Petition before this Hon'ble Court, seeking the same relief earlier.
5. It is therefore prayed that this Hon'ble Court may be pleased to grant the reliefs prayed for in the above Writ Petition (Civil).

The above facts are true,

Dated this the 24th day of February, 2020

Sd/-
Deponent

Solemnly affirmed and signed before me by the deponent on this the 24th day of February, 2020, in my office at Ernakulam.

Sd/-
Santhosh Mathew,
Advocate

WWW.LIVELAW.IN

BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

W.P. (Civil) No. of 2020
(Special Original Jurisdiction)

Mr. Joe Johnson and others	:	Petitioners
v.		
Union of India and another	:	Respondents

Synopsis

Dates and Events:

1995	The Cable Television Networks (Regulation) Act, 1995 was enacted.
1997	Telecom Regulatory Authority of India Act, 1997 was enacted. The Telecom Regulatory Authority of India (TRAI) was to regulate only the telecommunication services.
2003	As per Amendment Act 2 of 2003, the Cable Television Networks (Regulation) Act, 1995 was amended.
09-01-2004 (Ext. P1)	By notification, the Central Government entrusted to TRAI additional functions in respect of broadcasting services and cable services. These additional functions were to make recommendation regarding the terms and conditions on which the "addressable systems" shall be provided to customers and the parameters for regulating maximum time for advertisements in pay channels as well as other channels and to specify standard norms for, and periodicity of, revision of rates of pay channels, including interim measures.
15-01-2004 (Ext. P2)	TRAI issued the Telecommunication (Broadcasting and Cable) Services Tariff Order 2004 whereby the charges payable by subscribers to distributors as prevalent on 26-12-2003 was fixed as the ceiling for both free-to-air and pay channels. TRAI thereafter issued various Orders whereby the maximum amount which a distributor could demand from a subscriber for receiving the programmes transmitted in the basic service tier was fixed initially at Rs. 72/-, then revised to Rs. 77/-, and then revised again on multiple occasions
2011	S. 4-A was inserted in the Cable Television Networks (Regulation) Act, 1995. S. 4-A provided, *inter alia*, for the provision of a 'basic service tier'. A distributor was mandatorily required to offer a basic service tier package

WWW.LIVELAW.IN

	comprising of free-to-air channels of different genres. The subscriber had the option of subscribing or not subscribing to a basic service tier package.
01-01-2017 (Ext. P3)	TRAI issued the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations 2017. 'Network capacity fee' is defined in these Regulations, though the Regulations do not contain any clause providing for levy of network capacity fee. Taking note of the cost incurred by the distributor in providing its services, these Regulations also provide for 'carriage fee' and 'distributor fee'. These regulations also set a cap on the amount of discounting that could be offered by broadcasters.
03-03-2017 (Ext. P4)	TRAI issued the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017. Clause 4 of this Order dealt with the network capacity fee payable by a subscriber to the distributor. Clause 5 of this Order retained the option of the subscriber to opt for the basic service tier. The Explanatory Memorandum of this Order recognised the need for and legal obligation to provide subscribers the option of a basic service tier.
February / March 2019	Ext. P3 and Ext. P4 came into effect.
01-01-2020 (Ext. P5)	TRAI issued the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) (Second Amendment) Regulations, 2020.
01-01-2020 (Ext. P6)	TRAI issued the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff (Second Amendment) Order, 2020. This Order retained the imposition of network capacity fee. Clause 5 of this Order did away with the provision of basic service tier as an option to the subscriber. Clause 7 of this Order imposed further restrictions on the quantum of discount that could be offered by a

WWW.LIVELAW.IN

C

broadcaster.

The petitioners are consumers of cable television networks.

As per S. 4-A of the Cable Television Networks (Regulation) Act, 1995, the subscribers have a legal right to have the option of subscribing or not subscribing to the basic service tier package which mandatorily has to be offered by the distributor. Though Ext. P4 retained the option of the subscriber to opt for the basic service tier, Ext. P6 has done away with the same. The legal prescription contained in the Cable Television Networks (Regulation) Act, 1995 cannot be deleted or amended by Ext. P6 since an executive instruction issued by TRAI, that too while exercising power under the Telecom Regulatory Authority of India Act, 1997, cannot override or indirectly amend a statutory prescription contained in the Cable Television Networks (Regulation) Act, 1995.

The imposition of a network capacity fee on subscribers as per Exts. P3, P4, P5 and P6 is arbitrary and illegal. TRAI does not have the power under the Telecom Regulatory Authority of India Act, 1997 to direct the imposition of a network capacity fee on subscribers. TRAI possesses powers to regulate the inter connection or the relationship between the service providers and the same does not extend to prescribing any fee compulsorily payable by a consumer, since consumers are not included within the definition of 'service provider'. Ext. P3 issued by TRAI itself states that it shall cover commercial and technical arrangements, among service providers for interconnection, for broadcasting services relating to television provided through addressable systems throughout the territory of India. Thus, the imposition of any fee on consumers, who are not service providers, is beyond the scope of Ext. P3.

Moreover, Ext. P3 does not contain any clause providing for the extraction of network capacity fee from the subscribers. Thus, network capacity fee is not being levied or extracted from a consumer on the strength of a subordinate legislation or under a rule-making power. For a subscriber who only wants to subscribe to a few select channels, the imposition of a network capacity fee amounts to a levy for which there is no quid pro quo rendered by the distributor.

