TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 29TH JULY, 2010

Petition No. 79(C) of 2010

Viraj Cable Network …Petitioner

Vs.

Wire and Wireless (I) Ltd. …Respondent

Along with

Petition No. 78(C) of 2010

Om Sai Vision …Petitioner

Vs.

Wire and Wireless (I) Ltd. …Respondent

Petition No. 84(C) of 2010

M/s Patil Cable Network …Petitioner

Vs.

M/s Wire & Wireless (India) Ltd. …Respondent

AND

Petition No. 85(C) of 2010

M/s Margao City Cable …Petitioner

Vs.

M/s Wire & Wireless (India) Ltd. …Respondent

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. Kaushik Mishra, Advocate

For Respondent : Mr. Maninder Singh, Senior Advocate with
Mr. Paras Anand, Advocate
Mr. Ravi Bhardwaj, Advocate
Mr. Arjun Natrajan, Advocate for
Mrs.Prathiba M. Singh, Advocate

O R D E R

These petitions involving a common question of law and fact were taken for hearing together and are being disposed of by this common judgment.

The petitioners herein are Local Cable Operators within the meaning of the provisions of the Cable T.V. Broadcasting & Networks Act, 1995 (1995 Act).

One Dish TV India Ltd. was to supply its HITS digital signals to the respondent herein, which is a Multi System Operator and entered into an agreement with it.

The petitioners, being Local Cable Operators, entered into agreements with the respondent herein in terms whereof it was to supply signals of channels of various broadcasters including MSM Discovery Pvt. Ltd. for retransmission to the viewers of T.V.

The respondent and the aforementioned Dish TV India Ltd. filed a petition before this Tribunal wherein the following prayers were made :-

"Directing the Respondents to provide activated decoders/viewing cards forthwith – for the petitioner receiving the signals of its Channels to the petitioners on non discriminatory terms for distribution through HITS platform in both CAS and Non

CAS areas i.e. areas in which the petitioners would distribute the signals of the Respondents channels in addressable form through its HITS platform at the rates of Rs.5 per day channel per subscriber per month (retail price to consumers) on ala-carte basis in accordance with revenue share mechanism stipulated by TRAI vide tariff order dt. 31.8.2006 or at such rates and terms as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case."

The respondent, thereafter, as noticed heretobefore, entered into an agreement with the petitioners on or about 4.8.2009. Some of the terms of the said agreement are as under :-

"*5.1 The Affiliate shall deposit with WWIL, a sum of Rs.2,47,000/- (Rupees two lac forty seven thousand only) interest free and refundable security deposit. At the time of expiration or termination of this Agreement, Affiliate shall be entitled to refund amount of security deposit, subject to the adjustment of arrears of bills, interest on arrears of bill, connection and re-connection charges, value of damages and other amounts payable by the Affiliate to WWIL by virtue of the covenants of this Agreement.*

5.2 In addition to above, the Affiliate shall also be liable to pay such additional amount of security deposit as may be determined by WWIL from time to time based on the Hardware procured by the Affiliate from WWIL for installation.

9.1 Without prejudice to such rights and remedies that WWIL may have in law or under the provisions of this agreement, in the event of any delay or failure by the Affiliate, to make payments of such sum as are due from him and which he is obliged under the provisions of this Agreement to remit/pay to WWIL including but not limited to amount collected from subscribers in respect of bills raised to them, security deposits, in such mode as may be notified by WWIL from time to time, or to deposit the amount payable in respect of such Bills in bank accounts, notified by WWIL from time to time, WWIL shall have right, in addition to the rights mentioned in Articles 11 and 12 of this Agreement.

10.1 The term of this agreement shall come into force w.e.f. the commercially operationalisation of HITS Services and shall be for a period of three (3) years and shall, notwithstanding anything mentioned in this agreement, automatically expire on the occurrence of the events mentioned in ARTICLE 11 including but not limited to the expiration of the agreement due to efflux of time, without any further notice, declaration or action by either of the parties and without need of administrative or judicial notice or resolution. Any continued arrangement between the parties after the expiration or

termination of this agreement shall not be deemed to be renewal of this agreement but merely an extension of this agreement."

