TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 28th May, 2010

Petition No.37 (C) of 2009

Bargachh Telelinks Pvt. Ltd. & Anr. .....Petitioner

Versus

M/s. Noida Vision ....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. Tejveer Singh Bhatia, Advocate
ForRespondent : Mr. Vibhav Srivastava, Advocate

JUDGEMENT

S. B. Sinha

The Petitioner No.1 is a distributor appointed by the Petitioner No. 2. Both were Multi Service Operators (MSO). The Petitioner No. 2 carries on business in distribution of signals of various broadcasters wherefor it has established its cable networks head-ends/control rooms all over India. The first petitioner runs its control room and operational network from A-57, Sector-4, Noida, Gautambudha Nagar, Uttar Pradesh.

Respondent is said to be a cable operator having its business in Noida and its surrounding areas. It is not in dispute that the Petitioner No. 2 earlier was known as M/s. Siti Cable Network Limited. It has been de-merged and now vested in the 2nd Petitioner in terms of an order dated 17.11.2006 of the High Court of Bombay.

The respondent entered into a subscription agreement with the 1st Petitioner herein on or about 1.2.2002 for obtaining supply of signals of the channels of the various broadcasters in terms whereof the respondent was obligated to provide a list of subscribers with their names, address and other relevant informations.

Clause 3 of the subscription agreement reads as under :

> "The price payable by the FRANCHISEE for access to the signals provided by the Network shall be as follows :
>
> Rs. 25/- per subscriber per month to be paid before 7th day of the every month. (This subscription charge of Rs. 25/- is only for providing Free to Air channels. Charges for encrypted (Pay) channels

shall be charged extra as per the pricing policy adopted by the Pay Channel providers from time to time.) This subscription rate of Rs. 25/- or such increased subscription charges payable by franchisee to network shall be net of taxes. If any taxes/rates are payable on Cable TV Business, same shall be borne by franchisees only.

The Network reserves its right to increase the subscription charges as mentioned above depending upon market conditions and cost of supply of signals."

Indisputably the supply of signal by the 1st Petitioner to the Respondent herein commenced from the date of entering into the said franchise agreement namely 1st February, 2002. It continued upto 31st July, 2008. According to the Petitioners, the respondent has defaulted in regular payment of the subscription fees and as on the said date a sum of Rs.44,21,849/- was owning and due to it from the respondent. The subscriber base of the respondent is said to be 787.

The petitioners contend that despite clause 3 of the aforementioned agreement which we have noticed heretobefore but having regard to inclusion of a large number of channels which had become Pay Channels and/or owing to increase in the subscriber base of the respondent and furthermore imposition of 'Service Tax', the originally stipulated amount of subscription fee had to be increased from time to time. The petitioners have annexed a large number of invoices which are said to have been raised and served on the respondent from the period February, 2002 till 1.10.2006 as also for the rest of the period namely 1.10.2006 to 31st July 2008.

In view of the fact that the respondent failed and/or neglected to clear its dues, the petitioner raised a demand upon it on or about 26.07.2008, inter alia stating :-

> "We would like to inform you that as per our Books of Accounts you have an outstanding payment of Rs. 43,80,464/- till June'2008. You are requested to please clear the above outstanding payment within 7 days otherwise we will take legal steps.
> We are enclose herewith outstanding details for your ready reference."

The petitioner has also proved a large number of receipts granted to the respondent herein for payments received from it.

In view of the fact that despite the said demand dated 26.07.2008, the respondent failed and/or neglected to pay its dues to the petitioners herein, a second notice being dated 19.08.2008 was served on the respondent; the contents whereof are as under :-

> "Kindly refer to the Franchisee Agreement dated 1st February, 2002 under which each party was under an obligation to carry out their respective obligations envisaged therein. In furtherance of the said Franchisee Agreement, we have been providing cable TV signals to you from February 2002 onwards.

You have been continuously availing our services since February 2002 and are enjoying signals of various channels provided by us for onward transmission to the subscribers in your operational area and have earned substantial subscription income from the subscribers.

However, it is regretting to point out that after taking the signals from us, you have neglected to pay the subscription charges regularly as a result of which a sum of Rs. 44,21,849/- (Rupees Forty Four Lakhs Twenty One Thousand Eight Hundred Forty Nine only) has become outstanding against you. We have been continuously following up with you to clear the said outstanding, however you have deliberately ignored our reminders and withheld the said payment which you are liable to pay to us on account of services/signals received from us. It may also pointed out that in terms of the agreement you are also liable to pay interest @18% per annum for the delayed period on the above mentioned outstanding amount of Rs. 44,21,849/-. Copy of statement of account showing the outstanding dues payable to company enclosed herewith as **Annexure-A.**

We once again call upon you to pay a sum of Rs. 44,21,849/- within seven days from date of this notice along with interest, failing which we shall initiate appropriate action as per law, which shall be at your cost and consequences."

