

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

DATED 16TH DECEMBER, 2010

PETITION NO. 187(C) of 2010

Nirman & Associates Private Ltd.

.... Petitioner

Vs.

ESPN Software India Pvt. Ltd. & Ors.

... Respondents

BEFORE :

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

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

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

For Petitioner : Mr. Navin Chawla, Advocate
Mr. Yoginder Handoo, Advocate

For Respondent No.1 : Mr. N. Ganpathy, Advocate

For Respondent No.2 & 3: Ms. Kanika Agnihotri, Advocate
Ms. Shikha Tandon, Advocate

JUDGMENT

S.B. SINHA

Introduction

1. Interpretation of certain provisions of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004 as amended from time to time is in question in this petition, wherein the petitioner has, inter-alia, prayed for the following reliefs :
 - a) *Setting aside the Notice dated 4.06.2010 and the Public Notice dated 5.06.2010 issued by the Respondent No. 1; and*
 - b) *Declaring the action of the Respondent No. 1 as illegal and holding the same as mala fide; and*
 - c) *Directing the Respondent No. 1 to negotiate for renewal of the subscription agreement on non-discriminatory and reasonable terms and in terms of the Telecom Regulatory Authority of India Interconnect Regulations.*

Background Facts

2. This petition is a follow-up of an earlier petition filed by the petitioner against the first respondent herein being Petition No. 229(C) of 2009.

One of the questions which arose for consideration in the said petition was as to whether the petitioner was a defaulter and/or violated the conditions of the Regulations so far as it relates to a duty cast upon it to submit monthly Subscription Line Reports as envisaged under Clause 9.2 of the Regulations.

3. Before, however, we advert to the said question, we may place on record that in this petition one Assam Cable Communication said to be a competitor Multi Service Operator and Mr. Sanjiv Narain, said to be the distributor of

the first respondent herein, have been impleaded as parties.

They, however, have not filed any reply to the petition.

4. The petitioner in this petition has inter-alia questioned the legality and/or validity of the notices purported to be under Clause 4.1 and 4.3 of the Regulations inter-alia on the premise that no violation, as alleged, had taken place nor any reason therefor has been assigned therein.
5. According to the petitioner, by reason of three letters, the petitioner had informed the first respondent as regards change of its connectivity being dated 15th May, 2010, 1st June, 2010 and 2nd June, 2010.

It, however, appears that the first respondent received the service of the said SLRs and as also a list of the operators of the affiliates for the period 1st May and 27th May, 2010. It has further been contended that apart therefrom, SLRs were sent for the month of March, 2010 on 8th April, 2010, on 5th June, 2010 for April, 2010 and various other SLRs for the month of April, May and June. According to the petitioner, it would be evident from the aforementioned Subscribe Line Reports that some LCOs have migrated from other MSOs and joined its network and some have left its network also. The petitioner in the aforementioned situation would contend that no specific amount having been mentioned in the demand made in terms of Clause 4.1 and the public notice and furthermore as envisaged under Clause 4.3 of the Regulation and furthermore having regard to the fact that SLRs have all along been supplied to it, the question of its being either a defaulter or having violated the provisions of Clause 9.1 did not arise.

With a view to appreciate the contention of the petitioner we may notice that the first respondent by a letter dated 3rd June, 2010 asked the petitioner to comply with the provisions of the Regulations and pay unto it additional amounts for the additional subscribers on account of various LCOs joining the network of the petitioner.

It reads thus :

“We are in receipt of your mails between 13th Mar’10 and 2nd Jun’10 intimating us the names of the Cable Operators being joined by you. Vide our mail dated 23rd Mar’10 we had already intimated to you that in all your communications you are asking us to provide SLRs of the Cable Operators who you are joining. In this regard our submission is as under :

As per clause 12 of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation, 2004, as amended by the Telecommunication (Broadcasting and Cable Services) Interconnection (Third Amendment) Regulation, 2006, all Distributor of TV channels are required to submit their updated subscriber base statements with the Broadcasters. So under the said regulation you are obliged to provide us with your update SLRs. You are therefore, once again requested to provide us with your updated SLR and disclose the detailed subscriber list for each of the cable operators who you have joined. Based on such subscriber list you are required to make us the payment of the additional subscription fee over and above the contractual subscription fee based on the representation made by you while entering into the contract as you have joined new networks post the contract.

It would be appropriate to state that we have been continuously following up with you to pay us for the additional subscribers on account of you joining additional Cable operators. But you have not paid us for the same till date and you have been delaying the payment on one pretext or the other.”

6. Another notice was issued on 4.6.2010, which according to the petitioner, was issued without giving it an opportunity to comply with the aforesaid said notice under Regulation 4.1.

It reads as under :

“Kindly refer to our Service Contract G486514 dated 19/06/09 entered into between you i.e. M/s. Nirman & Associates Pvt. Ltd. and us i.e. ESPN Software India Pvt. Ltd. (ESPN) for the ESPN, STAR Sports & STAR Cricket Programming Service (the Service).

