TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 14th December, 2010

MA No.91 of 2009
in
PETITION No.209(C) OF 2008

Hathway Cable and Datacom Ltd .....Decree holder Applicant

Versus

Neo Sports Broadcast Pvt. Ltd. ……Judgment Debtor/Petitioner

BEFORE:

HON'BLE MR.JUSTICE S.B. SINHA, CHAIRPERSON
HON'BLE MR. G. D. GAIHA, MEMBER

For Petitioner : Mr.Nasir Husain,Advocate

For Respondent : Mr.Mahesh Agarwal, Advocate

Mr.Rishi Agarwala,Advocate
Mr. Ankit Shah, Advocate

JUDGMENT

S.B. Sinha

Whether, when the parties enter into a settlement, it would bind them in terms of Order XXIII Rule 3 of CPC or Order XXI Rule 2 thereof, is the question involved in this petition.

The basic fact of the matter is not in dispute.

The Judgment-Debtor herein has filed the original petition against the Decree Holder praying, inter alia, for the following reliefs:

"A. Declare the said Public Notice dated 12.09.2008 appearing in 'Indian Express' at New Delhi to be illegal, null and void and/or

B. Declare the said Notice dated 28.09.2008 sent to the petitioner to be illegal, null and void and/or

C. Restrain the Respondent from switching off/disconnecting the signals for Neo Sports and Neo Cricket channels distributed by the respondent and/or;

D. Direct the Respondent to raise invoices entity wise as per the list of entities provided to the Respondent"

A decree was passed by this Tribunal on or about 13.05.2009 making, inter alia, the following directions:

"18. As can be seen from the above, the Agreement is very clear that the initial number was only tentative and that the Petitioner is obliged to report regularly the subscriber base through SLR and pay the subscription fee accordingly. The reliance placed upon by the counsel for Petitioner on the paragraph (the last Para quoted above) providing that the subscriber base shall remain fixed during the course of the Agreement overlooks the fact that it comes after all the other paragraphs. In other words, the assumed fixity of the subscriber base is only in the event that there is no expansion of the same, and also assumes proper conduct on the part of the Affiliate. It does not in any way obliterate the duty of the Petitioner to provide the SLR particularly when the first paragraph clearly states that the subscriber number in Annexure-A to the Agreement is only on the basis of the declaration made by the Petitioner. We therefore hold that the Petitioner is liable to supply the SLR to the Respondent every month. We do not agree with the contention of the Petitioner that the number of 1,12,932 subscribers is fixed through the course of the entire Agreement. What is fixed is the 'territory' and the rate of Rs.38.74 per subscriber per month (exclusive of taxes). The Petitioner is liable to report the subscriber base and pay at the agreed rate for the entire subscriber base.

23. As regards the public notice, the Petitioner shall furnish to the Respondent the subscriber base details within two weeks from the date of this order. As regards the amount due by the Petitioner to the Respondent, the two parties shall meet within one week from the date of this order and arrive at the amount due by the Petitioner to the Respondent on the basis of the above findings. This exercise shall be completed within three weeks from the date of this order. The Respondent shall immediately thereupon raise an invoice on the Petitioner who shall make the

payment of the entire sum due within one week from the date of receipt of the invoice. As regards the future course of action, both parties shall abide by the directions given above."

Indisputably, against a part of the aforementioned judgment and order the Decree Holder herein has preferred an appeal before the Supreme Court of India in terms of Section 18 of the Telecom Regulatory Authority of India, 1997 (the Act).

Inter alia, on the premise that the original petitioner herein was obligated to supply SLR to the decree holder herein on the basis whereof it was to raise invoices having not been complied with, an application for execution purported to be in terms of Section 19 of the Act was filed.

On the one hand, the Judgement Debtor has filed before this Tribunal in a sealed cover the list of LCOs to contend that whereas for the financial year 2008-09 it had 112932 declared subscribers base, for the financial year 2009 to 2011, its subscriber base was reduced to 68356.