Alongwith the said notice the petitioners have also enclosed a statement of account for the period in question. The receipt of the said notices is not disputed and in fact the respondent responded thereto in terms its letter dated

25.08.2008, the contents whereof are as under :-

> "I am in receipt of your letter dated 19th August 2008. At the outset I deny the outstanding as alleged is payable to you. Please note that I am not getting any feed from you with effect from 31st July, 2008. You are also aware of this fact, therefore, you had created false outstanding against me. I had paid all the dues to you. Kindly send me the legible copies of statement of accounts, which you had sent along with the letter to enable me to reconcile with my accounts. You are also requested to send me the legible copy of the Franchise Agreement dated 1st February, 2002 as alleged by you in the letter as I am not in possession of any Franchise Agreement and I do not remember also that any Agreement had been executed with you."

On the aforementioned premise, the petitioners had filed this petition praying inter alia the following reliefs :-

> "(a) Order/decree in favour of the petitioner and against the respondent for an amount of Rs. 44,21,849/- (Rupees Forty four lakhs twenty one thousand eight hundred and forty nine only) being the outstanding amount due from the respondent as on 12.09.2008 for the cable services received by the respondent from the petitioner.
>
> (b) an order awarding an interest in favour of the petitioner for an amount of Rs. 87,045.65 on the aforesaid payment of Rs. 44,21,849/- till 18.07.2008.

(c) an order awarding pendent elite interest @ 18% on the above mentioned amount due of Rs. 45,08,894.65.

(d) pass an order awarding costs to the petitioner.

(e) any other order as this Hon'ble Tribunal may deed fit in the facts and circumstances of the present case."

Before, however, we advert to the defence of the respondent, we may notice that according to the petitioners, the respondent had migrated to another Multi Service Operator without clearing of its dues and ultimately it transferred its network to M/s. Den Network Limited.

The respondent, however, in its defence contended :-

a) It having ceased to carry out any operation as Multi Service Operator to the knowledge of the petitioner; this petition is not maintainable. Reference has been made to Petition No. 52(C) of 2005 : P.B
Enterprises Vs. World View & Ors. (TDSAT Compilation, Page 133).

b) Alternatively the petition is barred under the law of limitation.

c) TRAI having frozen the tariff, no amount is payable to the petitioner.

d) It having not received any invoice from the petitioners in terms of the Telecommunication (Broadcasting and Cable Services Interconnection Regulations) 2004 as amended in the year 2006,

was not bound to pay any amount to the petitioners.

In view of the aforementioned pleadings of the parties this Tribunal framed the following issues :-

1. Whether this Tribunal has the Jurisdiction to adjudicate the present dispute between the parties?
2. Whether the petitioner is entitled to the amounts claimed in the petition towards Subscription fee i.e. Rs.44,21,849?
3. Whether the petitioner is entitled for interest on Rs.44,21,849/- @ 18 % i.e. Rs. 87,045.65?
4. Whether the petitioner is entitled to any Subscription fee after July, 2008?
5. Whether the respondent had received the invoices of subscription fee raised by petitioner?
6. Whether the respondent is bound to pay the subscription amount mentioned in the invoices raised by the petitioner?
7. Whether the respondent had made payment as per the invoices received by it?
8. Whether the respondent issued any notice to the petitioner before migrate to competing MSO's after availing continuous signals from the petitioner as per the regulations?
9. Whether the respondent has ceased to be a cable operator?

Mr. Tejveer Singh Bhatia, the learned counsel appearing on behalf of the petitioner has advanced the following contentions, which we would notice with reference to the principal issues:-

(A) Regarding maintainability :

(a) Section 14 of the Telecom Regulatory Authority of India Act, 1997 merely identifies the type of dispute but it does not say that the respondent has to be a service provider.

(b) The matter relating to adjudication of any dispute is contained in Section 14 (A) of the Act and in terms thereof it is not required that both the parties should continue to be service provider and/or the respondent must be a service provider vis-à-vis the petitioner.

(c) The statutory regime having been changed in the year 2005 as an amendment was carried out by the TRAI on or about 4.09.2006, whereby and whereunder it had been provided that once a cable operator ceased to have a business relationship, a public notice is required to be given.

(d) Furthermore, an Explanation has been appended to clause 3.2 which confers a statutory right on the service provider to realize its dues from the outgoing local cable operator or service provider.