This also has reference to the various reminders sent to you through our email and letter dated 23/03/10 and 03/06/10 intimating you to provide us with the SLRs of the Cable Operators who you are joining and pay for the additional subscribers. In the said letter we had requested you to pay us for the additional subscribers on account of you joining additional Cable operators failing which appropriate measures will be initiated from our end as per TRAI regulations.

It would be appropriate to mention here that you have made no efforts to either provide us with your updated SLRs or pay for the additional subscribers on account of you joining additional Cable Operators and all our efforts to collect the additional subscription fee has been turned down due to your non-cooperation.

Please be advised that failure to pay for the additional subscribers on account of you joining additional Cable operators will entitle us to deactivate you services. Accordingly, please treat this letter as 21 days notice as required under Clause 4.1 of the telecommunication (Broadcasting and Cable Services) Interconnection Regulation 2004, as amended by the Telecommunication (Broadcasting and Cable Services) Interconnection (Third Amendment) Regulation, 2006.

We therefore, call upon you to pay for the additional subscribers else we would be left with no other option but to deactivate your services. Lastly, please note that we are in the process of issuing a public notice to keep your customers informed of the above.”

7. Admittedly public notices were issued on the next date i.e. 5th June, 2010 in two newspapers i.e. 'North East Times' in English and 'Sentinel' in Hindi.

We may notice one of them being the Northeast Times, which reads as under :

“This is to inform the consumers of NIRMAN & ASSOCIATES PVT. LTD., Suraj Complex, Ist Floor, South Sarania Road, Ulubari Chariali, PO Ulubari, District Kamrup, P.S. : Paltan Bazar, Guwahati-781007, Area services Guwahati, that the ESPN, STAR SPORTS & STAR cricket services being provided to them are liable to deactivation due to payment default on account of additional subscribers. Hence, their viewers may not be able to view the ESPN, STAR SPORTS and STAR cricket channels on their television sets after expiry of 21 days from this publication.”

Submissions

8. Mr. Navin Chawla, learned counsel appearing on behalf of the petitioner in support of the petition would principally raise three contentions :-
- (i) Keeping in view the statutory scheme as contained in the Regulations and in particular Clause 3.2, in terms whereof the Telecom Regulatory Authority of India (TRAI) has laid down a must provide clause on a reasonable and non-discriminatory basis, the other provisions contained therein, namely Clause 9.1 and 9.2, 10.1 and 10.2, Clause 11 and 12 thereof must be construed in such a manner so as to hold that although SLR is contemplated to be given on a monthly basis, once an agreement is entered into, the same can be altered only in terms of Clause 10 thereof and in that view of the matter it is not necessary to hold monthly meetings.
 - (ii) The second proviso contained in Clause 10.2 envisages in a case of this nature a situation where LCOs have left another MSOs and joined the network of the petitioner, to mandate the broadcaster to disclose the SLRs of

the old MSOs so as to enable a new MSO to enter into the negotiations with it and unless such a negotiated figure of the subscriber base is arrived at and on the basis thereof an amount is fixed so as to enable the MSO concerned to receive a fresh demand, the question of making any payment in relation thereto does not and cannot arise.

- (iii) The provisions of Clause 11.2 also envisage payment of a higher amount of subscription fee only in regard to a change and not in regard to the total subscriber base. The provisions of the Regulations are required to be read keeping in view the Tariff Order issued by TRAI and having regard to the fact that in terms thereof no local cable operator is entitled to realise a sum of more than Rs.250/- per month from a subscriber and, thus, it would be impossible for an MSO to supply all the channels of all the broadcasters. TRAI in a recent survey report has accepted that keeping in view the introduction of DTH platform etc. the subscription fees received by the LCOs are going down.

9. Mr. Ganpathy, learned counsel appearing on behalf of the first respondent, on the other hand, submitted :-

- (i) Although in earlier litigation being the petition no. 229(C) of 2009 an order of injunction was passed restraining the respondent No. 1 from disconnecting the supply of signal of the petitioner, having regard to the fact that it not only violated the order of injunction but also the terms of the Regulations, notice was issued so as to enable the petitioner to remedy the breach although no disconnection was contemplated thereby and, in fact, the first respondent had made a statement before this Tribunal that no disconnection was to be effected.
- (ii) Although the petitioner had been issuing letters informing the first respondent about the joining and leaving of the local cable operators, it having not been furnished the number of the subscribers and furthermore

having not being paying the amount towards increased subscription fee on its own, it was impossible for the first respondent to raise any invoice on the petitioner having regard to the increased number of subscribers on the petitioner.

- (iii) The respondent having asked the petitioner to enter into negotiations but it having not responded thereto, the notices impugned in this petition cannot be said to be bad in law.
- (iv) The Regulations must be held to have been made for achieving a good purpose namely making of Service Line Report; the broadcasting industry being a dynamic industry where LCOs keep changing and MSOs keep growing and thus, the broadcasters are entitled to know the actual subscriber base of a Multi Service Operator so as to enable it to enter into an effective negotiation.

