TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

DATED 9TH JULY, 2010

Petition No.248 (C) of 2009

Clear Media (India) Pvt. Ltd. ...Petitioner
Vs.
Union of India & Anr. ...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. Nikhil Majithia, Advocate

For Respondents : Mr. Alok Kumar, Advocate
Mr. Harish Garg, Advocate
Mr. Deepak Mittal, Advocate

ORDER

S.B. Sinha

Introduction

The petitioner is a FM broadcaster. The respondent No. 1 herein granted a license to the petitioner in order to enable it to broadcast on FM Channel. The second respondent is a public sector undertaking carrying on business inter alia of construction of transmission towers.

Background Facts

Indisputably licenses were granted to the FM broadcasters in two phases. The second phase, with which we are concerned in this petition, began with issuance of a notice inviting tender by the first respondent herein, pursuant whereto, the petitioner submitted its tender.

The said notice inviting offer was issued in respect of six licenses. Amongst a large number of bidders, five of them became successful, the petitioner being one of them.

The successful bidders, however, were required to enter into agreements not only with the respondent No. 1 but also with the respondent No.2 and Prasar Bharati, other Public Sector Undertakings; the latter being the successor in interest of 'Doordarshan', created under The Prasar Bharati (Broadcasting Corporation of India) Act, 1990.

In terms of the relevant conditions contained in the tender documents, it was mandatory for the respondent No. 2 to be a part of system integrator for creating "common transfer infrastructure for the private broadcasters". Indisputably, however, the license fee was payable on a revenue sharing basis i.e. @ 4% of the revenue earned by the broadcasters.

For the purpose of creation of a co-location facility which was to be provided on the towers and lands of All India Radio and Doordarshan in Delhi, the successful bidders were permitted to operationalise their channels on individual basis for a period of two years or till the co-location facility is commissioned whichever is later. On the expiry of the said period, the licensees were required to shift their operations to the new facilities.

Letter of Intent and the Agreement

A letter of intent was issued to the petitioner for operating FM Radio Broadcast services on or about 17.01.2006 by the first respondent herein whereby and whereunder it was asked to comply with the requisite conditions of eligibility for signing of a 'Grant of Permission Agreement' (GOPA) within a period of 9 months. It was also required to sign an agreement with the respondent No. 2 and make payments to it within 30 days of issue of LOI and execution of an agreement with Prasar Bharati and making requisite payments to it within a period of 60 days therefrom.

Project Management Agreement for CTI at Delhi was signed by the petitioner with the respondent No. 2 on or about 3.2.2006.

In terms of the said agreement, the petitioner was required to make an advance payment of Rs. 1 crore 8 lakhs being its 100% share so far as the estimated cost of construction of CTI by the respondent No. 2 was concerned.

The petitioner and the 2nd Respondent entered into an agreement on or about 3.2.2006.

The respondent No. 2 in terms of the said agreement was to set up the tower within a period of 12 months from the date of signing of the agreement as also payment of the estimated capital costs by LoI holders joining the CTI; the 11 months' period from the date of SACFA clearance of all advice holders was given on 12.4.2006 or two months from the date of construction of tower; whichever is later.

The respondent No. 2 also charged Project Management Fee at 10% of the actual cost of CTI. Provision for payment of liquidated damages was also provided for therein @ 0.25% of the petitioner's share of costs of CTI per week subject to a maximum limit of 5%.

Some Provisions of the Agreement

We may for the sake of completion of narration of facts notice the following clauses:-

"2.10.1 Upon deposit by the Successful Bidders of the balance 50% of their respective Financial Bids within a period of seven days from the date of announcement of successful bidders by the Government of India and

on fulfillment of other eligibility conditions within the prescribed period, the Successful Bidders will be issued a Letter of Intent ("**LOI**") in the format, to be prescribed separately, along with return of the PBG-I.

2.10.5 Upon issue of the Letter of Intent, the Successful Bidder shall be liable to comply with all necessary eligibility conditions as specified by the Government of India in writing and shall be liable to execute the Grant of Permission Agreement within a period of nine months from the date of issue of the Letter of Intent and comply with such other written instructions as received from the Government of India. The grant of permission agreement shall be in the format, which will be prescribed separately.

3.11.1 It has been made mandatory for all Phase II operators to co-locate transmission facilities in all the 91 cities, on terms and conditions to be prescribed separately. In 84 cities, the facilities would be co-located on existing AIR/DD towers, while in remaining 7 cities, new towers shall be got constructed by the Ministry, through Broadcast Engineering Consultants India Limited (BECIL) for the purpose. The details of cities where AIR/DD towers would be utilized for co-location as well as where new towers will be constructed are available at Schedule I hereto.

3.11.2 Pending creation of co-location facility of BECIL, in due course, the successful bidders in these 7 cities will be permitted to Operationalise their Channels on individual basis for a period of two years or till the co-location facility is commissioned, whichever is later, at the end of which they shall shift their operations to the new facilities. Permission to run its individual Channel will be granted to each successful bidder only after it has entered into an agreement with BECIL and made full payments towards its share in the common infrastructure. In the case of Mumbai, even the existing operators shall be permitted to migrate to Phase 2

only after they have entered into agreements with BECIL and made the required payments towards tgheir share in the common infrastructure for co-location."

The first schedule appended to the said Notice Inviting Tender contains a list of six towers to be set up in the town of Delhi. The Letter of Intent issued on 17.1.2006 contained a Project Management Agreement for CTI wherein it was inter alia stated :-

> "AND WHEREAS in terms of the phase II FM Radio Policy announced by the Government of India, successful bidders have to co-locate transmission facilities on existing All India Radio/Doordarshan (Prasar Bharati) towers or towers to be constructed by BECIL as the case may be and common facilities have to be integrated by BECIL."

The term 'CTI' was defined therein as :

> "Common Transmission Infrastructure" (CTI) means the common equipment and other related infrastructure of the FM radio broadcast facility more particularly set out and described in Annexure I and to be built, installed, commissioned and completed by BECIL at the site in accordance with the terms and conditions of this Agreement."

'Project Management Service' has been defined in the following terms:-

> "Project Management Services" means the project management services to be provided by BECIL in relation to the building, installation, commissioning and completition of the CTI more particularly described and set out in Annexure II."
>
> "BECIL shall make all reasonable endeavors to complete each of the activities in respect of the building, installation, commissioning and completion of the CTI to the satisfaction of the first party.

The conditions relating to payment of fees and expenses are laid down in clause 5 of the said agreement , the relevant portions whereof read as under :-

> "The cost of the project shall be payable by the first party to BECIL as follows :-
>
> i) An advance payment of a sum of Rupees One Crore, Eight Lakh only (Rs. 1,08,00,000/-) as approximately hundred percent (100%) of the first party's Share of the estimated Costs (including fee for Project Management Services) as provided in Annexure IV, immediately after signing the agreement on the same day;
>
> ii) The aforesaid payment of fees shall be subject to deduction of tax at source as per the applicable income tax laws;

iii) Final settlement of account on the basis of actual expenditure shall be carried out after the completion of project as explained in Annexure – IV."

The obligations on the part of the respondent No. 2 are stipulated in paragraph 6 of the said agreement, the relevant portions whereof read as under:-

"BECIL covenants and undertakes as follows :-

It shall provide all the Project Management Services diligently and professionally;

It shall comply with all applicable laws and regulations or orders and directives of any competent authority (including without limitation applicable labour and other laws and regulations governing its employees contractors, sub-contractors and any persons employed or engaged in connection with this Agreement) in performing and carrying out its obligations under this Agreement and shall discharge and fully indemnify the first party against all liability, claims, demands, fines, penalties and other consequences arising from its failure to comply with such laws and regulations.

BECIL shall install, test and commission the Equipment and shall ensure that the Equipment functions and performs in accordance with its published specifications and any other representations made by the manufacturers of the Equipment to the satisfaction of the first party.