(e) The Supreme Court of India, in Union of India Vs. M/s. Tata Teleservices reported in 2007 Vol. 7, SCC Page 517 having brought out a new concept in regard to the scope of jurisdiction of this Tribunal in so far as therein it was held that for the purpose of maintenance of a counter claim, it was not necessary for the Union of India to grant a license to the respondent therein or an agreement, therefore, was required to be entered into, this Tribunal must be held to have the requisite jurisdiction to adjudicate on this dispute.

(f) Disputes by and between the parties hereto having arisen, when both of them were service providers, the decision of this Tribunal in P.B. Enterprises (Supra) cannot be said to have correctly been rendered.

(B) Reg. Limitation :

(i) As the petitioner had been maintaining continuous account and in view of the admitted fact that the respondent had been making payments, the petition is not barred by limitation.

(ii) In any view of the matter, in view of the provision of Section 60 of the Indian Contract Act, the petitioner is entitled to adjust the payments made by the respondent from its total dues as was obtaining on the said date.

(C) Freezing of Tariff :

Although TRAI had frozen the tariff in May, 2003, but having regard to the fact that petitioners have continuously been raising invoices keeping in view the growth of its subscriber base as also the increase in the Pay Channel costs and service taxes, the respondent was bound to pay the same.

(D) Reg. Service of Invoice and the payability of the claimed amount.

(i) From a perusal of the evidence of the respondent itself, it would appear that it has been accepted that subscription fee payable was within a range of 53,000 to Rs. 80,000 and after

2002 an increase in subscription fee has taken place. The amount in question is payable by the respondent.

(ii) It having further been admitted by the respondent in his evidence that the subscription fee payable was about Rs. 2,00000 in the year 2007-2008, the petitioner must be held to have proved its case.

(iii) From the cross examination of the respondent it would appear that on a suggestion made to him as to whether the subscription fee was a sum of Rs. 2,56,578/- as in July 2007, he avoided any straight answer thereto, contending that he did not remember the same, which is also sufficient to prove the petitioner's claim.

(iv) From the two communications being dated 26.07.2008 Exhibit PW1-4 and dated 19.08.2008 at page 289 being exhibit PW1-7, which have admittedly been received by the respondent, but the same having not been responded to and no statement having been made that the invoices sent by the petitioner have not been received earlier, they must be held to have been admitted to have been received.

(v) In any view of the matter Mr. Umesh Pal Singh (PW2), a technical head working with the petitioner No. 2, in his evidence having categorically stated that he had personally served a notice to Shri Ravi and Shri Bobby, the employees of the respondent, the petitioner must be held to have proved its contention in relation thereto.

(vi) So far as the invoice at page 318 is concerned, the said witness having categorically stated that he had gone to the network of the petitioner and served the same on its sole proprietor

and Mr. Warish had signed the said invoices in his presence but the same has not been denied by the Respondent. In this connection our attention has been drawn to the two invoices, which are of course for the same period but one was containing the signature of the petitioner No. 1 and another was a computer generated one, to contend that both of them contained the same particulars, and, thus, they are genuine documents.

(vii) No suggestion to the said witness having been given in relation thereto and Mr. Warish having signed on the invoice at page 318 of the paper book, the same must be held to have been admitted.

(viii) Although Mr. Warish examined himself on 10.02.2009, but in his evidence by way of affidavit and filed before this Tribunal on 22.02.2010 having not stated that the said invoice did not contain his signature, and, although stated that Mr. Ravi and Mr. Bobby were not his employees but he having not produced any document whatsoever in support of the said contention and in view of the fact that in his cross examination he admitted that he maintains his books of accounts and from a perusal whereof it would appear as to how many employees he had and the amount of salary paid to them; an adverse inference should be drawn against him. In support of the said contention reliance has been placed on Murugessan Pillai Vs. Manik & other 1917, Law Report, 44 Indian Appeals, page 98 as also a decision of the Delhi High Court in Niranjan Kaur Vs. New Delhi Hotels limited reported in ILR (1987) Vol. II, Delhi page 285.

(L) In any event Mr. Warish having not denied or disputed his signature on the said invoice, the same must be held to have been admitted.

Strong reliance in this behalf has been placed on the decision of this Tribunal in Indian Cable Net Vs. Dumdum Cable TV wherein it has been held that effect of not questioning the correctness of the statement made by a witness in his Examination in Chief in cross examination would be as if the same has been admitted.

Our attention has been drawn to the statement of account of the petitioner by Mr. Bhatia to contend that from a perusal thereof it would appear that the part demands made by the respondent almost correspondence the amount for which the invoices were raised.