10. Ms. Shikha Tandon, learned counsel appearing on behalf of respondent Nos. 2 & 3 urged :-

- (i) No relief having been sought for by the petitioner as against the respondent No. 2 and 3, this petition is not maintainable against them.
- (ii) All the relevant SLRs having been provided to the first respondent, the respondent No. 2 cannot even be asked by the petitioner to furnish SLR of its own LCOs.
- (iii) The allegations of malafide and/or discrimination having merely being alleged but no material has been placed on record in support thereof, this petition must be held to be not maintainable against them having

regard to the provisions contained in Section 14 of the Telecom Regulatory Authority of India Act, 1997, as it envisages a dispute between two service providers only.

Regulations

11. At the outset, we may notice the relevant provisions of the Regulations.

“2.(p) “subscriber base” means the number of subscribers

(i) as agreed to by service providers in a non-addressable system on the basis of which payments are made by one service provider to the other, or

(ii) as reflected by the Subscriber Management System, where addressable systems are employed.

2.(q) “Subscriber line report” or “SLR” means a monthly statement wherein, in a non-addressable system, a multi system operator and a cable operator agree upon the subscriber base for that month.

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; [HITS Operators and multi system operators shall also, on request re-transmit signals received from a broadcaster, on a non-discriminatory basis to cable operators].

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

[Provided also that the provisions of this sub-regulation shall not apply in the case of a distributor of TV channels, who seeks signals of a particular TV channel from a broadcaster, while at the same time demanding carriage fee for carrying that channel on its distribution platform.]

“Explanation 1

The applicant distributors of TV channels intending to get signal feed from any multi-system operator other than the presently-affiliated multi system operator, or from any agent/ any other intermediary of the broadcaster/multi system operator, or directly from broadcasters shall produce along with their request for services, a copy of the latest monthly invoice showing the dues, if any, from the presently-affiliated multi system operator, or from any agent/ any other intermediary of the broadcaster/multi system operator who collects the payment for providing TV channel signals.”

“Explanation 2. The stipulation of “placement frequency” or “package/ tier” by the broadcaster from whom the signals have been sought by a distributor of TV channels, as a “pre-condition” for making available signals of the requested channel(s) shall also amount to imposition of unreasonable terms.”

First agreement between Multi System Operator and Cable Operator

9.1 In non-addressable systems, while executing an interconnection agreement for the first time between a multi system operator and a cable operator, the parties to the agreement shall take into account the subscriber base of the cable operator on the basis of the Subscriber Line Report (SLR) where such SLR exists. Where such SLR does not exist, this shall be negotiated on the basis of the evidence provided by the two parties on the subscriber base, including the subscriber base of similarly placed cable operators and local survey.

Explanation

The Subscriber Line Report (SLR) is only an indicative basis for arriving at the subscriber base and the subscriber base as mutually agreed by the two parties could be more than or less than the number indicated by the SLR.

First agreement between Multi System Operator and Broadcaster

9.2 In non-addressable systems, while executing an interconnection agreement for the first time between a multi system operator and a broadcaster, the multi system operator shall furnish a list of the cable operators who will be getting signals from its network along with their subscriber base. The parties to the agreement shall take into account the subscriber base of cable operators connected to the multi system operator while negotiating the

subscriber base of the multi system operator. For the consumers proposed to be directly served by the multi system operator, the procedure as laid down in sub-clause 9.1 of this regulation shall be followed.

10. Variation of Subscriber Base during validity of agreement

Between Multi System Operator and Cable Operator

10.1 In non-addressable systems, the subscriber base agreed upon by the parties at the time of execution of the interconnection agreement between a multi system operator and a cable operator shall remain fixed during the course of the agreement except in exceptional circumstances that warrant an increase or decrease in the subscriber base. In such an eventuality, it is for the service provider seeking a change in the subscriber base to provide reasons and accompanying evidence including local survey for the proposed change.

Between Multi System Operator and Broadcaster

10.2 In non-addressable systems, the subscriber base agreed upon by the parties at the time of execution of the interconnection agreement between a multi system operator and a broadcaster shall remain fixed during the course of the agreement except in exceptional circumstances that warrant an increase or decrease in the subscriber base. In such an eventuality, it is for the service provider seeking a change in the subscriber base to provide reasons and accompanying evidence including local survey for the proposed change.

Provided that this sub-clause shall not apply to changes in the subscriber base of a multi system operator on account of any cable operator joining or leaving the multi system operator.

Provided further that any change in the subscriber base of a multi system operator, which is the basis of payment to a broadcaster, on account of any cable operator joining or leaving the network of the multi system operator shall be equal to the subscriber base of the cable operator, joining or leaving the network.

11. Finalising Subscriber Base at the time of Renewal of agreement

Between Multi System Operator and Cable Operator

11.1 In non-addressable systems, negotiations on revision of subscriber base at the time of renewal of interconnection agreement between a multi system operator and a cable operator shall take into account the changes in subscriber base of the cable operator over the past three years, as well as the changes in subscriber base of other cable operators operating in the area in which the cable operator is operating and its adjoining areas for the current period.

Between Multi System Operator and Broadcaster

11.2 In non-addressable systems, negotiations on revision of subscriber base at the time of renewal of interconnection agreement between a multi system operator and a broadcaster shall take into account the changes in subscriber base of the multi system operator over the past three years, as well as the changes in subscriber base of other multi system operators operating in the area in which the multi system operator is operating and its adjoining areas for the current period.”