Representations have been made before this Tribunal from time to time by the parties that they had been on negotiating terms. It furthermore appears that pursuant to an observation made by one of us, (G.D. Gaiha, Member) in the proceeding sheet dated 17.08.2010 that the issue raised by the parties therein, namely; as to whether there has been a huge outstanding bill which was to be cleared before a public notice could be issued and the SLRs are required to be produced being different, it was opined that negotiations should be held for the said purpose having regard to Clause 3.2 of the Regulations and if it is found that the signal seeker is a defaulter, the same can be denied to it.

It was observed:

> "Learned counsel for respondent submits that SLR should be provided to them before the meeting. I also feel that for reconciliation purpose the SLR is a must and, therefore, as per our order dated 13.5.2009 the SLR should be provided to the respondent before the meeting for reconciliation of accounts. Learned counsel for petitioner says that the petitioner will provide another copy of the SLR to the respondent within three days before the meeting for reconciliation of accounts."

We have noticed heretobefore that the talks for settlement had started in respect whereof a statement before this Tribunal was made as far as back on 12.11.2009.

In fact a memorandum of understanding was entered into by and between the parties in respect of financial year 2009-2010, which has nothing to do with the judgement in question.

Talks of settlement continued for some time. However, the failure was reported to this Tribunal on 19.11.2010.

Yet again a representation was made on 11.02.2010 that although the parties had entered into a new agreement, reconciliation of accounts before them had been going on. Yet again on 15.03.2010 it was stated that no settlement had been arrived at.

On a representation made on 05.04.2010, time till 23.04.2010 was granted for arriving at a settlement and/or for hearing of the matter.

Yet again several opportunities have been granted to the parties in respect thereof.

On an application filed by the Decree Holder herein for disobedience of this Tribunal's order dated 17.08.2009 and 16.02.2009, this Tribunal by an order dated 17.05.2010 passed by one of us which has been referred to hereinbefore, the Managing Director of the petitioner company was directed to remain present in court. Mr.K.Jayaraman, the Managing Director of the company, however, could not be present on 28.05.2010 and in his place one Mr.Sudhir Mongia, General Manager came to this Tribunal.

Mr.Jayaraman, however, has appeared before this Tribunal on the next date, namely; on 19.07.2010.

We, however, as requested by Mr.Kathpalia, that Mr.Jayaraman shall meet an officer representing the Decree Holder at 11.00 am on 29.07.2010, adjourned the matter. Pursuant thereto the parties met.

It was contended before us on 11.08.2010 that the parties have entered into a settlement and a memorandum of understanding would be filed within one week. Not only on the next date fixed, namely, 19.08.2010; Mr.Ringe appearing on behalf of the Decree Holder submitted that the Judgement Debtor had gone back from its commitment although settlement had been arrived at and the memorandum of settlement was at a drafting stage.

It was on the aforementioned premise this Tribunal directed that the matter on the question, as to whether a settlement had been arrived at or not, would be heard.

The said order appears to have been passed on the premise that the proviso to Order XXIII Rule 3 applies in the instant case.

Upon hearing the counsel for the parties, however, we are of the opinion that Order XXIII Rule 3 may not have any application as the proceeding before us is not an original proceeding.

However, having regard to the order proposed to be passed by us, in our opinion, the same would take a back seat.

Mr.Mahesh Agarwal, the learned counsel appearing on behalf of the Decree Holder would contend that from a perusal of the E-mails exchanged between the parties as also the minutes of the meetings drawn, it would appear they had entered into the dialogue for settlement without prejudice to their respective rights and contentions and as the draft MOUs exchanged between the parties contained the expressions "without prejudice", no settlement can be said to have been arrived at. Strong reliance in this behalf has been placed on the decision of a House of Lords in *Ofulue and Another v Bossert* reported in 2009 UKHL 16 as also a decision of the Supreme Court of India in *Chairman and MD, NTPC Ltd. v. Reshmi Constructions, Builders & Contractors* reported in (2004) 2 SCC 663.