Upon the completition and the successful acceptance testing (if applicable), to the satisfaction of the Group of LOI holders, BECIL shall issue a certificate of completion of the building, installation, commissioning of the Common Transmission Infrastructure.

BECIL undertakes and warrants that the services rendered by it by way of handling, installation, integration & commissioning of the Common Transmission Infrastructure are free from all defects in workmanship. This warranty is for a period of one year from the date of delivery of the Common Transmission Infrastructure to the first party. During the said period BECIL shall rectify, as soon as reasonably practicable any such defect in the workmanship of the Common Transmission Infrastructure without any charge. This clause shall survive the expiry/termination of the Agreement and the final settlement of accounts."

The matter relating to CIT and procurement procedure is laid down in clause 8. The provision relating to payment of Liquidated Damages is contained in clause 13 providing for a limited liability. It reads as under :-

"In the event BECIL is not able to complete the project as per the timeline set in this agreement because of any delay on its part, BECIL will be liable to pay liquidated damages to the first party @ 0.25% of the first party's share of the cost of the CTI per completed week of delay to a maximum of 5%."

Common Transmission Infrastructures required to be provided are laid down in Annexure-I.
Annexure III appended thereto provides for timeline; the relevant provision whereof reads as under :-

"In the case where towers are to be constructed by the Government, 12 months from the date of signing this agreement and payment of estimated capital cost by all LOI holders joining the Common

Transmission Infrastructure for a particular city or 11 months from the date of submission of SACFA clearance by all LOI holders or 2 months from the construction of tower, whichever is later.

Illustration : If for a particular city e.g. Delhi, the agreements are signed on 4.5.06, 8.5.06, 15.5.06, 26.5.06 and 2.6.06, then 12 months shall be counted from the date on which the last LOI holder signed the agreement.

Similarly, if SACFA clearances are submitted on 15.5.06, 20.5.06, 28.5.06, 7.6.06 and 17.6.06, then 11 months shall be counted from the date of submission of last clearance on 17.6.06. In this case the timeline shall be 12 months from 2.6.06, being later. However, if the last clearance is submitted on 10.7.06, then timeline shall be 11 months from 10.7.06.

In case tower construction is completed on 31.5.07 then the timeline shall be two months thereafter i.e. 31.7.07. If tower is constructed two months before expiry of 12 months from date of signing last agreement or 11 months from submission of last SACFA clearance, the timeline shall be reckoned accordingly."

The illustration noticed heretobefore clearly provides that the 12 months period was to be computed from the date of construction of the tower and if the same was completed in June, 2007; by September of the same year the facilities were required to be provided to the broadcaster.

We have noticed heretobefore that the tower during the interegnum was to be constructed on the lands provided for by Prasar Bharati wherefor the petitioner entered into an agreement on or about 7th February, 2006, the consideration wherefor is provided in clause 3 in the following terms :-

"The Lincensee shall pay annual License Fee in advance and for the first year at the time of signing of this agreement to the Licensor for the use of the licensed Infrastructure as per details given below :

S.No.	Licensed Infrastructure	RATE @	QUANTITY	LICENSE FEE PER ANNUM
A	Open Space	Rs. 6,400/- per sq. mt. per annum	220 Sq. mtr. (As per layout plan submitted by BECIL	Rs. 14.08 lakhs**
B	Covered Space #	Rs. 7,600/- per Sq. Mt. per annum	Sq. Mtr. * (As per layout plan submitted by BECIL)	Rs. 0.00 lakhs**
C	Common facilities	Rs. 1.00 lakh Per annum	LS	Rs. 1.00 lakh
D	Taxes (if applicable)			Rs. 0.00 lakhs"

Indisputably, an interim arrangement was to be entered into by and between the parties.

It envisages two types of payment of rent namely :-

a) Rent for Tower; and

b) Rent for land, amounting to Rs. 15.08 lakh per year with an incremental enhancement after two years.

According to the petitioner, it had no other option but to enter into such an agreement having regard to the fact that in the event it is not able to broadcast its programmes, it would not earn any revenue.

An agreement with Prasar Bharati was entered into on or about 13th March, 2006, in terms whereof the Petitioner was to pay a sum of Rs. 17.00 Lakh per annum for availing the infrastructure facilities provided for by it wherefor it was to pay Rs. 18.5 lakhs which was to be increased to 10% after every two years for open covered space and 2.5% every year for the tower.

The petitioner, on or about 16.03.2006, was granted a license for establishing wireless telegraph station RS par output for 50 kw (EIRT).

It also entered into a Grant of Permission Agreement with the respondent No. 1 on or about 14.06.2006; clause 3.3 whereof reads as under :-

"The first year from the date of signing this Agreement shall be reckoned as the commissioning period. The first year's fee shall become payable with effect from the date of operationalisation of the Channel or

expiry of one year from the date of signing this Agreement, whichever is earlier. Provided that in the event of default in operationalisation of channel being attributable to delay beyond reasonable period by BECIL/Prasar Bharati.

In terms of the said agreement, the effective date is stipulated as under :-

"The effective date of the Permission Period shall be reckoned from the date of operationalisation of the Channel or one year from the date hereof, whichever is earlier, unless the time limit for operationalisation has been extended by the Secretary, Ministry of Information & Broadcasting Article 3.3 hereinabove, in which case the effective date of the Permission Period shall be the last date so fixed."

Thus, the time limit for operationalisation was fixed for one year i.e. from June 2006 to June 2007.

Clause 5 of the said agreement provides for requirements to provide FM Broadcasting laying down the following mandatory provision:-

"The Permission Holder shall be liable to operationalise the channel, after installation of the Common Transmission Infrastructure through M/s Broadcast Engineers Consultants India Limited (BECIL), and other broadcast facilities including studio, transmitter, program link etc. obtaining of Wireless Operational License and commissioning of the Applicable Systems, within a period of one year from the date of execution hereof.

> The Permission Holder having permission to establish & operate a FM radio channel in a city, where new tower is to be erected through BECIL, can operationalise its channel on individual basis for a period of two years or till the co-location facility is commissioned, whichever is later, at the end of which it shall shift its operations to the new facility."

The said agreement also provided for a dispute resolution mechanism as contained in clause 16 thereof. It reads as under :-

> "Provided that if any such third party dispute arises on account of nonobservance or breach of any rules or regulations or any other terms and conditions by the Permission Holder as provided in this Permission Agreement, the Grantor shall have the right to take any action against the Permission Holder as provided herein."

It is not in controversy that in terms of the said agreement, the respondent No. 1 keeping in view the provisions of GOPA could take any action against the licensees, in the event, a violation of eligibility conditions of terms is committed as would appear from the following:-

> "Failure/omission of the Permission Holder to comply with the sanctions imposed within the prescribed time, shall result in the revocation of Permission and prohibition to broadcast for the remaining period of the Permission and disqualification to hold any fresh Permission in future for a period of five years."

Commissioning of Towers and Installation of Facilities

The petitioner received an email from the respondent No. 2 forwarding a schedule of commissioning of CTI, on a perusal whereof it appears that in Delhi the same was to take place by August – September, 2007. However, indisputably the respondent No. 2 had not been able to complete the constructions and/or commissioning of the tower by the said date.

The petitioner with a view to apprise itself as regards the status of construction issued a notice on or about 12.3.2007 and furthermore, requested for payment of interest as is said to have been agreed upon between it and the respondent No. 2.

The respondent No. 2 by letter dated 13 March, 2007 stated as under:-

"1. We expect the CTI to be ready by August-September 2007.

2. The work on new 149 mtr. Tower is in progress and it is likely to be ready by April – May 2007. We propose to hire the readymade building of AIR which will be modified for CTI.