12. TRAI in exercise of its power conferred on it under Section 11(1) (b) of the Act purported to be read with Section 36 thereof, made Tariff Orders from time to time.

Indisputably, in terms of the second Tariff Order 2004 framed by TRAI, a local cable operator may only receive a sum of Rs. 250/- per month from each of the subscriber irrespective of the number of channels of different broadcasters it may retransmit. It is also not in dispute that in the year 2006 TRAI having regard to inflation increased the amount of subscription by 4% on or about 4.10.2007 and by reason of another notification increased the same by 7%, which came into force with effect from 1.1.2008.

13. It is stated that this Tribunal has quashed the said notification and an appeal thereagainst is pending before the Supreme Court of India.

14. We may, however, place on record that in certain matters, without noticing the said fact, this Tribunal has directed increase of 7% in the amount of subscription charges.

Interpretation of the Regulations

15. Broadcasting and Cable Services is a regulated industry.

In terms of the provisions of TRAI Act, 1997 as also the Regulations, the provisions governing general law of contract are superseded. TRAI is an independent regulator. It is an independent statutory body. It is not answerable to any Minister in charge of the Government of India. It is not even a department of the Government. Although it is funded by the Government of India and is required to maintain proper accounts, other relevant records and prepare an annual statement of account, it is significant to notice that under Sub-section 2 of Section 23 of the said provision, read with the Explanation appended thereto, in the matter of issuing any order and in discharge of its functions in respect thereof, it is not even amenable to any audit by the Comptroller and Auditor General.

The aforementioned provision, therefore, must be held to have been made so as to make it to be truly independent.

TRAI, thus, being an independent regulator is also enjoined with a duty to monitor and implement the provisions of the Regulations laid down by it.

16. It is stated at the bar that except in the town of Kolkata and some other town in India, the Regulation providing for furnishing of the SLR is almost a non starter.

We are also informed at the bar that TRAI is contemplating to do away with the requirements to furnish SLR. This stand at the Bar poses difficult question before us.

17. Admittedly, a Broadcaster keeping in view the statutory scheme and in particular Clause 3.2 of the Regulations is bound to provide signals to a Multi Service Operator or to a Local Cable Operator, in the event any request is made therefor.

A broadcaster ordinarily and subject to the other provisions contained in the Regulation may deny the MSO or the Local Cable Operator supply of signal inter-alia on the premise that it is a defaulter and/or it has not furnished requisite SLR and/or informations as are necessary in terms of Clause 9.1 of the Regulations have not been provided.

There cannot, however, be any doubt or dispute that the broadcaster with a view to protect its interest may seek for any other or further information so as to enable it to supply signals on reasonable terms.

18. What would be the reasonable terms, will depend upon the fact situation involved in each case. No hard and fast rule can be laid down therefor.

We are inclined to take a view that the heart and soul of the entire Regulation is Clause 3.2 and for all intent and purpose the other provisions are required to be interpreted in terms thereof but there cannot be doubt and

dispute that other provisions are required to be interpreted of their own, as and when any occasion arises therefor. The Regulations have taken within its purview all situations as far as an independent regulator could envisage. It not only provides for a 'must provide' clause but also those who are the first entrant, those who have already been getting supply of signal but intends to obtain supply of signal from another broadcaster or even had been taking supply of signal from the same broadcaster but discontinued the same for one reason or the other.

It also takes into consideration the cases of those who have migrated from one Multi Service Operator to another; the terms and conditions of supply between a broadcaster and a distributor, a distributor and a local cable operator, the rental, the subscription charges to be paid by the subscriber to the local cable operator, the quality of supply, the mode and manner in which the contract can be terminated, the renewal of the contract thereof as well as the subscriber base and subscription charges are concerned they have all been provided for in the Regulations. Different provisions of the Regulations, therefore, shall be attracted in different factual situations. We, therefore, may not be in a position to envisage a principle governing Clause 3.2 in all situations.

19. We may, however, proceed on the premise that supply of signal must be on reasonable terms and on non-discriminatory basis. A broadcaster or a multi-service operator is not and cannot be said to be a 'State' within the meaning of Article 12 of the Constitution of India. It, being not so, for commercial reasons may deal with in different manners with different MSOs and local cable operators. Even otherwise the question of discrimination would arise provided both of the parties are equally placed. Two unequals cannot be treated equally as it is well known that the same would itself violate the equality doctrine. It is, therefore, difficult for any Court of Law to treat the cases of two parties who are not similarly situated to treat them on equal terms. In other words the parameters of extending the principle of 'Equality' cannot in our opinion be weighed in golden scale.

20. It is not in dispute that the monthly subscription charges payable by a subscriber to a local cable operator or a Multi Service Operator would depend upon a large number of factors; some of them being :-

- a) Locality
- b) Capacity of the persons living in a particular area,
- c) The choice of channels of the viewers,
- d) The viewership
- e) The current prevailing market etc.

21. Keeping in view the aforementioned principles, we may make endeavours to analyse the statutory provisions. Regulation 2 starts with the usual clause namely “unless the context otherwise requires”. The definition of subscriber base is not a restricted one.