Mr. Agarwal contended that keeping in view the fact that the Judgement Debtor intentionally and deliberately had refused to comply with the decree, and no appeal having been preferred there against, this Tribunal should execute it own order which is deemed to be a decree passed under the Code of Civil Procedure by granting appropriate relief in favour of the Decree Holder. According to the learned counsel, this Tribunal can force the judgement debtor to disclose the SLRs only on the basis whereof the invoices can been raised. Our attention has further been drawn to the fact that although the agreement had expired on and from 12.04.2009, the supply of signal continued in view of the interim order passed by this Tribunal dated **13.05.2009.**

Mr.Nasir Hussain, the learned counsel appearing on behalf of the Judgment Debtor, on the other hand, would contend that MOUs having been sent by the Decree Holder and the same, having been accepted by the Judgment Debtor, it would constitute a contract within the meaning of the provisions of the Indian Contract Act, 1872. It was furthermore submitted that the Judgement Debtor having already supplied the SLRs and as the actual subscriber base will have to be determined on the basis of the negotiations to be held between the parties, it cannot be said that the Judgment Debtor has failed and/or neglected to satisfy the decree.

Before adverting to the respective contentions of the parties, we may notice the MOUs in question, which have been exchanged between them. We may notice only those which are of some significance.

On or about 09.08.2010, Mr.Bhavik Palan of Hathway sent the following MOU with the covering letter which reads thus:-

"WITHOUT PREJUDICE

Dear Girish

I refer to the meeting held in our office on 29th July 2010.

In accordance with the discussions held at the meeting and as agreed upon in the meeting, I have prepared an MOU recording the terms of settlement arrived at between Hathway And Neo .

The blanks in the MOU regarding the cheque nos. will be filled in by my collegue , Mr. Amit Shah.

Please let me have your suggestions, if any, and then we can execute the same.

Warm Regards

Bhavik"

The said letter was marked "Without Prejudice". The MOU which was also sent therewith had also been marked "Without Prejudice".

We may notice the relevant clauses thereof:

"1. Hathway agrees to pay to Neo Rs. 1,25,00,000/- (Rupees One Crore Twenty Five Lacs only) in four equal monthly installments as full and final settlement towards subscription charges for the period April to August 2009. Hathway has upon execution of this MOU handed over to Neo the following post dated cheques and the payment schedule is as follows:

1. Rs. 3,062,500/- by cheque no _____dated 31.08.2010 drawn on _____Bank
2. Rs. 3,062,500/- by cheque no _____dated 30.09.2010 drawn on _____Bank
3. Rs. 3,062,500/- by cheque no _____dated 31.10.2010 drawn on _____Bank
4. Rs. 3,062,500/- by cheque no _____dated 30.11.2010 drawn on _____Bank

Hathway has provided the required TDS Certificates to Neo on _____2010.

2. The issue of SLR has been resolved amicably between the parties for all intents and purposes and all the issues between the parties stand resolved amicably between the parties.

3. Hathway had filed Petition being Petition no. 209 (c) of 2008 in before Hon'ble Telecom Dispute Settlement Appellate Tribunal (TDSAT), New Delhi which was disposed off vide judgement dated 13.5.2009, However, Neo had filed Misc. Applications against Hathway being M.A. No. 91 of 2009 and 32 of 2010 in Petition No. 209 of 2008 which are listed on 11.8.2010. Neo has also filed a Civil Appeal bearing No. 6247 of 2009 in the Supreme Court against the judgement dated 13.5.2009 of TDSAT which is pending for disposal in Supreme Court. The parties agree, that upon execution of this MOU by the parties, all statements and claims, made by a Party against the other Party in the aforesaid legal proceedings , shall be deemed to be withdrawn and Neo agrees and undertakes to withdraw all the aforesaid legal proceedings pending in the TDSAT and the Supreme Court of India , unconditionally within one week from execution of this MOU."

Yet again, another E-mail was sent by Mr.Palan on 10.08.2010 at about 2.47 pm which contained another copy of the same MOU within the following letter:

"WITHOUT PREJUDICE

Dear Girish

Once you confirm , Arun and myself can execute the MOU as we are both in Bombay and the cheques are also in Bombay with Amit.