Mr. Vibhav Srivastava the learned counsel appearing on behalf of the respondent, on the other hand, urged :-

a) The decision of this Tribunal in PB Enterprises, having been rendered by a 3 judge bench of this Tribunal and no statutory change as such having been effected by reason of 2006 amendment as by reason thereof the service providers have not derived any statutory right to realize its dues, the said decision is binding on us.

b) The petition having been filed on 13.3.2009 and the period of limitation being 3 years, a part of the claim must be held to be barred under the law limitation.

c) The petitioner having not argued that the respondent had migrated to the network of another MSO and in any event no evidence in that behalf having been laid, the case of the respondent that it had to close down its Cable TV Network business after July 2008 must be held to be correct.

d) The petitioner failed to prove service of any invoices by adducing any cogent evidence. The petitioner has not pleaded as to on the basis of as cause of action for the present petition has srosem.

e) Keeping in view the provisions of clause 3 of the agreement in terms whereof the respondent was to pay a sum of Rs. 25 per subscriber per month for free to air channel only, and furthermore having regard to the freeze order passed by the TRAI on 15.1.2004, no amount is payable to the petitioner.

The petitioner, thus, cannot be permitted to raise any claim more than what was demanded and payable on the said date.

f) In view of the statement of PW-1 to the effect that he has accepted in cross examination that when confronted with the questions as to whether inclusion of any new channel had been

conveyed to the respondent, the answer was rendered in the negative which would clearly go to show that transmission of the new channel, if any was without the consent of the respondent.

g) The purported accounts maintained by the petitioner and shown in the ledger account, cannot be accepted in view of the fact that the agreement was not amended.

h) So far as the contention of the petitioner that once Shri Ravi and Shri Bobby were the employees of the respondent, no such plea having been raised in the petition or in the rejoinder, no reliance can be placed hereupon.

i) The invoices being at page 318 must be held to be a forged one, as the signature of the respondent therein even on a bare perusal appear, that the same does not tally with his other admitted signature.

j) The petitioner has also not been able to prove that the respondent has sold out his network to them.

Although this Tribunal, as has been noticed hereinbefore, has framed a large number of issues, the principal questions which fall for consideration by this Tribunal, are as under :-

1) Whether this petition is maintainable;

2) Whether the petition is barred by limitation;

3) Whether in view of the freeze order of TRAI and furthermore in view of the fact the invoices having been served upon the respondent, it was bound to make any payment ?

4) Whether the invoices were served on the respondent?

Re-Maintainability

Section 14 of the Act provides for the issues which may arise for consideration of this Tribunal; whereas Section 14(A) confers the jurisdiction of this Tribunal.

Both these provisions were inserted by the Parliament by reason of the Amendment carried out in the year 1997 Act in 2000.

Section 14 of the Act was inserted upon deletion of the Section 18 of the old Act in terms whereof the bar of appeal against a judgment and order of TRAI vested in the High Court.

Indisputably the jurisdiction of this Tribunal is wide in nature.

Section 14 provides for the nature of the dispute. It is not exhaustive. Section 14 and Section 14 (A) of the said Act, in our opinion must be read conjointly. Recently this Tribunal in Appeal No. 1 and 8 of 2006, Bharat

Sanchar Nigam Limited Vs. TRAI, wherein a question arose as to whether an application can be filed by a licensee against the regulator, independent of the provisions of Section 14 (A) of the Act whereby a period of limitation has been prescribed, it was held that both the provisions must be read conjointly.

If both the provisions are required to be read conjointly and keeping in view the legislative history as also the scheme of the Act, in our opinion, there cannot be any doubt or dispute that no restriction should be imposed on the exercises of the jurisdiction of this Tribunal. It has been so held by the Supreme Court of India in Cellular Operators Association of India Vs. Union of India reported in 2003 Vol. III SCC page 186.

We may furthermore notice that recently Balasubramanyan J. in Union of India Vs. M/s. Tata Teleservice Limited reported in 2007(7) SCC page 517 has categorically held that the jurisdiction of this Tribunal is so wide that a counter claim at the instance of the Union of India would be maintainable despite the fact that no binding agreement had come into being by and between parties thereto.

In that case, the respondent therein had taken part in the auction of licenses, but ultimately did not enter into an agreement. If a potential licensee was also held to be a licensee for the purpose of entertaining a counter claim by the Union of India, there cannot be any doubt or dispute in our opinion that although a person has allegedly

ceased to be a multi service operator, the petition would be maintainable. We cannot lose sight of the fact that under Section 15 of the Act, the jurisdiction of the Civil Court is barred.