Clause 11 contains various provisions as to what would constitute the breach of the terms of the contract.

Clause 12 provide for rights and obligations of the parties.

The said agreement contained a 'Force Majeure' clause, which reads as under :-

> *"Neither Party shall be responsible to the other, for any failure of performance hereunder which is due to the acts of God such as any act of war, destructive act of public enemy, vandalism, riots, civil commotion, sabotage, explosions, state or nation wide strikes or industry-wide strikes, acts of third parties (other than a Party's employees), acts and regulations of Government(s) and/or local bodies."*

The petitioners, however, received a notice purported to be dated 11.3.2010 wherein it was stated :

> *"In pursuance of the Agreement dated 10th March 2009, executed between our company and you, our company has been supplying the HITS signals comprising of various channels to you after receiving the same from Dish TV India Limited – the licensed HITS Operator.*
>
> *We would like to bring to your kind notice that :*
>
> 1. *Dish TV India Limited – the provider of HITS digital signals has informed us that it is discontinuing the HITS operations with effect from March 31, 2009 on account of occurrence of Force Majeure events due to certain regulatory constraints.*

2. In view of Dish TV India Limited discontinuing its HITS operations with effect from March 31, 2010, we are forced to discontinue the HITS digital signals being provided to you with effect from March 31, 2010 since the HITS signals will not be available to us from the HITS service provider.

3. You are requested to take note of the above and immediately clear all the outstanding dues.

Our company is also taking necessary steps to inform the consumers by way of public notices."

A copy of the said notice was sent with an E. Mail dated 31.3.2010 stating :

"Enclosed please find a copy of the Letter we have already sent to you by Registered Post on Saturday, 20 March 2010 from our Head Office.

This is for your records please."

According to the petitioners, the said notices were received on or about 25.3.2010. However, it is accepted that the said E. Mail was received on 23.3.2010. These petitions have been filed on 5.4.2010.

It also stands admitted that supply of signals of the channels of the broadcasters have been discontinued on and from 31.3.2010.

Mr. Kaushik Mishra, learned counsel appearing on behalf of the petitioner would contend :-

(i) The respondent could not have taken recourse to the 'Force Majeure' clause in so far as it had not made any serious effort to take up the matter with Dish TV India Ltd. so far as for implementations of the agreement by and between the parties are

concerned.

(ii) The Dish TV India Ltd. being eligible to continue to transmit the signals in the Sky HITS technology, the Force Majeure clause could not have been resorted to, having regard to the provisions contained in the guidelines issued by the Ministry of Information & Broadcasting on 26.11.2009.

(iii) The respondent should have intimated the Dish TV India Ltd. that it had commercial obligations in relation thereto.

(iv) The petitioners having paid huge amount by way of security and/or price of the set top boxes, it was obligatory on the part of the respondent to take recourse to such action against the Dish T.V. as was permissible in law.

(v) The impugned notice cannot be given effect to keeping in view of the fact that the petitioners have all along been paying the subscription fee.

(vi) The action on the part of respondent does not attract the doctrine of 'frustration' as has been contended by the respondent.

Mr. Maninder Singh, the learned Senior Counsel appearing on behalf of the respondent, on the other hand, would urge that the petitioners having the knowledge in regard to the difficulties of the Dish TV to transmit signals on HITS platform now should not be heard to say that it was possible for it to continue to transmit signals on its platform.

(ii) The petition is not maintainable as the Dish TV India Ltd. has not been impleaded as a party in this proceeding.

(iii) The impugned notices being not required within the meaning of clause 4.2 of the Regulations and as such it was not necessary to serve 21 days notice.

(iv) The respondent having no license to transmit signals on HITS platform and it, being dependent on another entity namely Dish TV therefor, the contract by and between the parties hereto must be held to have become impossible to be

performed.

The factual matrix involved in this petition is not in dispute.