3. a) Regulatory Permissions : The SACFA Clearance for the Tower is already available with us. No building permission is required and we have applied for the electric connection.

b) Tower Construction : Tower construction is in progress as stated above.

c) Transmitter, Combiner Utility Room Construction : We propose to take up building modification in May 2007.

d) Antenna System including Antenna, Patch panel, RF Coaxial Cable, Rigid lines, dehydrator system and accessories : We propose to place an order for these items in March – April 2007.

e) Combiner System including Air-conditioning system : The combiner will be a part of RF equipment order and air-conditioning system for combiners will be provided when the combiners are ready.

f) Electrical system including Switchgear, HT Transformers Power Backup Etc. : The order for these items is under finalization.

4. CMI requests the payment of interest : It is proposed to discuss this issue in a meeting with you."

Indisputably the transmission of signals in the meanwhile was to take place from the old building. We have noticed heretobefore that with regard to the payment of interest, the Chairman and Managing Director of the respondent No. 2 proposed to discuss the said issue in a meeting with it. According to the petitioner the meeting was held and by an E-mail dated 18th April, 2007, the petitioner was informed the following:-

"This is in reference to agreement signed for establishment of Common Transmission Infrastructure with your organization and letter issued by Chairman & Managing Director. During the financial Year 2006-2007 the sum of Rs. 4,95,000/- (Rupees Four Lakhs Ninety Five Thousand only) is provided as Interest

on the advance amount given for the establishment of Common Transmission Infrastructure. The detail of Interest along with the tax deducted is enclosed.

The interest is provided is based upon provisional figures and subject to the finalization of audit of the company. Any changes in the figure will be adjusted in the final settlement of account for each CTI center.

As per the BECIL accounting policy, revenue has been recognized on the basis of percentage of completion method as determined by the management. The income is recognized where the work is performed/completed in excess of 25% of the total value of the contract. The list of station is attached in which income is recognized. The figures are provisional subject to the finalization of audit of the company."

It may be noticed that the said letter was signed by the Deputy Manager, Finance of the respondent No.1. It is also evident from the said letter that certificate showing deduction of tax to the extent of Rs.1,11,078 from a sum of Rs. 4,98,000 was also issued. The petitioner however, did not receive any interest for the months of April to June 2007. Only on or about 10th March, 2008 the respondent No. 2 issued another letter asking the Petitioner to sign an agreement and receipt of advance payments on the following terms :-

"You may appropriate for BECIL which is a commercial and self sustaining organization without any Govt. support, it is not possible to continue the services without signing the agreement and receipt of advance

payments. If a signed copy of agreement and advance payments are not received, within two weeks i.e. latest by 21.3.2008 then BECIL will not be responsible for disconnection of power supply at any place by concerned electricity department due to non-payment of power supply consumption charges."

Some other correspondences passed between the parties, but we may notice that the petitioner by a letter dated 31.3.2008 inter alia, in response to the respondent No. 2's communications dated 19.2.2008, 10.03.2008 and 27.03.2008 in regard to the provisions of GOPA inter alia stated :-

"CMI may, therefore require a break in Transmission during the dismantling, shifting and re-installation of the equipment from the individual Facility to the CTI Facility.

To minimize the break in Transmission it is imperative that the CTI installation is completed in all respects before the shifting of Transmission Equipment commences."

Paragraph 2 of the said communication reads as under :-

"a. Expected date of receipt of regulatory permissions i.e. SACFA Clearance for the Tower, Water supply, Electrical Supply, Building Permissions etc.

b. Expected date of completion of CTI Tower Construction.

c. Expected date of completion of the room to house the Transmitter, Combiner and other allied equipment."

Respondent No. 2, however, by a letter dated 7th April, 2008 stated :-

> "However it is expected that the CTI Set up will be ready for operation by the end of 2nd week of May, 2008.
>
> Therefore to have minimum break in your transmission during shifting of your equipment from the interim set up to HPT Kingsway Camp, Delhi may be planned accordingly."

Yet again on 19.4.2008 interest was directed to be paid for which a TDS Certificate was also issued.

However, the respondent by a letter dated 24th April, 2008 made a demand for a sum of Rs. 13,97,076 towards security charges being equivalent to one year's rental as also of Rs. 15, 56,047 pertaining to the charges for sharing of Prasar Bharati infrastructure for co-location under 'Phase II' and rental for tower from the petitioner. According to the petitioner by that time the CTI was not ready.

The petitioner by its letter dated 15.5.2008 raised the following questions in relation to the commencement of rental of CIT tower.

> "a. Date of BECIL receiving handover of Space from Prasar Bharti for CTI installation.
>
> b. Details of Space occupied by each broadcaster for the CTI installation.
>
> c. Completion of the Installation of the entire Common Transmission Infrastructure ("CTI") in Delhi.
>
> d. Handover of the Delhi CTI to the broadcasters.

e. A copy of the Tower Completion and Stability Certificate from an Independent Structural engineer.

f. A copy of Municipal and other statutory clearances for the Tower.

g. A copy of the Full Siting SACFA clearance for the Tower.

h. Lease agreement to be signed between the owner of the tower and all the broadcasters using the Tower."

According to the petitioner after installation of the tower it was necessary to undertake tests as also commissioning thereof.

Yet again by a letter dated 15.09.2008 the petitioner asked the respondent No. 2 to let it know as to who was the owner of the tower and to whom the rent would be payable. The petitioner did not, receive any response to its earlier letter from May to September 2008. According to it there was nothing to show that the respondent No. 2 was entitled to receive rent on behalf of the respondent No. 1 or otherwise. It was also not sure who had the liability to maintain the tower.

The respondent by a letter dated 29th August, 2008 informed the petitioner that the tower was ready and it may be handed over to the broadcaster for the regular transmission w.e.f. 23rd September, 2008. According to the petitioner, it had no liability to pay the rental as on the respondent's own showing till the said date the respondent had no jurisdiction to charge rental from April 2008 onwards. The petitioner, however, by a letter dated 7.10.2008

asked for a joint inspection and sought for certain documents as detailed in paragraph 2 thereof. According to the petitioner, even for the purpose of claiming rental in respect of the said tower, it was necessary for the parties to enter into an agreement. The petitioner contends that the said details have not been furnished. Yet again by a letter dated 30 October, 2008, the respondent No. 2 in response to the petitioner's query stated as under :-

> "2(a) Structural Design of Tower has got the approval of Indian Institute of Technology (IIT), Chennai. Copy of the approval is available with BECIL.
>
> 2(b) For building, you have signed the agreement with Prasar Bharati. Structural stability certificate may be obtained from Prasar Bharati with whom you have signed the agreement for sharing the infrastructure.
>
> 2(c) A copy of Handing over, Taking over certificate of CTI site between Prasar Bharati and BECIL is enclosed for your kind reference.
>
> 2(l) Clearance of manufacturer's for satisfactory installation and testing of Antenna etc. is not required. However BECIL have got it done and a copy shall be made available to you for your reference."

According to it a copy of the lease agreement between the respondents inter se was under consideration of the Ministry of Law for approval. The parties, thereafter held a meeting.

The Minutes of the meeting for 21st October, 2008 were drawn up wherein, according to the petitioner and as contained in its letter dated 24.10.2008 inter alia, the following points were discussed:-

"1. Due to a faulty switchgear no power was available at the CTI site;

2. BECIL is yet waiting for a reply from the supplier with regard to the date of replacement of switchgear and commissioning of the Power System.

3. The Broadcasters also expressed their dissatisfaction with regard to :

a) the quality of some of the electrical equipment installed;

b) and the Responsiveness of some of the Vendors;

4. After the commissioning of the Power Systems all Vendors would be called to demonstrate the working of their equipment;

5. An electrical audit would be carried out by the broadcasters to :

a. Ensure the quality of Electrical components installed;

b. Robustness of the electrical Systems;

c. Responsiveness of Vendors;

d. Ascertain Critical spares required to ensure uninterrupted functioning of the Power Systems;

e. Ascertain the requirement of a Mechanical Bypass to the AMF panel in the event of a failure;

II. Area of Installing VSAT Dish :

The options given by BECIL to the broadcasters for installation of the VSAT Dish were :

1. Either the broadcasters needed to construct a cross beam support on the existing parapet of the roof of the building or
2. Else make a platform outside the CTI boundary wall.