The 'Cause of action' means a bundle of facts which are required to be proved for the purpose of maintaining an action against the defendant (See Halsbury's Laws of England Vol.37 page 24 Para 18. It reads as under :

> "18. **Cause of action.** 'Cause of action' has been defined as meaning simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. The phrase has been held from the earliest time to include every fact which is material to be proved to entitled the claimant to succeed, and every fact which the defendant would have a right to travers. 'Cause of action' has also been taken to mean that particular act on the part of the defendant which gives the claimant his cause of complaint, or the subject matter or grievance founding the claim, not merely the technical cause of action."

Herein we are dealing with a petition for recovery of the subscription fee for the period during which parties had a subsisting agreement; the cause of action whereafter had arisen. Only because according to the respondent, it has ceased to be a multi service operator, the same in our considered view, can not by itself be a ground to hold that the petition which was otherwise validly filed would become non-maintainable by reason thereof.

The question which is required to be posed and answered is whether in respect of the aforementioned claim of the petitioner, a Civil suit would be maintainable. The answer thereto must be rendered in the negative.

Our attention, furthermore has rightly been drawn by Mr. Bhatia to the new statutory regime, which we may notice :-

In a given case it is possible that having regard to the provisions of Regulations 4.2 and 4.3 of the interconnected regulations in the event no notice thereunder is given, the relationship would continue despite the fact that the respondent has wound up its business. It may be true that by reason of the Explanation appended to Clause 3.2 of the Regulations, a new MSO to whom the local cable operator or MSO intends to migrate may not refuse the migration itself, only because an invoice is produced before it showing the outstanding dues, but there can not be any doubt or dispute that in relation thereto the outgoing MSO would have a right to bring an action before this Tribunal for an injunction against the new MSO and/or to restrain it from allowing the local cable operator to migrate to its network and/or for issuance of a direction not to do so without clearing the former's dues.

It is to the aforementioned limited aspect, a new right has been created which did not exist prior to coming into force of the 2006 Amendment Act.

It is now also beyond any dispute that a petition for recovery of an amount against a LCO/MSO by another service provider would be maintainable if Telecommunication Services have been provided. So far as a dispute between two service providers is concerned, irrespective of the fact that one has allegedly ceased to be a service provider, is concerned. Suffice it to point out that the Parliament thought that an Expert Appellate Tribunal created for the said purpose should have exclusive jurisdiction in relation thereto and not any other court.

If a petition otherwise is maintainable, indispurably, no suit would lie before a Civil Court. If it is maintainable as on the date of the institution thereof; only in view of the defence taken , this Tribunal would not cease to have any jurisdiction.

The decision of this Tribunal in P.B. Enterprises(Supra), unfortunately, did not take into consideration these aspects of the matter.

It is now a well settled principle of law that a decision which rendered sub-silentio would not operate as a binding precedent. A Constitution Bench of the Supreme Court of India in State of Uttar Pradesh Vs. Synthetics and Chemicals Limited, 1991 (4) SCC Page 139 held as under :-

"41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration

of law? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. "A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind." (*Salmond on Jurisprudence* 12th Edn., p. 153). In *Lancaster Motor Company (London) Ltd.* v. *Bremith Ltd*.[13] the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in *Municipal Corporation of Delhi* v. *Gurnam Kaur*.[14] The bench held that, 'precedents sub-silentio and without argument are of no moment'. The courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not *ratio decidendi*. In *B. Shama Rao* v. *Union Territory of Pondicherry*[15] it was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is

for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

Moreover, in view of the fact that this Tribunal only sits mostly in a three member bench or a smaller bench, if is found that an earlier bench of equal strength has committed a serious error in rendering a decision without taking into consideration the statutory provisions or binding decisions of the Supreme Court of India, the same must be held to have been rendered par incurium.

In Synthetics and Chemical (Supra) it was held :

"40**.** 'Incuria' literally means 'carelessness'. In practice *per incuriam* appears to mean *per ignoratium*. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, '*in ignoratium* of a statute or other binding authority'. (*Young* v. *Bristol Aeroplane Co. Ltd.*[11]). Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In *Jaisri Sahu* v. *Rajdewan Dubey*[12] this Court while pointing out the procedure to be followed when conflicting decisions are placed before a bench extracted a passage from *Halsbury's Laws of England* incorporating one of the exceptions when the decision of an appellate court is not binding."

Reference may also be made in this behalf to Fuerst Lawson Limited Vs. Jindal Exports Limited reported in 2001 (6) SCC page 356.