It is also not in dispute that the Ministry of Information & Broadcasting had issued guidelines, the relevant clause whereof reads as under :

> *"1.6 Broadcasting Company(ies) and/or DTH licensee company(ies) will not be allowed to collectively hold or own more than 20% of the total paid up equity in the company at any time during the permission period. Simultaneously, the HITS permission holder should not hold or own more than 20% equity share in a broadcasting company and/or DTH licensee company. Further, any entity or person holding more than 20% equity in a HITS permission holder company shall not hold more than 20% equity in any other Broadcasting Company(ies) and/or DTH licensee and vice-versa. This restriction, however, will not apply to financial institutional investors. However, there would not be any restriction on equity holdings between a HITS permission holder company and a MSO/cable operator company."*

Transmission of signals on HITS platform is regulated. On or about 26.11.2009, the aforesaid guidelines were issued by the Government of India. According to the respondent, Dish TV despite serious efforts made in that behalf failed to satisfy the requirements of the said provision, as a result whereof it had no option but to close transmission of signal for Dish platform.

It is furthermore not in dispute that on or from 31.3.2010, the Dish TV discontinued its operation and supply of its digital signals and in that view of the matter, the respondent could not have continued to transmit its digital signals to its affiliates. In other words, no HITS signals were available for transmission to the respondents from this service provider i.e. Dish TV.

The contract between the parties, therefore, became impossible to be performed. Section 56 of the Indian Contract Act, 1872 reads as under :

> *"56. Agreement to do impossible act. An agreement to do an act impossible in itself is void. Contract to do act afterwards becoming impossible or unlawful . – A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the Promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.*
>
> *Compensation for loss through non-performance of act known to be impossible or unlawful.-Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."*

The petitioners were taking supply of signals from HITS digital platform. They were all along aware that the said signals were provided by M/s. Dish TV India Ltd. They were also aware of the efforts made by the respondent and Dish TV India Ltd. The petitioners have themselves filed a copy of the petition filed before this Tribunal. For the reasons best known to the petitioners, they have not impleaded M/s. Dish TV India Ltd. as a party to this proceeding. There cannot be any doubt or dispute that supply of signals from the HITS digital platform was being carried out by M/s. Dish TV. The respondent was dependent on it. As It does not receive any signals, the question of retransmitting the same to the petitioners would not arise. There cannot, thus, be any doubt or dispute that in a case of this nature, Section 56 of the Indian Contract Act would be attracted.

It is now well settled that the principle of 'frustration of contract' is applicable to a great variety of contracts. No hard and fast rule as to in which circumstances, the said doctrine shall be applied by party seeking excuse for performing its part of contract, cannot be

laid down.

There had been a change of circumstances in this case, as a result whereof it became impossible for the respondent to perform its part of contract.

It is not the case of the petitioner that such change of circumstances have been brought about by the fault of the respondent. It is also not a case where the performance of the contract had become onerous.

In Rozan Mian Vs. Tahera Begum and Ors. (C.A. No. 814 of 2005, disposed of on 14.08.2007) reported in AIR 2007 SC 2883 the Supreme Court of India held :

> *"an agreement to do an act impossible in itself is void. A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."*

The Orissa High Court in Indian Rare Earths Ltd. Vs. Managing director, Southern electricity Supply Company of Orissa Ltd. and anr. Reported in (109) 2010 CLT 680 opined :

> *"Here in this case, it is seen that by the act of the God, it became impossible for the supply company to supply the power to the consumer. The supervening circumstances in which neither of the parties had any control made the contract for the same impossible of being performed & as such during the said period, it can be said that the contract was hit by the "doctrine of frustration". In such a situation the supply company has no obligation to supply power & if any claim would have been made by the consumer for non-supply of energy, it goes without saying that the company could have escaped from the liability thereof taking the resort to the aforesaid doctrine of frustration.*

When the company could have escaped from the liability by availing of the doctrine of frustration, in such premises, it is fallacious to say that it could have pressed the consumer to pay the tariff charge even though, it has not supplied the power to the Petitioner."

We may notice that the term "Impossible" has not been used in Section 56 of the Indian Contract Act in the sense of physical impossibility. The impossibility to perform the terms of the contract may be because of subsequent events.