Warm Regards

Bhavik"

On 10.08.2010, the decree holder at about 8.20 pm sent the following E-mail:-

"Dear Bhavik

Please see my comments in track change for your review

Regards,

Girish"

The memorandum of understanding was corrected as under:

WITHOUT PREJUDICE

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding [**"MOU"**] is made on ___th day of August 2010 at _____ between:

-

Hathway Cable & Datacom Limited, a Company incorporated under the provisions of the Companies Act, 1956 and having its Registered Office at Rahejas', 04th Floor, Corner of Main Avenue & V. P. Road, Santa Cruz [West], Mumbai – 400 054, (Hereinafter referred to as " **Hathway "**, which expression unless repugnant to the context or meaning thereof shall mean and include its successors in title and assigns) of the FIRST PART;

And

Neo Sports Broadcasting Pvt. Ltd, a Company incorporated under the provisions of the Companies Act, 1956 and having its Office at _____-, (hereinafter referred to as **"Neo"** which expression shall unless it be repugnant to the context or meaning thereof be deemed to mean and include its successors and permitted assigns) of the SECOND PART;

WHEREAS there are certain disputes and differences between the parties *inter–se* with regard to outstanding payments and providing of SLR which are pending in the TDSAT and the Supreme Court of India, which have since been resolved amicably by and between the parties and that the parties are desirous of recording the terms of their settlement and understanding.

AND WHEREAS, both the parties have resolved their disputes and differences amicably and out of court and a settlement has been arrived at on the following terms: -

NOW THEREFORE THIS MEMORANDUM OF UNDERSTANDING WITNESSETH as follows: -

1. Hathway agrees to pay to Neo Rs. 1,25,00,000/- (Rupees One Crore Twenty Five Lacs only) inclusive of applicable taxes in four equal monthly installments as full and final settlement towards subscription charges for the period April 2009 to August 2009. Hathway has upon execution of this MOU handed over to Neo the following post dated cheques and the payment schedule is as follows:

The comments made thereupon were as under:

"1. Rs. 61, 25,3,062,500/- inclusive of applicable taxes by cheque no _____dated 31.08.2010 drawn on _____Bank

2. Rs. 3,062,500/- inclusive of applicable taxes by cheque no _____dated 30.09.2010 drawn on _____Bank

~~3.~~

Hathway has provided the required TDS Certificates to Neo.

.3 All issues with Hathway and NEO Sports which are in dispute between the parties in legal proceedings pending before the Hon'ble TDSAT and The Hon'ble Supreme Court of India including the issue of SLR has been resolved amicably between the parties for all intents and purposes.

4. Hathway had filed Petition being Petition no. 209 (c) of 2008 in before Hon'ble Telecom Dispute Settlement Appellate Tribunal (TDSAT), New Delhi which was disposed off vide judgement dated 13.5.2009, However, Neo had filed Misc. Applications against Hathway being M.A. No. 91 of 2009 and 32 of 2010 in Petition No. 209 of 2008 which are listed on 11.8.2010. Neo has also filed a Civil Appeal bearing No. 6247 of 2009 in the Supreme Court against the judgement dated 13.5.2009 of TDSAT which is pending for disposal in Supreme Court. The parties agree, that upon execution of this MOU by the parties, all statements and claims, made by a Party against the other Party in the aforesaid legal proceedings , shall be deemed to be withdrawn and Neo agrees and undertakes to withdraw all the aforesaid legal proceedings pending in the TDSAT and the Supreme Court of India , unconditionally within one week from execution of this MOU.

5 It is further agreed that in case the above said payment is not made as per this MoU or the Post dated cheques as issued are dis honoured for want of insufficient funds, the above understanding shall stand null and void

IN WITNESS WHEREOF the parties hereto have set their respective hands on the Original and one duplicate copy of this **MEMORANDUM OF UNDERSTANDING** hereof the day and year first hereinabove written."