Clause 9.1 with which we are concerned provides for the number of subscribers as agreed to by two service providers in a non-addressable system on the basis of which payments are made by one service provider to the other. The non-addressable system to a great extent is regulated for the uncertainties, adhocism for assessing the viewership on presumption which cannot be universally true. This Tribunal in Sky TV Vs Zee Television has in the context of the detailed operation while directing that DTH operator would pay 50% of the subscription fee payable in a non-addressable system opined that a gross under-declaration is made in an analogue mode. But, however, the extent of under-declaration is not and cannot be laid down by any Court of Law. The word ‘under-declaration’ may be termed as percentage viewership of a channel by an objective assessment.

For one reason or the other the Union of India through the Ministry of Information & Broadcasting or TRAI was not able to start an addressable system throughout India. Once an addressable system is introduced, a large

number of disputes would come to an end because all parameters will be available on a measureable scale. However, we hasten to add that the same being within the domain of the Government of India and the independent Regulator, any comment thereon by us may be found to be pre-mature and that too being unnecessary for this case and may prejudice.

22. The meaning of SLR is again restricted. It means a monthly statement wherein a multi-system operator and a cable operator agree upon the subscriber base for that month. Whereas the definition of subscriber base takes within its fold an agreement between two service providers; the Subscriber Line Reports confines itself to a subscriber base entered into by and between a Multi System Operator and a Cable Operator.

Clause 9 provides for finalising the subscriber base at the time of first agreement. It is in two parts. Clause 9.1 relate to a first agreement between Multi System Operator and a cable operator whereas Clause 9.2 provides for first agreement between Multi System Operator and a broadcaster.

We, although are concerned only with Clause 9.2, may however, notice the explanation appended to clause 9.1, which *stricto sensu* would not apply to a case falling within the purview thereof.

SLR, keeping in view its definition and also the Explanation appended to Clause 9.1, therefore, is a matter by and between an MSO and a LCO and does not have a universal definition.

It, on its own showing, is not sacrosanct.

Clause 9.2 speaks about subscriber base and not SLR. Thus, in a case governing the first agreement between a broadcaster and an MSO, what is necessary is the agreement between the parties. For the aforementioned purpose, the materials which are required to be considered by both the parties are the consumers proposed to be directly served by the MSO but for the procedure as laid down in sub-clause 9.1 of the Regulations shall be followed and in respect of others the subscriber base of the MSO; keeping in view the fact that the subscriber base of the MSO would not only consist of the negotiated subscriber base of the local cable operator but also those consumers who were proposed to be directly served by the MSO. It is only for that purpose the importance of SLR is required to be noticed.

23. Once, however, an agreement is entered into by and between the parties the novation of contract, if any, with regard to the validity of the agreement would arise only in terms of Clause 10.2. A plain reading of the said provision would clearly go to show that an exception is carved out to an ordinary situation namely the subscriber base shall remain fixed during the course of the agreement, as service provider seeking a change that is required to provide for reasons and accompanying evidence including local survey for the proposed change must establish the same. The first proviso, however, takes the main provision for all intent and purport outside the purview of Clause 10.2 as situation contemplated thereby namely changes in the subscriber base of a MSO on account of any cable operator joining or leaving the MSO. The 2nd proviso, however, not only controls the main proviso but also the first proviso thereof as it lays down that subscriber base should be the basis of payment to a broadcaster and in the event any cable operator joins or leaves its network, the change shall be equal to the subscriber base of the cable operator joining or leaving the network. Clause 11 provides for finalizing the subscriber base at the time of renewal of the agreement with which we are not concerned at the moment in the market.

We, in support of our findings aforementioned, may notice some decisions of the Apex Court on the interpretation of 'Explanation' and 'Proviso'.

In *Dattatraya Govind Mahajan v. State of Maharashtra*, (1977) 2 SCC 548, at page 563 :

“9.{....}It is true that the orthodox function of an explanation is to explain the meaning and effect of the main provision to which it is an explanation and to clear up any doubt or ambiguity in it. But ultimately it is the intention of the legislature which is paramount and mere use of a label cannot control or deflect such intention. It must be remembered that the legislature has different ways of expressing itself and in the last analysis the words used by the legislature alone are the true repository of the intent of the legislature and they must be construed having regard to the context and setting in which they occur. Therefore, even though the provision in question has been called an Explanation, we; must construe it according to its plain language and not on any priori considerations.”

In *Keshavji Ravji & Co. v. CIT*, (1990) 2 SCC 231, at page 251

“37. Sri Ramachandran urged that the introduction, in the year 1984, of Explanation I to Section 40 (b) ;was not to effect or bring about any change in the law, but was intended to be a mere legislative exposition of what the law has always been. An 'Explanation', generally speaking, is intended to explain the meaning of certain phrases and expressions contained in a statutory provision. There is no general theory as to the effect and intendment of an Explanation except that the purposes and intendment of the 'Explanation' are determined by its own words. An Explanation, depending on its language, might supply or take away something from the contents of a provision. It is also true that an Explanation may – this is what Sri Ramachandran suggests in this case – be introduced by way of abundant caution in order to clear any mental cobwebs surrounding the meaning of a statutory provision spun by interpretative errors and to place what the legislature considers to be the true meaning beyond controversy or doubt. Hypothetically, that such can be possible purpose of an 'Explanation'

cannot be doubted. But the question is whether in the present case, Explanation I inserted into Section 40(b) in the year 1984 has had that effect.”