III. Independent Main Entry to CTI :

BECIL informed the Broadcasters that AIR Resources were no longer giving approval to make a separate Main entrance to the CTI location. Boradcasters were required to follow up with AIR Resources directly incase they want to pursue this matter further.

IV. Structural Stability and waterproofing of CTI building :

The Broadcasters had some apprehensions on the stability of the CTI building and demanded a structural stability certificate form independent certified Structural Engineer. BECIL assured the Broadcasters that the CTI building was stable and asked the broadcasters to follow up directly with Prasar Bharati for a Structural Stability Certificate of the building.

V. Manuals, Warranty Certificates, Clearances, Layout Drawings, Vendor Details Etc. :

BECIL assured the Broadcasters that a complete Docket containing :

1. All Equipment manuals;
2. Warranty Certificates;
3. Vendor Details;
4. Electrical, Fire, Tower and Other Clearances;
5. Layout Drawings;

Would be handed over to the broadcasters at the earliest possible."

According to the petitioner neither any certificate was furnished nor the docket containing the assurances contained paragraph V was provided. It is furthermore contended that despite assurance, a copy of the 'handing over and taking over certificate' of CTI site between the Prasar Bharati and the Respondent No. 2 was also not furnished.

All of the five broadcasters however, made a complaint to the Director of the Respondent No. 2 by a letter dated 6/11/2008, stating:-

> "Transformer & Power Distribution Enclosure : The Power Distribution Equipment and Main Step Down Oil-Cooled Transformer are housed in a common enclosure. Due to this housing being extremely compact the Gap between the Transformer and the
>
> a. Input and output cables to and from the AMF Panel is hardly One inch
> b. Main output bus bar is approximately Three inches.
>
> The issues that arise due to this proximity of the transformer to the power distribution are :
>
> a. No access to the Bus and AMF Input Output cables during Maintenance;
> b. During Oil Change of the Transformer the entire Power distribution will need to be shut down causing a breakdown in service;
> c. The Heat emitted by the Transformer will cause degradation in performance of the cables, bus bar and switchgear leading to a failure of the electrical systems.

Labelling of components of the Electrical system : All cables, Switchgear, panels, chambers and other components of the electrical systems need to be clearly marked and labeled. Also an updated and accurate Single Line drawing of the electrical Installation needs to be laminated and displayed at the Site."

The respondent No. 2 sent a reminder to the petitioner for making payments by a letter dated 25.11.2008.

By another letter dated 1.12.2008 the petitioner contended that the CTI was incomplete inter alia, stating :

"1. The Common Transmission Infrastructure (CTI) is as on date incomplete and has not been handed over by BECIL to the FM Phase II broadcasters in Delhi.

2. The Lease Agreement for the Tower Aperture has not yet been signed between the FM Phase II broadcaster's and BECIL/Tower owner.

The commencement of the CTI tower lease and it's ensuing payment of Security Deposit and Rental can only become effective after both the above mentioned points are completed by BECIL.

Thus there is no amount due as on date to BECIL on this account.

As mentioned CTI is incomplete as on date and thus the issue of handover of the CTI by BECIL to the FM Phase II Broadcasters and subsequent operationalisation of services from the CTI does not arise."

A copy of the said letter was sent to the Director of Ministry of Information & Broadcasting. However certain maintenance charges were paid for which respondent No. 2 granted a receipt. The petitioner thereafter appointed one ESSGEE Electro Solutions Pvt. Ltd. It submitted a report dated 2.12.2008, wherein various defects in the tower have been pointed out. The respondent No. 2, however, issued a letter dated 27.01.2009 to all the broadcasters asking them to shift their respective FM Transmitters from interim to CTI setup without having any pre-assumption of failure of components.

The Broadcasters however, reiterated their complaint again by a letter dated 5th April, 2009, the relevant portions whereof are as under :-

> "However, in spite of our repeated requests for correcting these problems, no concrete action has been taken by BECIL. Instead BECIL has taken a rigid stand, that all work has been accurately completed and there is no need for any rectification.
>
> By sending the Letter dated 31st March, 2009 and making false statements and allegations BECIL is forcing the broadcasters to accept the handover of the CTI site in its existing incomplete condition.
>
> Furthermore BECIL is not even allowing the broadcasters to examine copies of Drawings, Test certificates, Statutory Approvals and other details; of the equipment and the setup till the time the broadcasters accept the handover of the CTI. Thus the broadcasters are unable to thoroughly verify the authenticity and correctness of the CTI setup before taking the handover from BECIL.

We also wish to bring to your notice that similar CTI setups from BECIL had earlier faced major issues in Chennai and Bangalore and other cities as well.

We have invariably stated that it is not the intention of the broadcasters to violate the provisions of GOPA but due to the poor work quality from BECIL the broadcasters are left hanging between two extremes.

The Broadcasters have no intention to violate the GOPA conditions and at the same time we also do not want to risk our operations and highly sensitive & expensive equipment without getting the proper rectifications done.

In fact, the broadcasters are facing a huge financial burden due to this delay caused by BECIL, and are ending up paying rent for both, interim and CTI set-up's, till the time the CTI is completed and ready for operation.

Hence, we would once again request you to please get the above mentioned issues rectified at the earliest and confirm."

The petitioner and the other Broadcasters made other and further complaints inter alia by a letter dated 30th April, 2009.

The respondent No. 2 however, took a rigid stand, insisting that the CTI facilities were complete in all respects.

The petitioner received a communication dated 28.05.2009 from the respondent No. 1 asking it to shift its operations to CTI in terms of clause 5.3 of GOPA. In view of the said direction, for which according to the Petitioner it had no other option but to shift to the new tower and to the said effect issued the letter dated 1.8.2009, stating as under :-

> "Since there has been no positive response from BECIL with regard to the completion of the CTI at Delhi all the FM Phase II broadcasters have decided to accept the CTI in its current incomplete state and take it upon themselves to complete the CTI."

Thereafter the impugned demand dated 3rd August, 2009 was made for the period 2008 – 2009 and 2009 - 2010 amounting to Rs. 31,39,780/-.

By another letter dated 12th August, 2009, the respondent stated as under :-

> "In continuation to our Director (O&M)'s office Email is mehla@becil.com. A copy of Ministry of Information & Broadcasting, New Delhi letter No. 212/6/2005-FM dated 18,06.2009 authorising BECIL to collect the rental of MIB Towers from Phase II FM Broadcasters for the tower erected at Delhi, Chennai, Jaipur and Hyderabad is being sent to you. The copy of agreement above to be signed between BECIL and your company also again enclosed. Kindly send it to BECIL after the agreement is signed by the

competent authority at your end. Agreement should accompany the Board resolution for the authorized signatory.

The required payments as per invoice raised from 01.04.2008 onwards for place-wise and year-wise is also enclosed again to enable you get prepared the Demand Draft enclosing along with agreement. So please remit the payment before/along with signing of agreement at the earliest."

By reason of the said letter dated 18.06.2009, the respondent no.1, referring to the BECIL's earlier letter dated 20.03.2009, granted administrative approval for the agreement to be signed between BECIL and FM Broadcasters.

"I am directed to refer to your letter No. BECIL/FM/Phase-II/2009 dated 20.03.2009 on the subject mentioned above and to convey the administrative approval for the agreement to be signed between BECIL and the Private FM Broadcasters. However, the above approval is subject to your seeking legal advice from your legal consultants/Counsel on this agreement."