In Continental Enterprises Ltd. Vs. State Trading Corporation of India Ltd. in CS (OS) 788A/1996 decided on 16.12.2009, a learned Judge of the Delhi High Court held :

"22. The Supreme Court in Smt. Sushila Devi and Anr. V. Hari Singh and Ors. Reported in MANU/SC/0025/1971:AIR 1971 SC 1756 has held as under :

11. …Section 56 of the Indian Contract Act. The view that Section 56 applies only to cases of physical impossibility and that where this section is not applicable recourse can be had to the principles of English law on the subject of frustration is not correct. Section 56 of the Indian Contract Act lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. The impossibility contemplated by Section 56 of the Contract Act is not confined to something which is not humanly possible. If the performance of a contract becomes impracticable or useless having regard to the object and purpose the parties had in view then it must be held that the performance of the contract has become impossible. But the supervening events should take away the basis of the contract and it should be of such a character that it strikes at the root of the contract.

12. …That object became impossible because of the supervening events. Further the terms of the agreement between the parties relating to taking possession of the properties also became impossible of performance. Therefore we agree with the trial court as well as the appellate court that the contract had become impossible of performance."

Mr. Mishra has placed reliance on a well known decision of the House of Lords in New Zealand Shipping Company Ltd. Vs. Societe Des Ateliers ET Chantiers De France in 1919 Vol. I A.C. Page 1 wherein the law has been laid down in the following lines :

> *"It is undoubtedly competent for the two parties to a contract to stipulate by a clause in it that the contract shall be void upon the happening of an event over which neither of the parties shall have any control, cannot bring about, prevent or retard. For instance, they may stipulate that if rain should fall on the thirtieth day after the date of the contract, the contract should be void. Then if rain did fall on that day the contract would be put an end to by this event, whether the parties so desire or not. Of course, they might during the currency of the contract rescind it and enter into a new one, or on its avoidance immediately enter into a new contract. But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his wrong, in the one case directly, and in the other case indirectly in a roundabout way, but in either way putting an end to the contract."*

In Cheall Vs. Association of Professional Executive Clerical and Computer Staff 1983 Vol. 2 All E.R. Page 855 it was stated :

> *"My Lords, the New Zealand Shipping case (1919) A.C. 1, from which, it is contended, the supposed rule of law can be extracted, was an appeal upon a case stated by an umpire in an arbitration of a phrase in a shipbuilding contract. "thereupon this contract shall become void." Where the events to the occurrence of which "thereupon" referred were of different kinds; some of them could only be brought about by some breach of the contract by the shipbuilder, others could happen without any breach of contract by either party. The umpire had found as a fact that the event relied upon by the shipbuilders as bringing the clause into operation so as to render the contract void happened without any breach of the shipbuilding contract by either party, and the actual decision of this House was that the shipbuilder was entitled to treat the contract as void. In the course of the speeches, which are not entirely consistent with one another, reference was made by all their Lordships to the well known rule of construction that, except in the unlikely case that the contract contains clear express provisions to the contrary, it is to be presumed*

that it was not the intention of the parties that either party should be entitled to rely upon his own breaches of his primary obligations as bringing the contract to an end, i.e. as terminating any further primary obligations on his part then remaining unperformed. This rule of construction, which is paralleled by the rule of law that a contracting party cannot rely upon one event brought about by his own breach of contract as having terminated a contract by frustration, is often expressed in broad language as : "A man cannot be permitted to take advantage of his own wrong. But this may be misleading if it is adopted without defining the breach of duty to which the prejorative word "wrong" is intended to refer and the person to whom the duty is owed."

We may notice that in Anson's Law of Contract 28th Edition, pages 527-528 it is stated :

"Automatic termination

Where the event is one over which the parties have no control and cannot bring about themselves, then effect will generally be given to a provision that the contract is ipso facto to cease to bind. But if the relevant event is a breach of contract the courts are likely to interpret the contract as nevertheless requiring an election by the innocent party before holding that the contract is terminated. This is an application of the principle that a party may not rely on its own breach to bring the contract to an end i.e. a party may not take advantage of his or her own wrong. The better view is that this is not an independent rule of law, but a principle of construction reflecting the presumed intention of the parties, and which may be rebutted by the express terms of the contract. Moreover, even if the event triggering the automatic termination provision is not a breach of contract, a party will not be able to take advantage of that provision if their wrongful action gave rise to the event upon which the automatic termination provision is based."