In S. Sundaram Pillai V. V.R. Pattabiraman (1985) 1 SCC 591

“53. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is –

(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same.”

It has been relied on in

(i) Dipak Chandra Ruhidas v. C K sarkar, (2003) 7 SCC 66 at page 71;

(ii) Dilip N. Shroff Karta of N.D. Shroff vs. Joint Commissioner of Income Tax, Special Range Mumbai and Anr. Reported in (2007) 6 SCC 329;

(iii) S.B. Bhattacharjee Vs. S.D. Majumdar and Ors. Reported in (2007) 10 SCC 513; and

(iv) Hardev Motor Transport Vs. State of M.P. and Ors. (2006) 8 SCC 613

Analysis

24. The petitioner herein was a new entrant. It requested the respondent to provide signal of its channels. It having not receive a favourable reply, approached TRAI. A subscription agreement was entered into on or about 19/6/2009 on a monthly subscription fee of Rs.1,35,960/-. The said agreement has come to an end on 13th June, 2010. The petitioner, as indicated hereinbefore, has filed a petition before this Tribunal on or about 15.10.2009 after the signal was disconnected by the respondent. Indisputably the said order of injunction is operative. In Petition No. 229 (C) of 2009 what was in question was the notice under Clause 4.1 being dated 24.9.2009 as also public notice of the same date.

The said petition was heard on 30.7.2010 and the judgment has been reserved. It, however, stands admitted that while the said order of injunction was operative, the impugned notices have been issued. One of the questions which arise for our consideration is as to whether the same is malafide and/or has been issued to show any favour to the respondent Nos. 2 and 3.

The petitioner in support of its plea of malafide and/or discriminatory acts on the part of the 1st respondent vis-à-vis the 2nd and 3rd respondent has made certain allegations in paragraphs 5, 6, 12 and 18 as also ground (e) thereof.

It is, however, stated that the respondent No. 3 is no longer a distributor of the first respondent; the distributorship agreement having been terminated w.e.f. March, 2010.

25. It is not necessary for us to go into the question as to whether the respondent No. 3 being a distributor of the 1st respondent, any favour was to be shown in favour to respondent No. 2 to retain its monopoly. No material has been placed on record to establish malafide and/or any discriminatory treatment.

It is now a well settled principle of law that the allegations of malafide must not only be made but established.

In absence of any plea of the details of malice and discrimination, so far as the respondent Nos. 2 and 3 are concerned, we are of the opinion that no case has been made out against them.

26. This raises a question as to whether the act of 1st respondent is malafide. The impugned notices, as noticed heretofore, have been served on the petitioner when this Tribunal was in seisin of the matter. An order of injunction was not only passed but in fact an undertaking has been given by the respondent that no disconnection of supply of signals of its channels to the petitioner shall be caused.

It is in the aforementioned situation, we must notice, that the petitioner received the first demand at about 1805 hrs. on 3rd June, 2010 by way of fax copy of the first respondent's letter of the said date. By reason of the said letter new demand was made. The petitioner was asked to provide the respondent with its updated SLR and detailed subscriber list for each of the cable operators who had joined it. It was also asked to make payments on the basis thereof. No sufficient time was given to the petitioner to comply therewith and/or even give reply to the said letter.

It was again at 16.35 hrs. the petitioner received the notice under Regulation 4.1 on 4th June, 2010. The public notice was issued on the next dated i.e. 5th June, 2010 which clearly goes to show that the same had already been sent for publication to the newspapers concerned. It is in the aforementioned situation the reply of the petitioner being dated 8th June, 2010 may be noticed.

“Ref : Your Fax dated 3rd June, 4th June 2010 and our various e-mails between 13th March to 2nd June 2010 & your Public Notice published on 5th June 2010

Sub : Joining of New Cable Operators

Dear Sir,

The purpose of this correspondence is to express our dismay & shock at the aforementioned PUBLIC NOTICE published in the local dailies “North east Times’ & ‘The Sentinel” on 5th June 2010. This public notice is nothing but an attempt made by you to overreach the Hon’ble TDSAT. In spite of the fact that disputes between us are pending before the Hon’ble TDSAT in Petition No. 229(C) of 2009 – Nirman & Associates Pvt. Ltd. Vs. ESPN Software India Pvt. Ltd. And the same is listed for hearing on 14.07.2010. You have consciously chosen to issue this public notice, being fully aware that the Hon’ble TDSAT is on vacation.

We have been continuously providing you the SLR. We are again enclosing herein our SLR list as on 30th April 2010. And we have also been intimating the number of cable operators who have migrated to us or migrated away from us. All this while you had chosen to remain silent and suddenly when the Hon’ble TDSAT has closed for vacations, you have issued the public notice on entirely frivolous grounds. The timing of the public notice is suspect. Simply because some cable operators have joined us does not warrant an increase in the subscriber base. This demand by you is not only unreasonable but is also contrary to the TRAI Regulations.