The respondent No. 1 however, informed the petitioner that it had granted its administrative approval in favour of respondent No. 2 for collection of the rental amounts. The petitioner informed the respondent No. 2 that it had shifted and had started broadcasting from 21st August, 2009. Yet again demands were raised by the respondent No. 2 by a letter dated 11th November, 2009 to which the petitioner sent a reply on 23.09.2009, stating :-

"It is a matter of record that CMI did not receive any draft agreement for the CTI tower lease to be signed between BECIL and CMI. It was only through BECIL's letter No. BECIL/Clear Media – Tower Rent/Finance-2009-10 dated 12.08.2009 that CMI received the following documents :

a. A draft copy of the agreement for the CTI Tower lease to be signed between BECIL and the Broadcasters.

b. An administrative approval dated 18.06.2009 conveyed from the Ministry of Information and Broadcasting to BECIL authorizing them to sign an agreement with the Broadcasters.

It is a matter of record that CMI was forced to shift to an incomplete CTI facility vide BECIL's letter dated 31.3.2009 and Ministry of Information and Broadcasting letter dated 28.5.2009 therefore CMI's liability/obligation to pay rent for the CTI arises only from the date it has taken physical possession of the CTI facility. It is made clear that CMI is perfectly willing to honour its obligations to pay rent for the CTI facility from 21.08.2009 i.e. the date it has taken physical possession of the CTI facility at HPT Kingsway Camp. At the cost of repetition it is pointed out that CMI has been requesting BECIL vide letters dated 15.05.2008, 15.09.2008, 7.10.2008, 1.12.2008 and 30.04.2009 to finalise the lease agreement for CTI Tower which it has unable to do. Therefore any antedated demand towards rent for the CTI tower when it was not even ready and neither had CMI taken physical possession or commenced broadcast from the co-located CTI facility is clearly illegal and arbitrary."

By reason of the said letter the respondent No. 2 was requested to finalise the draft agreement. A reminder was sent by the respondent No. 2 to the petitioner for making payment, whereto the petitioner inter alia stated,

referring to the minutes of the meeting held by the Joint Secretary regarding the status of CTI on 16th September, 2009, to which we shall refer to at an appropriate stage.

The aforementioned correspondences so far as the factual matrix involved in this matter is concerned are not in dispute.

Submissions

Mr. Nikhil Majithia, the learned counsel appearing on behalf of the petitioners, in support of this petition, raised the following contentions :-

1. Having regard to the provisions of the contract vis-à-vis conduct of the parties, it must be held that 'time was of the essence of the contract' and in view of the fact that the petitioner had performed its part of the contract, keeping in view the correspondences between the parties, the respondent must be held to have failed to do so.
2. The respondents are bound to pay the liquidated damages as per Clause 13 of the Project Management Agreement dated 3.2.2006.
3. The respondent having not maintained the standard in regard to the quality of towers as envisaged under the agreement, it is bound to pay damages to the petitioner.

4. The petitioner could not have been called upon to pay rent for the tower from 1.4.2008, i.e., for the period during which it was not fully ready so as to enable it to broadcast its programmes.
5. The petitioner keeping in view the commercial nature of the contract is entitled in law to damages for failure on the part of the respondent No. 2 to provide a tower having the stipulated height of 149 meters vis-à-vis the tower provided to it by Prasar Bharati having the height of 90 meters.
6. The petitioner having paid a huge amount by way of advance, was entitled to interest on the said amount for the financial year 2006-2007 and 2007-2008.

Mr. Alok Kumar, the learned counsel appearing on behalf of the respondent, on the other hand, urged :

1. The petitioner having not claimed any damages in regard to the quality of the tower and/or deficiency in the services, it is not entitled to any damages therefor.
2. The respondents having made the tower ready for occupation within the time specified in the contract, no damage was payable by the respondent No. 2 and in any event the petitioner having not led any evidence as to how it had suffered damages, if any, on this account, the petition is liable to be dismissed.
3. No interest was payable in terms of the agreement between the parties on the deposit made by the petitioners, and the agreement on the part of the respondent No. 2 to pay interest on deposit and TDS certificates having been issued by mistake which having been pointed out by the auditors; the Board of Directors of the respondent No. 2 was entitled to rectify the said mistake.

Issues

The core questions which arise for our consideration in this petition, are :-

a. Whether the petitioner is entitled to any damages from the respondents on account of delay in construction of a CTI tower and/or deficiency in service and/or failure on the part of the respondent No. 2 to maintain the quality of the tower in consonance with the international standard.

b. Whether the petitioner is entitled to any interest on the advance paid by it for the financial years 2006-2007 and 2007-2008.

Damages - Issue

Although, Mr. Majithia, the learned counsel appearing on behalf of the petitioner has addressed us at great length in regard to the quality and/or standard of the tower constructed, as has rightly been pointed out by Mr. Alok Kumar, the learned counsel appearing on behalf of the respondent that no such prayer having been made in the petition, the said argument need not be considered by us.

However, it would assume some significance only for the purpose of considering as to whether the promise on the part of the respondents to provide facilities to the petitioner would amount to make the facilities available to the petitioner within the meaning of the provisions of the contract.

The basic fact of the matter, as has been noticed heretobefore, is not in dispute. The parties had entered into several agreements but we are principally concerned with the terms and conditions of the agreement dated 3.2.2006.

Clause 13 of the said agreement stipulates that the respondent No. 2 was obligated to set up a tower within a period of 12 months from the date of signing of the agreement as also payment of estimated capital cost by the holders of the LOI joining the CTI.

It is not in dispute that the petitioner had complied with its part of contract namely payment of its share of the estimated amount of the construction of the tower in question, being a sum of Rs. 1.8 Crores.

We have noticed heretobefore that the agreement between the parties stipulated that 12 months' period was to be counted from the date of the construction of the tower, which, in view of the agreement dated 3.2.2006, was to be completed by June 2007. The facilities were also required to be provided to the broadcaster by September, 2007.

From the various correspondences exchanged between the parties, it appears that the respondent No. 2 could not complete the construction of the said tower within the specified time.

We may in this regard must keep in mind three relevant dates namely :-

1. 01.04.2008 from which date the petitioner was asked to pay rent by the Ministry of Information & Broadcasting,
2. 23.09.2008 being the date on which according to the respondents, the CTI was ready on all aspects and the petitioner has been asked to shift; and

3. 31.2.2009, when the petitioner in fact started using the facilities.

Although, Mr. Kumar has contended that the petitioner had failed and/or neglected to prove sufferance of any damages, we are of the opinion that in the event, this Tribunal comes to the conclusion that the time was of the essence of contract, it may be held to be entitled to payment of damages on the said account.

Section 55 of the Indian Contract act reads as under:-

"55. Effect of failure to perform a fixed time, in contract in which time is essential

When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before a specified time and fails to do such thing at or before a specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of essence of the contract.

Effect of such failure when time is not essential: If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than agreed upon: If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than agree, the promisee cannot claim

compensation of any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of acceptance, he give notice to the promisor of his intention to do so."

Indisputably the agreement was for commercial purpose. The petitioner in terms thereof was entitled to broadcast its programmes. For the said purpose it was inter alia required to enter into two contracts namely :-

1. For the purpose of construction of a permanent tower and
2. Use the facilities provided by the Prasar Bharati as an interim measure.

We are, in this petition, not concerned with the dispute by and between the petitioner and the Prasar Bharati, if any. We have, however, referred thereto only for the purpose of considering as to whether the petitioner could have been forced to pay rent both to the respondent No.1 and the Prasar Bharati on account of failure on the part of the respondent No. 2 to complete constructions of the tower in question. It is not expected that for the purpose of broadcasting its programme, the petitioner would pay rent at least for some time both to the respondent as also the Prasar Bharati. Furthermore, transmission of a programme for technical as well as commercial reasons would undoubtedly have been advantageous from a higher tower.

It can cover more areas and therefore more customers.

It, furthermore, would lose revenue from lack of adequate advertisements.

Even the quality of broadcasting will be different from a higher tower vis-à-vis from a lower one.