In any case, accounting for the cost incurred by the distributor in providing its services, Ext. P3 already provides for carriage fee and distributor fee to be paid by a broadcaster to a distributor. These amounts are significant. as per TRAI, there are a total of 579 free-to-air channels. For carrying each of these channels on their network and making them available for viewing by subscribers, the distributor will get 579 X 4 lakhs X 12 months = Rs. 277,92,00,000/- (Two hundred and seventy seven crores and ninety two lakh rupees). In addition to this, the distributor will also get an assured 20% distribution fee for every pay channel carried over its distribution networks. As per TRAI, there are 330 pay channels. Assuming that the subscriber base in Kerala is 1 crore, and the average subscription per subscriber for pay channels is Rs. 75/-, a distributor will get an assured income in the name of distribution fee of Rs. 15 crores per month. Furthermore, broadcasters offer a discount of 15% to the distributors for carrying their pay channels. This would translate to 11.25 X 1 crore = Rs. 11.25 crores per month.

Ext. P3 also put a restriction on the discount that can be offered by a broadcaster on the bouquet of channels offered by it and Ext. P6 has imposed further restrictions in this regard. The discounting offered by broadcasters to distributors influences the price paid by subscribers. Curtailing the right of the broadcaster in this manner amounts to infringing

WWW.LIVELAW.IN

the right of the petitioners herein to receive the benefit that the broadcaster was willing to give, and the same constitutes a violation of the rights of the petitioners under Article 19 (1) (a), especially since the restriction imposed by TRAI on the extent of discount that can be offered by broadcasters is arbitrary and not based on any valid considerations or relevant materials.

The fundamental right of the petitioners to obtain information through their cable television subscriptions can only be restricted by the operation of a law and not through Exts. P3, P4, P5, and P6, which do not have the colour of law. Moreover, TRAI has not provided transparent and clear reasons for the steps it has taken in Exts. P3, P4, P5 and P6 or engaged with or considered the objections raised by subscribers to the same.

Hence, this Writ Petition is being filed to challenge the removal of the provision of basic service tier as an option for subscribers as per Clause 5 of Ext. P6, the imposition of network capacity fee on subscribers as per Regulation 2 (ee) of Ext. P3 and Clause 4 of Ext. P4 as amended by Ext. P6, and the restriction on broadcasters on the extent of discount they can offer to the distributors as per S. 7 (4) of Ext. P3 and Clause 7 of Ext. P6.

Decisions referred:

1. Union of India v. Association of Unified Telecom Service Providers of India, (2011) 10 SCC 543

Dated this the 24th day of February, 2020.

Sd/-
COUNSEL FOR THE PETITIONERS

WWW.LIVELAW.IN

BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

W.P.(Civil)No. of 2020
(Special Original Jurisdiction)

Mr. Joe Johnson and others : Petitioners
v.
Union of India and another : Respondents

Index

Sl. No.	**Contents**	**Page Nos.**
1.	Synopsis	
2.	Memorandum of Writ Petition (Civil)	
3.	Affidavit	
4.	**Exhibit P1:** True copy of the Notification dated 09-01-2004 issued by the Ministry of Communication and Information Technology.	
5	**Exhibit P2:** True copy of the Telecommunication (Broadcasting and Cable) Services Tariff Order 2004 dated 15-01-2004 along with subsequent amendments.	
6	**Exhibit P3:** True copy of the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations 2017.	
7	**Exhibit P4:** True copy of the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017.	
8	**Exhibit P5:** True copy of the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) (Second Amendment) Regulations, 2020.	
9	**Exhibit P6:** True copy of the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff (Second Amendment) Order, 2020.	
7	**Exhibit P7:** True copy of the compilation of comments and objections raised by consumers and consumer organisations during a consultation process conducted by TRAI in August 2019.	

Dated this the 24th day of February, 2020

Sd/-
COUNSEL FOR THE PETITIONERS

WWW.LIVELAW.IN

Presented on: 25-02-2020

SUBJECT **"CABLE TELEVISION NETWORKS (REGULATION) ACT, 1995 AND TELECOM REGULATORY AUTHORITY OF INDIA ACT, 1997 - CHALLENGING THE REMOVAL OF THE PROVISION OF BASIC SERVICE TIER AS AN OPTION FOR SUBSCRIBERS AS PER CLAUSE 5 OF EXT. P6, THE IMPOSITION OF NETWORK CAPACITY FEE ON SUBSCRIBERS AS PER REGULATION 2 (EE) OF EXT. P3 AND CLAUSE 4 OF EXT. P4 AS AMENDED BY EXT. P6, AND THE RESTRICTION ON BROADCASTERS ON THE EXTENT OF DISCOUNT THEY CAN OFFER TO THE DISTRIBUTORS AS PER S. 7 (4) OF EXT. P3 AND CLAUSE 7 OF EXT. P6."**

BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

W.P.(Civil)No. of 2020
(Special Original Jurisdiction)

Mr. Joe Johnson and others	:	Petitioners
v.		
Union of India and another	:	Respondents

MEMORANDUM OF WRIT PETITION (CIVIL) FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA

C.F. Rs. /- is paid

SANTHOSH MATHEW(S-204)
ARUN THOMAS (A-1056)
JENNIS STEPHEN (J-1033)
VIJAY V. PAUL (V-684)
KARTHIKA MARIA (K. 514)
VEENA RAVEENDRAN (V 713)
ANIL SEBASTIAN PULICKEL (A.1886)
DIVYA SARA GEORGE (D-433)
JAISY ELZA JOE (K.001690/2018)
ABI BENNY AREECKAL (K/001482/19)
&
LEAH RACHEL NINAN (K/002325/19)
COUNSEL FOR THE PETITIONERS