On 11.08.2010, Mr.Girish Gupta of Neo Sports sent the following E-mail at 4:11 pm:-

"Without prejudice

Dear Bhavik

A clause of payment of July and August 2010 was deleted by you which I have incorporated again. Since this was agreed by Mr. Alok also to be incorporated in the MoU

Please look into the same

Thanks

Girish"

Yet again on 11.08.2010 at 6.27 pm another Email was sent which reads as under:-

"Without prejudice

Dear Bhavik

It was also agreed that the existing outstanding of the recent agreement would also be paid at the time of execution of the MoU, since the cheques are ready at your office

The above clause is also to be incorporated in the MoU, as per our telecom

Regards,

Girish"

Reply thereto by the Judgement Debtor was sent on 12.08.2010 at 3.31 pm which reads as under:

"WITHOUT PREJUDICE

Dear Girish

I refer to previous correspondence in the matter and in particular to my mail of date sent to you a while back.

Firstly, the MOU was finalized and concluded with your mail dated 10th August 2010 which you sent to me at 8:20 pm .

Secondly, I have spoken to Alok and he informs me that at no point in time has he ever agreed that the clause you are referring to is to be incorporated in the MOU.

In fact , and without prejudice to the aforesaid , the clause that you are referring to has no relevance to the MOU, which records the terms of settlement between the parties in respect of the legal proceedings pending before the TDSAT. In view thereof you correctly accepted the deletion that was made by me. If you recollect,, the deletion was unconditionally accepted by you in your draft attached to your mail dated 10th August 2010 @ 8.20 pm.

I trust this clarifies the matter.

Warm Regards

Bhavik"

The Judgment Debtor had sent, it appears, an Email at 3.32 pm at 12.08.2010 which reads as under:

"WITHOUT PREJUDICE

Dear Girish

I refer to the previous correspondence in the matter and in particular to the two mails of date that I have sent you a while back.

Your repeated attempts to include clauses which are both irrelevant and not agreed to be incorporated in the MOU which has already been finalized and concluded and which is awaiting execution , appear to be tactics which are dilatory in nature.

As per my earlier mail , please indicate a convenient date (well before 19th August 2010) on which we can execute the MOU.

Warm Regards

Bhavik"

It again sent an E-mail at 4.06 pm on 12.08.2010, attaching the MOU, the relevant portion of which states:

"1. Hathway agrees to pay to Neo Rs. 1,25,00,000/- (Rupees One Crore Twenty Five Lacs only) plus all the applicable taxes in two equal monthly installments as full and final settlement towards subscription charges for the period April 2009 to August 2009. Hathway has upon execution of this MOU handed over to Neo the following post dated cheques at the time of execution of this MoU and the payment schedule is as follows:

1. Rs. 61,25,000/- plus applicable taxes by cheque no _____dated 31.08.2010 drawn on _____Bank
2. Rs. 61,25,000/- plus applicable taxes by cheque no _____dated 30.09.2010 drawn on _____Bank
3. The above payment shall be made subject to TDS.

Hathway has provided the required TDS Certificates to Neo on _____2010.

4. In addition it is agreed that Hathway shall clear its dues till date and make the payment of subscription fee for the months July and August 2010 (as per the existing agreement) by two post date cheques no _____dated 30.09.2010 drawn on _____Bank on the date of execution of this MoU

5. ……..

6. The parties agree, that upon execution of this MOU by the parties, all statements and claims, made by a Party against the other Party in the aforesaid legal proceedings , shall be deemed to be withdrawn and Neo agrees and undertakes to withdraw all the aforesaid legal proceedings pending in the TDSAT and the Supreme Court of India , unconditionally within one week from execution of this MOU.

7. It is further agreed that in case the above said payment is not made as per this MoU or the Post dated cheques as issued are dis honoured, the above understanding shall stand null and void and Hathway shall be obligated to pay the full amount of subscription fee in stead of discounted amount as mentioned in clause 1 above."

We have noticed heretobefore the proceeding dated 11.08.2010.

It appears that a wrong representation was made before us that an agreement had already been entered into. Some new initiative on the part of the Judgment Debtor had started after the appearance of its Managing Director before us was directed.

The blame game thereafter started on each other. We may notice, in this behalf, that two of the other E-mails sent at 6.51 pm on 12.08.2010 and reply thereto at 11.08 pm on 12.08.2010 as also a counter reply on 11.25 am on 13.08.2010.