The FIFA World Cup 2010, which are to be telecast soon on your channel seems to be another instigating factor for you to create panic among our affiliate cable operators and subscribers, who after seeing the public notice have threatened to leave our small network and join Assam Cable Communications. This action on your

part conclusively establishes that you want to destroy our small network and scuttle competition, so that M/s Assam Cable Communication and M/s. Dolly's Cable Network and their partner networks who are nothing but after egos of Mr. Sanjeev Narain continue with their monopoly. Thus we request you to please withdraw the Public Notice as it is hampering our business and any loss suffered by us would be entirely at your cost.

This is for your kind information & necessary action please.

Thanking you,

Yours sincerely,

For Nirman & Associates Pvt. Ltd.

Sd/-

(Rana Saidur Zaman)

Managing Director

Dated : 8th June 2010

Place : Guwahati

Enclo : As above."

27. The allegations made therein are pointer to the following facts :-

- (i) notice had been issued during pendency of another petition in this Tribunal;
- (ii) the FIFA world Cup was to be telecast,
- (iii) the first respondent acted in undue haste.

28. It is well settled that allegations of malafide are not only to be pleaded but also to be proved, but it is also well settled. An undue haste may itself be held to be an act of malafide.

(See *S.L. Kapoor v. Jagmohan*, (1980) 4 SCC 379)

29. It is also well settled that an allegation of malafide can be proved upon taking into consideration various factors as also the conduct of the parties

(See Bal Kalyani & Ors v. State of Maharashtra & Ors. (AIR 1993 Bom 10)

30. Keeping in view the fact that a proceeding had been pending before this Tribunal, in the event the respondent No. 1 had any grievance with regard to any action on the part of the petitioner it could have said so. It could not have made an attempt to overreach the court. It knew that it could not have disconnected the signal. If that be so, we fail to understand what was the purpose of issuing two notices in two days and publication of a public notice on the third day? The conduct of the 1st respondent is such, which compels us to lead to a conclusion that the said notices had been issued only to cause harm to the petitioner.

31. We, therefore, are of the opinion that the conduct of the respondent constitutes a malice of fact. Any act which is malafide cannot be legal. The statute contemplates service of a notice for just cause. It contemplates that a broadcaster shall act bonafide. It, should not assume itself a function indirectly which it could not assume directly. We, for the aforementioned reason, must hold that the purported notice dated 4th June, 2010 issued in terms of Regulation 4.1 and the public notice dated 5th June, 2010 are not sustainable in law.

32. We could have stopped there, but we must also take into consideration certain other provisions of the agreement as also the conduct of the parties.

33. Apart from the statutory regulations, we may also notice the following clause in the agreement :

“In the event the Licensor believes in its reasonable discretion that the Affiliate has under declared its subscriber base or there has been an increase in the base of the Affiliate’s Subscribers, the Licensor may withdraw the discount immediately and may call for an increase of the Affiliate Subscription Fees payable hereunder. On withdrawal of the discount the total subscription as referred above, shall be payable to the Licensor for the entire term of the Agreement. If after a period of seven days, the Affiliate fails to pay the increased Subscription Fees as requested by the Licensor, the Licensor may, subject to observance of TRAI’s applicable regulations, as its sole discretion, deactivate/disconnect the Service here under provided and/or terminate this Agreement without prejudice to its right to claim additional Affiliate Subscription Fee resulting from such under declaration by the Affiliate or the increase in its subscriber base referred to above. For avoidance of doubt, an increase of Affiliate’s Subscribers shall include, without limitation, increase of Subscribers to which Affiliate directly distributes the Service or an increase of such Subscribers to which the service is distributed by the sub operators and sub affiliates/cable operators listed in Annexure I and other sub operators and sub affiliates/cable operators added by the Affiliate to its/his cable network and/or Distribution System(s) during the term of this Agreement.”

34. We may furthermore notice that although the petitioner had issued letters after letters, disclosing addition/deletion of the subscribers, the respondent issued two letters to the petitioner being dated 17th March, 2010 and 23rd March, 2010. They read as under :

“Wed, Mar 17, 2010 at 11.09 AM

Subject : RE : JOINING OF NEW CABLE OPERATORS

Mailed – espnstar.co.in

by

Dear Mr. Zaman

We are in receipt of your mails dated 13th Mar’10 and 15th Mar’10 and have noted the contents thereof. Vide your above said mails you have communicated that certain existing/new cable operators have expressed their desire to join your network. You have also informed us that you are gearing up to connect the following cable operators to your network. The names of the operators are as follows :

M/s. Classic Channel, Paltan Bazar, Guwahati
M/s. A.R. Network, Manipuri Basti, Guwahati
M/s Samin Ahmed, Ulubari, Guwahati
M/s Barsa Cable Network, Birubari (Nijarapar), Guwahati
M/s Igloo Cable Network, Birubari, Guwahati
M/s Mithu Vision, Kumarpara, Guwahati

But instead of waiting, for our permission you have gone ahead and connected some of these networks without agreeing on the commercial terms. Please note before joining any network you are required to disclose us the subscribers of that network by submitting a detailed Subscriber Line Report (SLR). After proper verification of your SLR we shall finalise the no. of subscribers for whom you need to pay us. Only after agreeing on the commercial terms you can connect a network.