It is now a well settled principle of law in view of the decision in Synthetics and Chemicals Limited (Supra) that a decision which is not express and is not otherwise founded on reasons nor it proceeds on considerations of relevant issues can not be held to be a law declared or to have any binding effect on any subsequent bench.

In Fuerest Day Lawson (Supra) it has been held :-

"19**.** In *Mamleshwar Prasad* v. *Kanhaiya Lal*[12] reflecting on the principle of judgment per incuriam, in paras 7 and 8, this Court has stated thus: (SCC p. 235)

"*7*. Certainty of the law, consistency of rulings and comity of courts — all flowering from the same principle — converge to the conclusion that a decision once rendered must later bind like cases. We do not intend to detract from the rule that, in exceptional instances, where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have the sway of binding precedents. It should be a glaring case, an obtrusive omission. No such situation presents itself here and we do not embark on the principle of judgment per incuriam.

8. Finally it remains to be noticed that a prior decision of this Court on identical facts and law binds the Court on the same points in a later case. Here we have a decision admittedly rendered on facts and law, indistinguishably identical, and that ruling must bind."

23**.** A prior decision of this Court on identical facts and law binds the Court on the same points of law in a latter case. This is not an exceptional case by inadvertence or oversight of any judgment or statutory provisions running counter to the reason and result reached. Unless it is a glaring case of obtrusive omission, it is not desirable to depend on the principle of judgment "per incuriam". It is also not shown that some part of the decision was based on a reasoning which was demonstrably wrong, hence the principle of per incuriam cannot be applied. It cannot also be said that while deciding *Thyssen*1 the promulgation of the first Ordinance, which was effective from 25-1-1996, or subsequent Ordinances were not kept in mind more so when the judgment of the Gujarat High Court in *Western Shipbreaking Corpn.*2 did clearly state in para 8 of the said judgment thus:

"*8*. We now come to the Arbitration and Conciliation Ordinance, 1996 which was promulgated on 16-1-1996 and brought into force with effect from 25-1-1996. The second Ordinance, 1996 was also promulgated on 26-3-1991 as a supplement to the main Ordinance giving retrospective effect from 25-1-1996. The Ordinance received assent of the President on 16-8-1996 giving the retrospective effect from 25-1-1996. Thus the Ordinance has now become an Act. All the

provisions of the Ordinance as well as the Act are same. Therefore, the use of the words 'the Ordinance' shall also mean the Act and vice versa."

It appears in the portion extracted above that there is a mistake as to the date of promulgation of the second Ordinance as 26-3-1991. But the correct date is 26-3-1996."

In any event, in exceptional situations there cannot be any dispute, that this Tribunal can overrule its earlier decision as has been held in Bengal Immunity Co. Ltd. Vs. State of Bihar AIR 1955 Supreme Court 661. See also 'In the matter of Cauvery Water Disputes Tribunal' reported in 1993 Supp (1) SCC 96.

It is also a well settled principle of law that a strict compliance of statute would be required in the case of exclusion of jurisdiction of a Court [See G.P. Singh's Principles of Statutory Interpretation (11th Edition) Page 707].

We, therefore, are of the opinion that this Tribunal has the requisite jurisdiction to determine the dispute between the parties.

Furthermore, the meaning of the words should be given a plain meaning unless context otherwise requires. (See Lalu Prasad Yadav Vs. State of Bihar reported in [2010(3)SCALE 443(Paras 18-25)].

Given the ordinary meaning assigned to the term 'Dispute' between two service providers; the same would not mean that so long as they remain service providers and both of them must continue to have the relationship, although when the dispute arose, both of them were service providers.

Limitation

Article 1 of the schedule appended to the Limitation Act 1963 on which reliance has been placed by Mr. Bhatia, in our opinion, is not applicable. The said provision would be attracted not only when the account is an open and current one but also mutual.

In the transactions entered into by and between the parties no mutuality was involved. The petitioner in terms of the contract is not required to pay any amount to the respondent.

Faced up with the aforementioned situation Mr. Bhatia relies upon the provisions contained in Section 60 of the Indian Contract Act.

> "**59. Application of payment where debt to be discharged is indicated.** – Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying, that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

60. Application of payment where debt to be discharged is not indicated. - Where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitations of suits."

When however, asked as to whether the petitioner has raised any pleadings in that behalf and/or adduced any evidence, answer of Mr. Bhatia was in the negative.