In Chitty on Contracts Page 1309 it is stated :

"Determination of contract. The parties may expressly provide that the contract shall ipso facto determine upon the happening of a certain event. But such a provision is to be construed subject to the principle that no man can take advantage of his own wrong, so that one party may not be allowed to rely on such a provision where the occurrence of the event is attributable to his own act or default."

It was also stated at page 1345 that :

> *"Self-induced frustration. The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it. Thus, a contracting party cannot rely on "self-induced frustration, that is, on frustration due to his own conduct or to the conduct of those for whom he is responsible. Although the concept of self-induced frustration is clearly established as a matter of general principle, the precise limits of the doctrine have not been clearly established. It is merely a "label" which has been used to describe "those situations where one party has been held by the Courts not to be entitled to treat himself as discharged from his contractual obligations. Thus frustration has been held to be "self-induced" where the alleged frustrating event was caused by a breach or anticipatory breach of contract by the party claiming that the contract has been frustrated broke the chain of causation between the alleged frustrating event and the event which made performance of the contract impossible and where the alleged frustrating event was not a supervening event or "something altogether outside the control of the parties." A party who has been at fault or whose act was deliberate will generally be unable to invoke frustration because of the difficulty which such a party will inevitably face in showing the existence of a supervening event which is outside his control."*

Mr. Mishra has also relied upon a decision of a learned Single Judge of Andhra Pradesh High Court in Samina Venkata Sureswara Sarma Vs. Meesala Kota Muvullayya in AIR 1996 AP – Pg. 440 wherein the contract was to be performed upon vacation of the tenanted premises. A finding of fact was arrived at that the Defendant No.2 had not made all efforts to do his best to get the tenant's premises vacated. It was on that premise held that the contract had not frustrated.

In that case, however, parties to the contract were dependent on the supply of signals on HITS Dish digital platform by another entity. The respondent had no control in respect of its affairs. It was a third party to the contract. Dish TV had tried their best to follow the

guidelines issued by the Ministry of Information & Broadcasting which come in their way to continue the supply of signals from the said platform and, thus, it cannot be said that the contract did not become frustrated because of self imposed act on the part of the respondent. We are, therefore, of the opinion that the contract by and between the parties herein cannot be directed to be enforced. In this case the respondent has not committed any breach of contract. Performance of contract on his part depended upon the positive acts of a third party. For its incapability to run the organization because of its inability to comply with the guidelines issued by the Ministry of Information and Technology, the respondent is neither responsible nor had it anything to do therewith.

Even if the respondent informed the said Dish TV let it had its own contractual obligations, by reason thereof only, Dish TV could not have changed its share pattern.

It must have its own reasons for finding itself unable to comply with the said requirement.

Section 14 (1) (a) of the Specific Relief Act, 1963 reads as under :

"14. Contracts not specifically enforceable.-(1) The following contracts cannot be specifically enforced, namely:--

(a) a contract for the non-performance of which compensation in money is an adequate relief;"

The petitioners did not state that they have suffered any damages. They have, in fact, not made any prayer to that effect.

A court of law, it is well settled, would not enforce a contract which cannot be directed to be performed.

The remedy of the petitioner, therefore, was to initiate an action for damages.

We, however, must place on record the statement of Mr. Maninder Singh, learned Senior Counsel appearing on behalf of the respondent that upon determination of the contract, the parties were bound to reconcile their accounts.

The petitioners have also stated that they are ready and willing to return all the set top boxes. We are sure that the process of reconciliation of accounts and return of set top boxes would start immediately and preferably within a week from the date.

We have no doubt in our mind that the respondents herein shall refund the amount of security and/or payments made by them for set top boxes upon taking into consideration all aspects of the matter subject, of-course, to the provisions of the contract.

For the reasons aforementioned, these petitions are disposed of with the aforementioned observations and direction.

However, there shall be no order as to costs.

…….....J
(S.B. Sinha)
Chairperson

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(G. D. Gaiha)
Member

…….....
(P. K. Rastogi)
Member

rkc