Furthermore, construction of tower and installation of facilities was to be done within a time-frame. Failure on the part of the respondent no. 2 entailed payment of damages.

Such a provision was not inserted in the contract by way of 'in terrorem'.

Indisputably, the parties had pre-estimated the damages being 0.25% per month subject to a maximum of 5 % of the petitioner's share of the cost of the CTI. It is not denied or disputed that no rent was payable for the period during which the tower was to be constructed. It may be true that the respondent No. 2, being a company incorporated under the Indian Companies Act, 1956 and, thus, a distinct entity vis-à-vis the Ministry of Information & Broadcasting and Prasar Bharati, cannot be denied any rent, if payable to it only on the ground that the petitioner was paying rent to the Prasar Bharati.

In terms of the conditions for co-location as contained in clause 3.11.2, the petitioner was forced to enter into an agreement with BECIL and make full payments towards its share in the common infrastructure. By reason of the provisions contained in the agreement entered into by and between the petitioner and the respondent No. 1, the

petitioner was obligated to enter into an agreement with the respondent No. 2 which was done on 3rd February, 2006 pursuant to and in furtherance of the letter of intent issued by the Ministry of Information & Broadcasting to the petitioner on 17th January, 2006.

The said agreement dated 3rd February, 2006 stipulates various obligations on the part of the respondent No. 2.

Clause 6.1 of the said agreement contains obligations on the part of the respondent No. 2, inter-alia, in regard to maintenance of international standards, compliance of the applicable laws, the satisfaction of the petitioner in regard to standard of several equipments and successful acceptance of testing etc.

Clause 13.1 provides for the remedy for delay, namely, the payment of liquidated damages. It is in the aforementioned context the provisions of timeline contained in Annexure III of the said agreement and the illustrations appended thereto assume importance.

We have also noticed heretobefore the agreement entered into by and between the petitioner and Prasar Bharati being dated 7th February, 2006. Although we are not concerned with the compliance of terms and conditions thereof either by the Prasar Bharti or by the petitioner; as indicated hereinbefore, we have noticed the same only to show that time was the essence of contract. We, at the cost of repetition, may observe that the contract being a commercial one, the parties ordinarily were required to adhere to the time schedule in view of the

fact that while carrying out its business venture, the petitioner was required to pay rent to the respondent as also the Prasar Bharati for the same period. The petitioner was required to enter into another agreement with the respondent No. 1, namely, Grant of Permission Agreement on or about 18th June, 2006, clause 3.3 whereof provides for a date of the agreement is to be reckoned to the commissioning period. Clause 4 of the said agreement provides for term of permission according to which the effective date of permission period was to be reckoned from the date of operationalisation of the channel or one year from the date of agreement whichever is earlier. Clause 5.3 also obligated the petitioner to establish and operate upon operationalisation of its channel for a period of two years or till the co-location facility is commissioned, whichever is later and at end thereof it was required to shift its operation to the new facility. Clause 25.3.2 empowered the respondent No. 1 to revoke the permission granted to the petitioner and prohibit it to broadcast not only for the remaining period of the permission but also disqualify it to hold any fresh permission in future for a period of 5 years.

It is in the aforementioned backdrop, as noticed heretobefore, the effect of the letter of the respondent No. 2 dated 13th March, 2007 is required to be considered.

In terms of the said letter, the CTI was to be ready by August-September 2007 and the construction of 149 meters tower was to be ready by April – May 2007. Only on 19th February, 2008, the LOI holder was intimated that the transmission room for the FM Station at Delhi was said to be ready for installation.

The question which arises at this stage is as to whether the same would mean that the petitioner was bound to shift its operation at that point of time, i.e., only at the asking of respondent no. 2. The answer to the said question

must be rendered in the negative. A reasonable time was required therefor. It was therefore, necessary, as indicated by the petitioner in its letter dated 31.3.2008, that CTI installation was required to be completed in all respects before the shifting of transmission equipments could commence.

The petitioner was asked to pay not only the rental but also the security charges equivalent to one year's rental by the respondent No. 2 by its letter dated 24th April, 2008. Although, as stands admitted now, it was not entitled to charge any amount of rent from it at that point of time having not been authorized therefor by the respondent no. 1.

The petitioner questioned the correctness of the said demand by its letter dated 15.5.2008 and furthermore raised a question as to whether the respondent No. 1 or the respondent No. 2 owns the tower, so as to enable the parties to effectively execute the base agreement.

We are however not oblivious of the fact that although the respondent No. 1 conveyed its administrative approval for execution of the agreement between the respondent No. 2 and the private FM broadcasters only on 18.6.2009, but the same may not matter much as the rent was payable either to the respondent No. 1 or to the respondent No. 2. The petitioner, in fact, had paid the rent on and from 1.4.2008.

The respondent No. 2 by its letter dated 6th October, 2009 contended:-

> "Also as you may be aware as per FM Phase-II policy at places where suitable tower of Prasar Bharati were not available, broadcasters were permitted to operationalise their transmission facilities on interim basis for a period of 2 years or **till the permanent CTI is made operational which ever is later**.

Delhi is also such a place where broadcasters were operating on interim setup. On completion of CTI in all respect on 23.09.2008 all the broadcasters including M/s. Clear Media were duly informed for shifting their operation from interim setup to permanent CTI stating that all CTI works are complete and broadcasters operating with interim setup can shift their transmitter to CTI at Kingsway Camp. Inspite of this M/s. Clear Media (India) Pvt. Ltd. continued their transmission upto 20.08.2009 from interim setup. **This is violation of clause 5.3 of GOPA for a period of almost one year.**

(a) In view of the fact mentioned above the invoice raised on you for making the payment of rental for Delhi tower w.e.f. 01.04.2008 must be made within a fortnight, failing which interest @ SBI PLR + 2% shall be chargeable.

(b) Similarly rental for this tower which became due w.e.f. 01.04.2009 i.e. after completion of one year also has been raised. Payment of same also may please be remitted within a fortnight, failing which penal interest @ SBI PLR 2% shall be chargeable.

(c) In addition to rental security deposit equal to one year rental also is to be paid."

In this context, the contention of the respondent No. 1 in the minutes of meeting dated 16th September 2009 assumes importance, wherein it was clearly stated :-

"On the issue of rental for the CTI tower, the broadcasters stated that they are being charged rentals by BECIL, i.e., w.e.f. 1.4.08 when their antennas were mounted. Broadcasters were of the view that the rental should be charged from the date of commencement of the transmission from the CTI.

CMD, BECIL made it clear that the rental for tower have become due from 1.4.08 after the tower is ready. In the case of other broadcasters too, rental is paid from 1.4.08 though date of operationalisation is later. If the broadcasters delay commencement of transmission from the CTI, they cannot expect to avoid payment of rent in the interim. JS(B) made it clear that tower rental has becomes due once the tower has been completed and notice given to broadcasters for migrating. The broadcasters should not delay signing of tower rental agreement and pay the due rental immediately with effect from the date of completion as other broadcasters have done, failing which penal interest would be charged after the due date @ SBI PLR+2% as per the terms of standard agreement. It is amply clear under clause 2.10.4 of the tender document itself that LOI holders are required to enter into agreement with Prasar Bharati for land/tower lease within 90 days of issue of LOI & agreement with BECIL for CTI within 30 days thereafter. As such delay cannot be condoned in the matter."

It is evident from the records that the petitioner had not started working on CTI till November, 2006 despite having deposited a huge amount of Rs. 1.08 crores apart from the E-mail dated 10.11.2006.

The respondent No. 2 had revised its time schedule for completing the CTI facility to the second week of May, 2008 by its letter dated 7.4.2008. Thus, even on its own showing the respondent No. 2 had been lagging behind by 8 months. The respondent No. 2 informed the petitioner being one of the private broadcasters with the CTI was ready for handing over to private broadcaster only w.e.f. 23.09.2008. The private broadcasters were asked by the respondent No. 1 to shift by its letter dated 28.05.2009. Although according to the petitioner even at that stage the

tower was not complete, it had no other option but to shift, stating in its letter dated 1.8.2009 that the private broadcasters would take upon themselves to complete the construction of CTI. The respondents did not respond to the said letter.

