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

**Dated 28th May, 2010**

**Petition No.132(C) of 2010**

M/s Polimer Channel …..Petitioner

Versus

M/s Sumangali Cable 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.Navin Chawla, Advocate
Mr.Sharath Sampath, Advocate

For Respondent : Mr.Maninder Singh, Sr.Advocate
Mrs. N.K.Sibale, Advocate

**ORDER**

The petitioner herein is ' a Broadcaster' within the meaning of Clause 2(e) of the Telecommunication (Broadcasting & Cable Services) Interconnect Regulation 2004 (hereinafter called and referred to as the Regulations). The said Regulations have been amended in the year 2006.

The respondent is a Multi-System Operator (MSO) within the meaning of the provisions of the said Regulations. Allegedly, the petitioner apart from being broadcaster of a local Cable TV channel known as Polimer Channel is also a producer. It airs free-to-air channel wherefor no charges are levied from the viewers. Learned counsel for the petitioner would contend that the respondent, for all intent and purport, enjoys a virtual monopoly status in the town of Coimbatore as a MSO and for the purpose of transmitting the said channel through its network, the parties entered into an agreement, in terms whereof the respondent was to charge a sum of Rs.2 lakhs per month from the petitioner for transmitting signals of the said channel through its networks as 'Carriage Charges'. The petitioner for the said purpose is stated to have deposited a sum of Rs.4 lakhs by way of interest free security deposit. For the said purpose, an agreement in writing was entered into on or about 01.09.2007. In the month of May, 2009, the respondent sought to increase the carriage charges from Rs.2 lakhs to Rs.3 lakhs which the petitioner agreed. However, the respondent without any prior notice discontinued the transmission of the said channel from its network at Coimbatore. The

grievance of the petitioner is that the said act on the part of the respondent is violative of clauses 4.2 and 4.3 of the Interconnect Regulations as neither any notice was issued nor any public notice was published in two newspapers as is required thereunder. The petitioner has further contended that the respondent has been holding security deposit of Rs.7 lakhs being Rs.4 lakhs for Coimbatore and Rs.3 lakhs for Sripur. On the aforementioned premise, the petitioner has filed this petition claiming inter alia, the following reliefs:

> "(a) Hold the disconnection of "Polimer Channel" by the Respondent to be illegal and in violation of the Interconnect Regulations;
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> (b) Award a sum of Rs.10,00,000/- (Rupees Ten Lakhs Only) as damages in favour of the Petitioner and against the Respondent;
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> (c) Direct the Respondent to forthwith reconnect the signals of the Polimer Channel of the Petitioner on its network on the same frequency as was being run by the Respondent i.e. S-13."

It has also prayed for an ad interim ex parte order directing the respondent to forthwith reconnect the signals of the said Polimer Channel disconnected on 06.04.2010. The matter came up before us on 11.05.2010.

Mr.Maninder Singh, learned counsel appearing on behalf of the respondent, on instructions, stated that although no notice under Clause 4.2 and 4.3 of the Regulations had been issued, but there is no requirement in law therefor. A reply to the said petition has been filed wherein, inter alia, the question of maintainability of this petition has been raised.

Mr.Maninder Singh would further contend:

(i) The petitioner being not a broadcaster within the meaning of the provisions of the Regulations, this petition is not maintainable.

(ii) The petitioner being not a registered operator with the Ministry of Information & Broadcasting, no relief can be granted to it.

(iii) Clauses 4.1, 4.2 and 4.3 of the Regulations read with the 'must provide' clause as contained in clause 3.2 thereof the petitioner has not derived any legal right to mandate a distributor to continue to carry on its network its channel, and, thus, it is not entitled to any relief in this petition.

Mr.Navin Chawla, the learned counsel appearing on behalf of the petitioner, on the other hand, would contend:

(a) The definition of 'Broadcasting' being a broad one and including a person who transmits its channel through cable service would come within its purview and thus, the petitioner must be held to be a 'Broadcaster'.

(b) Clause 4.1 is independent of clause 3.2 of the Regulations which would be evident form the fact that only in the year 2006, the regulator took a conscious and deliberated decision to introduce clauses 4.2 and 4.3 at thus, it is incorrect to suggest that an agreement in writing would be necessary for the purpose of placement of any channel through the network of a multi-service provider.

(c) Registration Certificate is not necessary in terms of Rule 65 of the Cable Television Networks Rules, 1994 or otherwise.

(d) In the event an order of injunction as has been prayed by the petitioner is refused, it would suffer an irreparable injury.

The Telecom Regulatory Authority of India (TRAI) in exercise of its jurisdiction under Section 11(1)(b)(ii)(iii) and (iv), made a Regulation known as the Telecommunication (Broadcasting & Cable Services) Interconnect Regulation 2004. Broadcasting services has been defined in Regulation 2(f) to mean:

> "(f) **"broadcasting services"** means the dissemination of any form of communication like signs, signals, writing, pictures, images and sounds of all kinds by transmission of electro magnetic waves through space or through cables intended to be received by the general public either directly or indirectly and all its grammatical variations and cognate expressions shall be construed accordingly."

Regulation 2(j) defines 'Distributor of TV channel' in the following terms:

> "(j) **"distributor of TV channels"** means any person including an individual, group of persons, public or body corporate, firm or any organization or body re-transmitting TV channels through electromagnetic waves through cable or through space intended to be received by general public directly or indirectly. The person may include, but is not limited to a cable operator, direct to home operator, multi system operator, head ends in the sky operator."