The final E-mail was at 11.38 am from the decree holder to the judgement debtor which reads as under:

> "Gentlemen can we please stop this exchange of mails. We are not going anywhere except making things un pleasent.
> Please hold till I return to mumbai tonight. Will discuss it tomorrow to close the issue. Let's be open minded to resolve this issue.
> Regards
> Arun"

The Judgement Debtor, in our opinion, has not only failed to comply with this Tribunal's order dated 13.05.2009; the details of the LCOs were not supplied; in our opinion, even no SLR as such had been communicated.

SLR is defined in Clause 2(p) of the Telecommunication (Broadcasting & Cable Services) Interconnection Regulations 2004, as amended in the year 2006 to mean:-

> "(p) **"subscriber base"** means the number of subscribers -
>
> (i) 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, or
>
> (ii) as reflected by the Subscriber Management System, where addressable systems are employed.

(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."

Clause 9.2 and 10.2 of the said Regulations read thus:

"**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.

10.2 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."

Thus a SLR, whether for the purpose meeting the exigencies of the situation of the present nature as was envisioned by this Tribunal while passing the Judgement and Order dated 13.05.2009 and/or for the purpose of renewal of the agreement, in our opinion, would not stricto sensu mean only the list of LCOs.

We, however, may not be held to have laid down the law to that effect finally being not necessary. They may not satisfy the requirements in all situations even for the purpose of second proviso appended to Clause 10.2 of the Regulations.

Be that as it may, we are of the opinion that as on the basis of the SLRs furnished, the Decree Holder was to raise the invoices, the same would mean a subscriber base which could be deciphered from the SLRs which are thus required to be the monthly SLRs and not for the purpose of Clause 9.2 or 10.2 alone.

Keeping in view the fact that the parties had entered into a subsequent agreement also and there may or may not be breaches of the said contract on either of the parties in relation thereto, in an execution application this Tribunal is not concerned therewith.

For the purpose of passing an effective order as to whether decree passed by this Tribunal stood satisfied or not, it is not necessary for us to arrive at a final conclusion as to whether the same has been complied with.

The exchange of E-mails between the parties, however, leave no manner or doubt and in fact as has been accepted by the counsel for the parties, the dispute now revolves round the question as to whether the applicable taxes were to be inclusive of the amount agreed to, namely; Rs.1.25 crores.

It may be true that even for the purposes of the arriving at a conclusion as to whether a contract has been entered into by and between the parties or not, the exchange of letters between them, their subsequent conduct would play some role.

The decisions of the Supreme Court of India as also other decisions which had been relied upon by Mr.Nasir Hussain also point out to the said fact. We may notice the same.

In ***Bhagwandas Goverdhandas Kedia v. Girdharilal Parshottamdas & Co.*** reported in (1966) 1 SCR 656, it has been held as follows:

> *"Authorities in India also exhibit a fairly uniform trend that in case of negotiations by post the contract is complete when acceptance of the offer is put into a course of transmission to the offeror: see Baroda Oil Cakes Traders' case1 and cases cited therein. A similar rule has been adopted when the offer and acceptance are by telegrams. The exception to the general rule requiring intimation of acceptance may be summarised as follows. When by agreement, course of conduct, or usage of trade, acceptance by post or telegram is authorised, the bargain is struck and the contract is complete when the acceptance is put into a course of transmission by the offeree by posting a letter or dispatching a telegram."*

It may be true that even for the purpose of arriving at a conclusion as to whether a contract had been entered into by and between the parties or not, the exchange of letters between them, their subsequent conduct would play a great role.

The English Common Law position more or less remains settled that evidence with respect to the conduct of the parties is generally inadmissible after a contract is made for interpreting the same. A few exceptions have been carved to this attitude of inadmissibility as for the purpose of determining the full terms of the contract, in the event of an allegation of estoppel by convention, when the contract is partly oral etc.