The terms and conditions of the agreement between the parties must be considered in their entirety.

The respondents were the stronger parties. The respondent no.1 indisputably compelled the petitioner and other broadcasters to entrust the construction of tower and installation of other requisite facilities to the respondent no.2.

All the broadcasters were made to pay the total estimated amount of construction cost in advance.

At the same time, it was required to pay to the Prasar Bharati a huge amount by way of rental for using its tower.

The agreement dated 3.2.06 envisaged quality construction. International standards were to be maintained therefor. Satisfaction in regard thereto was to be arrived at by the petitioner.

We are not unmindful of the fact that the petitioner did not claim any damages on the deficiencies in service or quality of construction, but there cannot be any doubt or dispute whatsoever that handing over the tower and installation of facilities would bring within its purview compliance of the contractual obligations on the part of the

respondent no. 2 within the stipulated time which meant, handing over of tower and facilities, not only complete in all respects but also the quality thereof.

But for the said purpose, the petitioner in this case having regard to the nature of the relief prayed for would not be entitled to claim any damages apart from the liquidated damages.

The question of delay should be considered from this aspect of the matter. The construction and handing over the complete facility of the broadcast to the petitioner, in our opinion, should be treated to have been completed only on 31.08.2009 and not prior thereto. The petitioner, thus, is entitled to damages for the default on the part of the respondent no. 2 of not being able to complete the construction of the tower and installation of facilities within the time stipulated under the contract.

Section 74 of the Contract Act reads as under :-

"74. Compensation of breach of contract where penalty stipulated for

When a contract has been broken, if a sum is named in the contract as the amount be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss or proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation : A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Explanation : When any person enters into any bail bond, recognisance or other instrument of the same nature or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein."

The provision contained in the contract dated 3.2.06 providing for liquidated damages is not penal in nature. The matter might have been different, had the same provided for payment of a huge amount by way of an '*in terrorem*' clause. In this case, the parties had entered into a genuine pre-estimated damages. The provisions for payment of damages have been provided for in contract in as much as the petitioner was to suffer in the event there was a delay in construction of the tower. It provided for payment of damages @ 0.25% per month but the same was subject to a maximum of 5% of the amount. It is, therefore, not a case where, as indicated hereinbefore, a huge sum by way of penalty became payable only by reason of a breach of contract on the part of a party to the contract. When a sum is required to be paid on a single event only, namely, non-completion of works within the stipulated time, it is to be regarded as the liquidated damages and not penalty. See Low Vs. Reddich Local Board [1892(1) Queen's Bench page 127].

The question came up for consideration before this Tribunal in BPL Mobile Cellular Limited and Anr Vs. Department of Telecommunications reported in 2010(1) Company Law Journal page 628 (TDSAT) wherein, having regard to the provisions of clause 6.4.6 of the contract in question, it was opined that the said clause was penal in nature and not a genuine pre-estimated damage. It was observed that the matter might have been different if in case of default, the party was deprived of a special advantage.

In Sova Ray and Anr Vs. Gostha Gopal Dey and Ors [1988(3)SCR 287], it has been held as under:-

> "*7*. We do not find any merit in the argument that the impugned Clause 6 of the agreement is illegal being penal in nature and has, therefore, to be ignored. It has to be noted that the plaintiffs had in the trial court obtained a decree for partition for one-third share in the suit properties and there was presumption in favour of correctness of the decree. At the appellate stage one of the three branches represented by the heirs of Brajgopal was satisfied with the share allotted to them and the interest of Gostha Gopal (Defendant 9) was identical to their interest. The situation was acceptable to Defendant 9 also but he wanted to acquire half the share of the plaintiffs on payment of consideration. The plaintiffs agreed and the sum of Rs 40,000 was fixed as the price. In Clause 2 of the agreement, as mentioned below, it was expressly stated thus:
>
> 'The sum of Rs 40,000 agreed to be paid by Defendant 9 to the plaintiffs *as compensation for the one-sixth share* shall be paid in two instalments: …' (emphasis in original)

That the amount was to be paid by way of price was reiterated by the use of the word 'consideration' in Clause 3. It is significant to note that Defendant 9 in the court below or his heirs (after his death) before us have not suggested that the entire compromise should be ignored on account of the impugned Clause 6. They have been relying upon the compromise except the default clause which alone is sought to be ignored. They insist that under the compromise the shares allotted to the different branches should be treated as final and further half of the share of the plaintiffs i.e. one-sixth share in the suit properties should have gone to Defendant 9 (and after him, to them i.e. his heirs) for Rs 40,000. This part of the compromise is in substance an agreement for transfer by the plaintiffs of half of their share for a sum of Rs 40,000 to be paid within the time indicated. It is true that the market price of the property was higher, and a beneficial right was bestowed on Defendant 9 to acquire the same for an amount considerably low. In this background the defendant was subjected to the condition that if he had to take the advantage of the bargain he was under a duty to pay the stipulated amount by the time mentioned in the agreement. On failure to do so within time, he was to be deprived of this special benefit. Such a clause cannot be considered to be a penalty clause. The expression 'penalty' is an elastic term with many different shades of meaning but it always involves an idea of punishment. The impugned clause in the present case does not involve infliction of any punishment; it merely deprives Defendant 9 of a special advantage in case of default."

In Deepa Bhargava & Anr Vs. Mahesh Bhargava & Ors [2009(2)SCC 294], the Supreme Court of India noticed Sova Ray (Supra), stating –

"9. There is no doubt or dispute as regards interpretation or application of the said consent terms. It is also not in dispute that the respondent judgment-debtors did not act in terms thereof. An executing court, it is well known, cannot go behind the decree. It has no jurisdiction to modify a decree. It must execute the decree as it is. A default clause contained in a compromise decree even otherwise would not be considered to be penal in nature so as to attract the provisions of Section 74 of the Contract Act."

The Supreme Court of India has also taken into consideration in the said decision opining that __

"12. Mr Tiwari, learned counsel appearing on behalf of the respondents, has relied upon a decision of this Court in *P. D'Souza* v. *Shondrilo Naidu*[2] to contend that even in a case of this nature, Section 74 of the Contract Act would be applicable. In *P. D'Souza*[2] this Court was concerned with a suit for specific performance of contract. It was in the facts and circumstances of that case held that the time was not the essence of contract in that case. There existed a mortgage which was required to be redeemed. The question as to whether Section 74 of the Contract Act was attracted in that case was considered from the point of view of grant of equitable remedy.

13. Reliance has also been placed on *Yogesh Mehta* v. *Custodian*[3]. In that case, this Court was concerned with the forfeiture of earnest money where the Special Court held a bidding, as therein one of the conditions, namely, grant of sanction of the Special Court was not complied with, it was opined that

the penal clause as regards forfeiture of the earnest money was not attracted. It was, therefore, held that the forfeiture of earnest money in the aforementioned situation could not have been directed, stating: (*Yogesh Mehta case*[3], SCC pp. 638-39, para 32)

"*32*. While directing forfeiture of the 'earnest money' the provisions of the Contract Act, 1872 are to be kept in mind. Forfeiture is permissible only when a concluded contract has come into being and not prior thereto. (See *Maula Bux* v. *Union of India*[4] and *Saurabh Prakash* v. *DLF Universal Ltd.*)"

In BPL Mobile Cellular Ltd (Supra), this Tribunal noticed the decision of the Supreme Court of India in Maula Bux(supra) wherein it was held as under:-

"7. In the present case, it was possible for the Government of India to lead evidence to prove the rates at which potatoes, poultry, eggs and fish were purchased by them when the plaintiff failed to deliver "regularly and fully" the quantities stipulated under the terms of the contracts and after the contracts were terminated. They could have proved the rates at which they had to be purchased and also the other incidental charges incurred by them in procuring the goods contracted for. But no such attempt was made."