Through this mail we call upon you to submit your updated SLR immediately so that we can finalise the commercial terms and the revised subscription fee. Keeping in mind the next date of hearing on 18th March'10 please expedite and submit your updated SLR without any delay.

*Regards,
Diputijal Sharma”*

*“date Tue, Mar 23, 2010 at 10.22 AM
Subject : Joining of New Cable Operators
Mailed-espnstar.co.in*

By

Dear Mr. Zaman,

We are in receipt of your mails dated 17th Mar'10, 18th Mar'10 and 20th Mar'10 and have noted the contents thereof. In all your communications you are asking us to provide you with the SLRs of the Cable Operators, who you are joining. In this regard our submission is as under :

As per clause 12 of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation, 2004, as amended by the Telecommunication (Broadcasting and Cable Services) Interconnection (Third Amendment) Regulation, 2006, all Distributor of TV channels are required to submit their updated subscriber base statements

with the Broadcasters. So, under the said regulation you are obliged to provide us with updated SLRs. So again you are being requested to provide us with your updated SLR and disclosed the detailed subscriber list for each of the cable operators who you are planning to join. Based on such subscriber list we shall finalise the commercials before you actually join any cable operator.

Through this mail you are again being requested to comply with the aforesaid regulation and oblige.

*Regards,
Diputijal Sharma.”*

35. It has not been brought to our notice that any attempt was made by the petitioner to hold any negotiation immediately thereafter.

It, however, appears that the petitioner by an E-mail dated 24th March, 2010 stated as under :

*“Wed, Mar 24, 2010 at 4.41 PM
Subject: Joining of New Cable Operators –
WITHOUT PREJUDICE
mailed –gmail.com
by*

Dear Sir,

This is in reply of your email dated 23rd March 2010 at 10.22 am, seeking updated SLR list. We are well aware of the Clause 12 of the TRAI Interconnect Regulations. Accordingly we are attaching herein the same for your ready reference.

However, in this context we would like to mention that your seeking detailed SLR list for each of the operators desiring to join us prior to even their joining is tough to accept under current circumstance, since the information you ask for is a commercial one. Revealing before you the details of the intending operators would mean

revealing the same before the Rival MSO Mr. Sanjive Narain who is also your Channel Distributor. Also it clearly once again indicates that you are working in collusion with the Rival MSO. For instance suppose we do inform you that the 'X' operator having 100 sub bases wants to join our network, and later on you from your end say that 'X' operator has 1000 sub bases and not 100 sub bases as found by us, how then will we be in a position to prove the validity of our statement?????

Nevertheless we are attaching our SLR list as on 8th Feb 2010, along with the new joining. Kindly acknowledge the same and do the needful in this regard.

This is for your kind information & necessary action please.

Thanking you,

Regards,

Rana Zaman

Managing Director

Nirman & Associates Pvt. Ltd."

36. The SLRs, which were furnished to the respondent, show the number of subscribers which have come to the fold of the petitioner at 3217. The said informations were furnished. The latest information was furnished only after 30th June.

It is, however, correct that list of operators has been furnished - one as on 31st March, 2010 showing the subscriber number of 3830, one as on 30th April, 2010 being 3502, one on between 1st May to 27th May, 2010 being 3552, on between 28th May to 31st May, 2010 - 3302, on between 1st June to 4th June, 2010 - 3477 and lastly on between 5th June to 30th June - 3217.

37. There had been some increase in the subscriber base that shows who had joined the petitioner were bound to show the last invoices which would have indicated the amount payable by them. Even subject to negotiation, the petitioner in order to show its bonafide, atleast should have disclosed the said amount to the respondent. The petitioner, if not phenomenally but noticeably, has been growing from strength to strength and, therefore, the latest SLR must be produced by it for negotiation purpose.

The petitioner does not say that it had give some incentives to the LCOs who had migrated to its network from the network of the respondent No. 2. It was necessary for the 1st respondent to verify the same.

38. This petition has been filed on 14.6.2010. The disconnection appears to have been caused despite an interim order. It is in that premise a mandatory order was passed.

We have noticed the conduct of the parties in detail for the simple reason that the agreement has expired and the parties, therefore, are required to renew their agreement.

The period of three months envisaged under Clause 8 of the Regulations also expired in September, 2010. We may place on record that no material has been brought on record that the petitioner has started negotiation from April, 2010 and in that view of the matter the proviso appended to Clause 8.2 may not have any application but then petitioner had been enjoying an order of injunction and we have, for the reasons stated hereinbefore, have found that the notices issued by the 1st respondent are unsustainable in law.

39. We, therefore, direct the parties to enter into negotiation afresh on the basis of the SLRs submitted by the petitioner, in the light of the observation made in Petition No. 229(c) of 2009 and the subscriber base disclosed by it

as also the changed situation at the ground level.

We may also place on record the submission made by Mr. Ganpathy that the parties have to negotiate to enter into a new agreement.

40. This petition is allowed to the aforementioned extent with the aforementioned observations and directions without any order as to costs.

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

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

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

Pk/rkc