The specific case of the petitioner is that monthly invoices were raised and served upon the respondent in terms whereof it was obligatory on its part to make payment every month. As would appear from the discussions made hereinafter, Mr. Bhatia himself has produced before us a chart of bills raised and payments received in order to contend that from a bare perusal thereof it would be evident that the respondent had been making payments more or less in terms of the invoices raised which, thus, must be held to have been served on it. We, will consider the question of service of invoices on the respondent a little later, but we have referred to the said argument of Mr. Bhatia at this stage, only for the purpose of showing that the contention of the petitioner in this behalf does not conform to its submission so as to attract the provisions of Section 60 of the Indian Contract Act.

In that view of the matter we have no doubt in our mind that the petition being related to recovery of the amount mentioned therein from the respondent, the period of limitation would be 3 years starting from the date of filing of the petition, i.e., from 14.03.2006 to 13.03.2009. The petitioner, therefore, in our opinion having regard to the fact that the claim has been made upto 31st July, 2008, i.e., for the period 12.2.2006 and 31.07.2008, the claim petition would be maintainable for three years and not for the period beyond the same.

Re-Migration

It has rightly been contended by Mr. Srivastava that although the petitioner in the petition has interalia raised a contention that the respondent has migrated to the network of another MSO, no evidence had been adduced in support of the said plea. The said contention of the petitioner, therefore, stands rejected.

Service of Invoices

The petitioner herein has sent 2 communications as noticed hereinbefore; one being dated 26.07.2008 and the other dated 19.08.2008. Indisputably, the same had been received by the respondent. With the said communications, the ledger account was enclosed. It contained the details invoicewise as also the dates on which

part or full payments had been made by the respondent. Both the aforementioned communications had not been responded to by the respondent.

The respondent in his evidence also did not raise any contention that it had not received the said invoices.

The petitioner has examined Shri Umesh Pal Singh, the Technical Head of the petitioner No. 2 company. He, in his evidence stated that the respondent had two employees, Shri Ravi and Shri Bobby. Invoices used to be served upon them. One of the questions which had arisen for our consideration is as to whether they were the employees of the respondent. We may only notice that the respondent in his evidence admitted that books of accounts were being maintained. It was furthermore admitted that the said books of accounts would show as to who were the concerned employees and what was the amount of salary paid to them. The respondent however, neither produced the books of accounts nor adduced any other evidence to show that the said Shri Ravi and Shri Bobby were not its employees. The respondent therefore has withheld the best evidence. It is neither in doubt nor in dispute that in terms of Section 106 of the Indian Evidence Act, the respondent has special knowledge as to who were its employees. He despite the fact that Shri Umesh Pal Singh was cross examined on 10th February, 2010 and the respondent has filed his affidavit on 22.02.2010, although stated that Shri Ravi and Shri Bobby were not his employees, but did not produce any document in support thereof.

Mr. Bhatia in this behalf had relied upon a decision of the Privy Council in Murugesam Pillai Vs. Manickavasaka Pandara and Ors. (Supra) wherein it has been held as under :-

"A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the 3 abstract doctrine of the onus of proof, and failing, accordingly, to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough – they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition. The present is a good instance of this bad practice."

The said decision has been followed by the Delhi High Court in Niranjan Kaur Vs. New Delhi Hotels Ltd. and Ors. (Supra) wherein in a similar situation, the Delhi High Court has held that books of accounts possessed by the respondent therein would have been the best evidence to prove who were its employees and who were not in the following terms :-

"In the face of the aforesaid authorities there is all force in the contention of the learned counsel for the plaintiff that an adverse inference should be drawn by the Court that if the account books and correspondence between the plaintiff and defendant No. 1 had been produced by defendant No.1, the same would have gone against defendant No. 1 and would have shown that defendant No.2 R. Ganesh was in the employment of defendant No. 1 at the relevant time and was concerned with the correspondence between defendant No. 1 and the plaintiff and others and consequently on the strength of the aforesaid adverse inference which is based on the withholding of the bad evidence on the point by defendant No.1, it stands proved that defendant

No. 2 R. Ganesh was in the employment of defendant No.1 and concerned with the correspondence being Personal Assistant of L. Ram Parshad the founding direction of defendant No.1, who though not the Managing Director was however the head figure in defendant No.1 as defendant No. 1 does not have a managing director."

It however, appears that there exists a controversy as to whether two documents (Exhibits 1 at page 119 and another at page 318) were the copies of each other or not. The only difference is whereas former has been signed by the authorized signatory of the petitioner, the later is not. Our attention however has been drawn by Mr. Bhatia to the one at page 318 to contend that the same was computer generated and also bears the signature of the respondent.

Mr. Srivastava however, would urge that both are computer generated ones but as the one at page 318 containing the endorsement "This is system generated invoices, hence, it does not require signature" itself would clearly go to show that in between the time when the print out of the one at page 109 was taken and the other at page 318, the software must have been changed.