Indisputably, Section 74 of the Indian Contract Act would be attracted in the event the parties had entered into a genuine pre-estimated damage. It has been so held in ONGC Vs. Saw Pipes [2003(5)SC 705].

In the event it is held that the parties had pre-estimated damages in a fair manner and the same does not constitute a penalty, evidently, no proof of damage is required to be brought on record. See ONGC (Supra).

Even otherwise, the language of Section 74 of the Indian Contract Act is absolutely clear and unambiguous. Only in a case where the penalty clause comes into force in the case of breach of contract, it was for the party to prove the sufferance of actual loss consequent thereto and not otherwise. It is now well-settled that if the compensation named in the contract is by way of penalty, consideration would be different and the party would be entitled only to reasonable compensation for the loss suffered but if the compensation claimed in the contract for such breach is genuine pre-estimate of loss, which the parties knew when they made the contract, which is likely to result from the breach of contract, there is no question of proving such loss or a party is not required to prove the actual loss suffered by him.

In view of the aforementioned pronouncement of the Supreme Court of India, in our opinion, although the petitioner has not proved sufferance of actual loss, it was entitled to the pre-estimated damages by way of penalty.

Payment of Rent.

We have noticed heretobefore that the parties had, in a meeting discussed the matter relating to the payment of rent. The respondent no. 1 has categorically opined in the said meeting dated 16.9.09 that the rent was payable

from 1.4.08 although the date of operationalisation is latter. It even did not lodge any protest. Furthermore, it paid the said amount of rent. No decree for recovery of the said amount has been prayed for. The petitioner, in our opinion, is liable to pay rent from 1.4.08, as it had not taken a contrary stand in the said meeting dated 16.9.2009, and in that view of the matter, only the question as to whether it is entitled to liquidated damages for delay in completion or operationalisation of the tower has been separately considered heretobefore.

Interest

The only question which survives for our consideration is payment of interest.

It is true that there was no provision for payment of interest on the amount deposited by the petitioner for the construction of tower. The petitioner, however, indisputably, claimed interest on the said amount by its letter dated 12.3.07. The respondent in reply thereto, in its letter dated 13.3.07 proposed to discuss the issue in a meeting with it. The parties thereafter evidently met.

By a letter dated 18.4.07, the respondent, while recording that a sum of Rs.4,95,000/- is payable towards costs/interest for the year 2006-07, deducted 22.44% of the tax being a sum of Rs.1,11078/- by way of TDS which we have noticed hereinbefore. Indisputably, for the year 2007-08 also the TDS was deducted.

It is in the aforementioned situation, the subsequent conduct of the respondent attracting the doctrine of 'Estoppel by Convention' is required to be considered.

In Amalgamated Investment and Property Company Limited Vs. Texas Commerce International Bank Ltd., reported in 1981 Vol. 3 All ER page 577 – Lord Donaldson M. R., held as under :-

"Subsequent conduct

For many years I thought that when the meaning of a contract was uncertain, you could look at the subsequent conduct of the parties so as to ascertain it. That seemed to me sensible enough. The parties themselves should know what they meant by their words better than anyone else. In this I was supported by Watchem v. Attorney General of East African Protectorate (1919) AC 533,[1918-19] All ER Rep 455, a Privy Council case which was applied repeatedly in my early days in the common law courts. But it was always repudiated by the more logical minds in Chancery. Eventually, the logicians prevailed. In James Miller (James) and Partners Ltd v. Whitworth Street Estates (Manchester) Ltd [1970] 1 All ER 796 at 798, [1970] AC 583 at 603 Lord Reid said :

'….it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.'

I can understand the logic of it when the construction is clear, but not when it is unclear. Still, we must accept it. Nevertheless a way of escape was left open by a Viscount Dilhorne in that very case when he said [1970] 1 All ER 796 at 805 [1970] AC 583 at 611) : "….subsequent conduct by one party may give rise to an estopel."

So, here we have available to us in point of practice if not in law, evidence of subsequent conduct to come to our aid. It is available, not so as to construe the contract, but to see how they themselves acted on it. Under the guise of estoppels we can prevent either party from going back on the interpretation they themselves gave to it."

It was furthermore observed :-

"If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it, on the faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation just as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not, or whether they were mistaken or not, or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it.

To us, the phrase of Latham CJ and Dison J in the Australian Hough Court in Grundt v Great Boulder Pfy Gold Mines Ltd (1937)99CLR 641 the parties by their course of dealing adopted a conventional basis for the governance of the relations between them, and are bound by it. I care not whether this is put as an agreed variation of the contract or as a species of estoppels. They are bound by the 'conventional basis' on which they conducted their affairs. The reason is because it would be altogether unjust to allow either party to insist on the strict interpretation of the original terms of the

contract when it would be inequitable to do so, having regard to dealings which have taken place between the inequitable to do so, having regard to dealings which have taken place between the parties. That is the principle on which we acted in Crabb v Arun District Council [1975] 3 All ER 865, [1976] Ch 179. It is particularly appropriate here where the judges differ as to what is the correct interpretation of the terms of the guarantee. The trial judge interpreted it one way. We interpret it in another way. It is only fair and just that the difference should be solved by the course of dealing, but the interpretation which the parties themselves put on it and on which they have conducted their affairs for years."

In Anson's Law of Contract 28th Edition, the learned author has, upon referring to the case of Amalgamated Investment (Supra), stated as under :-

"When the parties have acted in a transaction upon a common assumption (either of fact or law, whether due to mistake or misrepresentation) that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped against the other from questioning the truth of the statement of the facts so assumed where it would be unjust and unconscionable to resile from the common assumption. There must be some mutually manifest conduct by the parties, which is based on a common but mistaken assumption which the parties have agreed on, and such agreement may be inferred from conduct or even from silence."

To the same effect is the decision in Republic of India Vs. India Steamship Company Ltd., 1997 Vol. II, Weekly Law Reporter page 828.

We, therefore, are of the opinion that the petitioner is entitled to the aforementioned relief.

The respondent took a different stand only when an audit objection was raised.

The submission of Mr. Kumar that only an officer of lower rank had agreed to pay interest and as such the Board of Directors of the Respondent No. 2 company was entitled to rectify the mistake committed by the said officer is, in our considered opinion, not correct. It took a conscious decision despite absence of any provision in the contract. It intended to remedy an obvious omission. A new contract came into being. It was acted upon. The respondent no. 2 could not have resiled therefrom. No mistake was committed by it which could be ratified. Such a plea was taken without any factual basis. The petitioner pointed out an inequality: No valid contract was rescinded thereby, nor the rules of evidence were given a go by. We have noticed heretobefore that the respondent No. 2 itself in its letter dated 13.3.07 agreed to discuss the matter relating to the payment of interest in a meeting. The said letter was sent by the Chairman-cum-Managing Director of the Respondent No. 2 to the petitioner. There cannot be any doubt whatsoever that the matter must have been discussed in a meeting. It was only thereafter that the petitioner was asked to collect the TDS certificate. The said letter dated 18.3.07 might have been signed by the Deputy Manager (Finance) but we have no doubt in our mind that the said letter was made on behalf of the company and under its authority. The Respondent No. 2 does not state that the TDS certificate has not been issued

or the same has not been deducted. The amount of tax deducted from the amount of interest paid to the petitioner must have been deposited with the Income Tax Department.

We, therefore, are of the opinion that in this case the interest becomes payable.

Conclusion

For the reasons aforementioned, this petition is allowed in part and to the extent mentioned hereinbefore. However, in the facts and circumstances of this case, there shall be no order as to costs.

……....., J
(S.B.Sinha)
Chairperson

…….....
(G. D. Gaiha)
Member

…….....
(P.K. Rastogi)
Member