(See Carmichael v National Power Plc [1999] 1 WLR 2042
Ali v Lane, 2007 EWCA Civ 1532, CA.
Kellogg Brown & Root Inc. v. Concordia Maritime AG [2006] EWHC 3358
Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd. [1982] Q.B. 84)

Kim Lewison, Q.C in his celebrated work "Interpretation of Contracts" has stated, with respect to interpretation of contracts by referring to the subsequent conduct of the parties, acknowledging the reluctance of the English Courts to generally refrain from looking at the subsequent conduct of the parties to interpret a written agreement as thus:

> *"The current English approach is not shared internationally. The Unidroit Principles for International Commercial Contracts state that in interpreting a contract, regard shall be had to all the circumstances including "any conduct of the parties subsequent to the conclusion of the contract". Likewise Principles of European Contract Law state that in interpreting a contract, regard must be had to "the conduct of the parties, even subsequent to the conclusion of the contract".*
>
> *[.....]*
>
> *Even in some other common law jurisdictions, evidence of subsequent conduct is admissible"*

The learned author, refers to decisions of courts in New Zealand, Canada, United States and Australia wherein subsequent conduct has been recognized for consideration while interpreting a document. He further refers to Article 8(3) of the United Nations Convention on Contracts for the International Sale of Goods (1980) which says as follows:

> *"(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."*

In a recent decision, Justice Thomas of the Supreme Court of New Zealand in *Vector Gas Limited v Bay of Plenty Energy Limited* [2010] NZSC 5 has put the position of law as follows:

> "*Conduct which is not and has not been 'shared' or 'mutual' may nevertheless point to a meaning contrary to the meaning later asserted by one of the parties. That party has acted inconsistently with the meaning it seeks to persuade the court to place upon the contract. The value of the evidence stems from the inconsistency... It would be unfortunate if the principle that evidence of subsequent conduct is admissible as an aid to interpretation becomes hedged with qualifications which undermine the objective of the principle.*"

This leads us to the only question as to whether the E-mail sent by the Judgment Debtor had been accepted by the Decree Holder. Mr.Nasir Hussain contended that the memorandum of settlement sent with the E-mail dated 11.08.2010 which had been sent back to it by the Decree Holder along with its E-mail dated 10.08.2010 at 8.20 pm did not contain any changes.

The learned counsel, in our opinion, is not correct. Firstly, because the Email dated 02.08.2010 sent by decree holder at 8.20 pm was clearly for the purpose of drawing the sender's attention to its comments. The comments were on the formatting page A-I and A-II.

It is Judgment Debtor therefore was to reply thereto to the said comments. It is, therefore, incorrect to contend that the Decree Holder had accepted that the payment of Rs.1.25 lakhs was inclusive of taxes. It was to be exclusive of taxes. Once it is found to be their proposal, it was for the Judgement Debtor to accept the same. In our opinion, the agreement, if any, must be construed to have been arrived for a consideration of Rs.1.25 lakhs exclusive of taxes.

We, for the aforementioned purpose, do not intend to say that the new clauses which were sought to be inserted and which was not the subject matter of the legal proceedings should be kept out of the purview.

For the aforementioned purpose, in our opinion the central point of our discussion have been kept confined only to the old MOU and not the new MOU which was sent by the Decree Holder along with its E-mail dated 12.05.2010 at 4.06 pm.

For the reasons aforementioned as also in the interest of justice, we direct the Judgment Debtor to pay the aforementioned amount of Rs.1.25 lakhs apart from the taxes applicable thereon, by two cheques, one of them for a sum of Rs.61,25,000/- plus the taxes applicable thereupon within a week and another within one month thereafter. Any default in payment thereof shall be treated to be a violation of an order of this Tribunal and shall be dealt with appropriately.

It will also be open to the decree holder to proceed against the Judgment Debtor as if this order is not complied with. There cannot be any doubt or dispute that in the event, the Judgement Debtor satisfies this order of ours, the Decree Holder shall withdraw this proceeding before the Supreme Court of India a also from this Tribunal within one week from the date of encashment of the cheques.

At the cost of repetition, we may mention that this order of ours is confined only to the satisfaction of our order dated 13.05.2009 and no further. The rights and obligations of the parties arising under different contracts may have to be enforced separately and they would be at liberty to do so.

This Execution Application is disposed of with the aforementioned directions.

Judgement Debtor shall bear and pay the cost of this execution application. Advocate's fee assessed at Rs.1 lakh.

…….....J
(S.B. Sinha)
Chairperson

…….....
(G. D. Gaiha)
Member