There appears to be a controversy as to whether the invoice dated 1.4.2008 contains the signature of the respondent or not.

Mr. Srivastava wanted us to compare the initials of the respondent ourselves, but we are afraid that having regard to the time gap between the two, it may not be prudent on our part to undertake the said exercise.

We may, however, notice that it may not be correct on the part of Mr. Srivastava to contend that the same by itself would prove that the invoice is a forged and fabricated document.

It may, moreover, not be out of place to mention that Mr. Umesh Pal Singh was even not given any suggestion that the invoice at page 318 did not bear the initials of Mr. Warish, the proprietor of the respondent. We, therefore, are of the opinion that the invoices were served on the respondent.

This leaves us to the surviving question as to what relief, if any the petitioner is entitled to.

We have been taken through by the learned counsel for the parties to the statement of account. As indicated hereinbefore Mr. Bhatia has separately given us a copy of the abstracts from the ledger account, from a perusal whereof it would clearly appear that the respondent had been making part payments more or less of the same amounts which have been claimed in the invoices by the respondent. Raising of invoices or service thereof as contained in Explanation appended to clause 3.2 of the Regulations as also clause 3.3 thereof are not imperative for a Multi Service Operator to prove for the same for a service provider purpose of maintaining a recovery petition.

A local cable operator becomes obligated to pay the amount of subscription in terms of the contract.

There is no serious dispute with regard to the fact that from the date of entering into the contract namely 20th February, 2002 till 31st July, 2008 not only the number of Pay Channels has increased but also the number of

subscribers has increased. The petitioner has also, in the meanwhile, became entitled to the benefit of the two notifications issued by TRAI increasing the tariff by 7% and 4% respectively.

It, in the aforementioned situation, in our opinion, does not lie in the month of the respondent to contend that a large number of pay channels were thrust on it. The respondent is an experienced Multi Service Operator. It carried on the transactions with the petitioner for more than six years. It is difficult for us to accept the contention of Mr. Srivastava that the respondent used to make payments of the amounts as was asked to do by the petitioner's representative on phone. No reliable evidence has been adduced on its part in this behalf. The respondent had been making payments, on its own showing, by cheques. We would, therefore, assume that while sending cheques, it would address at least cheque forwarding letters to the petitioner.

If the petitioner had been thrusting a large number of Pay Channels on the respondent and consequently on its customers, it would not be difficult to presume that the respondent would not be able to realize the subscription fees from its customers to the said extent and in that view of the matter it is expected that protests thereabout would be made by it.

By its conduct, therefore, the respondent must be held to have knowledge about the increase in the number of pay channels as also the amounts specified in the invoices.

It is a common knowledge that a local cable operator agreeable to increase the subscription fee from a meagre amount of Rs. 25,000 per month for free to air channel to Rs. more than Rs. 2,00,000 per month within a period of 6 years. The Freeze Order, therefore, in the instant case is applicable.

We, therefore, have no other alternative but to hold that the amount of subscription fee had to be increased because of the increase in subscriber base, pay channels costs and the imposition of Service Taxes.

It is of some significance to notice that Mr. Warish in his evidence stated as under :-

> "From 2002 to till 2008 we have been taking signals from Siti Cable which was later on renamed to Petitioner No. 1 and now it is named as Wire and Wireless India Ltd.
>
> According to me the amount of subscription fee was either 53000 or 83000 but I am not sure the amount of subscription fee which was payable as I was asked to sign a blank agreement in the year 2002.
>
> In the year 2007-2008 the subscription fees payable was somewhere in excess of Rs. 2 lakhs.
>
> I can not say whether the subscription fees was Rs. 256578 in July 2007, however, I have already stated that subscription was in excess of Rs. 2 lakhs."

To a suggestion made to him, as noticed heretobefore, that the subscription fee was Rs. 2,56,578 in July, 2007 was answered with the words "I can't say".

Non-production of the books of accounts by the respondent would also go to show as to what amount he used to get from his subscribers. No LCO would year after year run its network upon suffering losses.

From a general trend of his cross examination also, it is evident that he had knowledge about all the developments.

For the reasons aforementioned the petition must be allowed to the extent mentioned hereinbefore namely for a period of three years from the date of filing of the petition out of the period 20th February, 2002 to 30th July, 2008. The petitioner shall, furthermore, be entitled to interest @ 12% per annum on the aforementioned amount throughout. This petition is allowed with costs. Counsel's fee assessed at Rs. 50,000/-.

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

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

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