Clause 3.2 reads as under:

> "3.2 Every broadcaster shall provide on request signals of its TV channels on non-discriminatory terms to all distributors of TV channels, which may include, but be not limited to a cable operator, direct to home operator, multi

system operator, head ends in the sky operator; Multi system operators shall also on request re-transmit signals received from a broadcaster, on a non-discriminatory basis to cable operators.

Provided that this provision shall not apply in the case of a distributor of TV channels having defaulted in payment.

Provided further that any imposition of terms which are unreasonable shall be deemed to constitute a denial of request."

Clause 4.1 of the Regulations provided for disconnection of TV channel signals. In the year 2006 an amendment was made in the said Regulations in terms whereof certain changes were made in Regulation 3 and Regulation 4. We may notice the applicable changes made therein. After the proviso appended to clause 3.2, an 'Explanation' was added which reads as under:

"Explanation

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

We may also notice clauses 3.3 and 3.5 which read as under:

"3.3 A broadcaster or his/her authorised distribution agency would be free to provide signals of TV channels either directly or through a particular designated agent or any other intermediary. A broadcaster shall not be held to be in violation of clauses 3.1 and 3.2 if it is ensured that the signals are provided through a particular designated agent or any other intermediary and not directly. Similarly a multi system operator shall not be held to be in violation of clause 3.1.and 3.2 if it is ensured that signals are provided through a particular designated agent or any other intermediary and not directly.

Provided that where the signals are provided through an agent or intermediary the broadcaster/multi system operator should ensure that the agent/intermediary acts in a manner that is (a) consistent with the obligations placed under this regulation and (b) not prejudicial to competition.

3.5 The volume related scheme to establish price differentials based on number of subscribers shall not amount to discrimination if there is a standard scheme equally applicable to all similarly based distributors of TV channel(s).

(Explanation: "Similarly based distributor of TV channels" means distributors of TV channels operating under similar conditions. The analysis of whether distributors of TV channels are similarly based includes consideration of, but is not limited to, such factors as whether distributors of TV channels operate within a geographical region and neighbourhood, have roughly the same number of subscribers, purchase a similar service, use the same distribution technology. '')"

After Regulation 4.1 as notice heretobefore, clauses 4.2 and 4.3 were added. We may also notice that the TRAI appended an Explanatory Memorandum, the relevant portions whereof read as under:

> "3. Moreover, the interests of consumers as well as the broadcaster/ multi system operator also get adversely affected if the distributor of TV channels decides to switch off signals of a particular channel due to some dispute with the broadcaster/ multi system operator. Accordingly, to protect their interests it is necessary that they get similar advance notice regarding discontinuation of TV channel signals. Therefore, the requirement of giving advance notice to disconnect signals has been extended to the distributors of TV channels also.
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> 4. The purpose of having a public notice is to give the consumers an opportunity to approach the necessary forum to ensure that their interests do not suffer on account of a dispute to which they have not contributed in any way. However, the very purpose gets defeated if the public notice is not issued at the time of giving notice to the service provider and is issued much later leaving very little time for consumers to agitate the matter at appropriate forum. Accordingly, it is necessary that the consumers get the notice before the notice period begins. Considering the fact that cable TV has reached even remote parts of the country, the notice period should be sufficient to enable the affected parties to approach the appropriate forum.
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> 6. The notice to the service provider concerned should clearly inform the service provider about the reasons for proposed disconnection. The notice should specify the terms & conditions of the agreement which have been allegedly violated and the details of such violation rather than cryptically mentioning violation of the agreement as the reason for issue of the notice. This is necessary so as to pin point the issues of dispute, so that the affected service

provider can take steps either for rectifying the violation or to approach appropriate forum for redressal. Similarly, the public notice should also have the reasons for proposed disconnection in brief."

The Central Government enacted the Cable Television Network Act in 1994. Prior thereto an Ordinance was promulgated. The Central Government in exercise of its Rule making power in terms of the said Ordinance framed Rules known as "The Cable Television Network Rules, 1994, wherein the cable operator has been defined in Rule 2(aa), to mean:-

"2. (aa) "cable operator' means any person who provides cable service through a cable television network or otherwise controls or is responsible for the management and operation of a cable television network."

Rule 3 provides for application for registration for a cable television network in India. It, however, does not apply to the broadcasters. Rule 6, however, provides for programme code. Sub-rule 6 of Rule 6, however, reads as under:

"6(6) No cable operator shall carry or include in his cable service any television broadcast or channel, which has not been registered by the Central Government for being viewed within the territory of India.

PROVIDED that a cable operator may continue to carry or include in his cable service any Television broadcast or channel, whose application for registration to the Central Government was made on or before 11th May, 2006 and is under consideration, for a period upto [31st May, 2008]1 or till such registration has been granted or refused, whichever is earlier

PROVIDED further that channels uplinking from India, in accordance permission for uplinking granted before 2nd December, 2005, shall be treated as registered television channels and can be carried or included in the cable service."

It would, however, be of some importance to notice that guidelines were issued for downlinking and uplinking of the services by the Central Government. Clause 1.4 of the guidelines for uplinking from India was issued on 02.12.2005. It reads as under:

**"1.4 Special Conditions/ Obligations.**

1.4.1 The company shall uplink only those TV channels which are specifically approved or permitted by the Ministry of I&B for uplinking from India.

1.4.2 The company shall stop uplinking TV channels whenever permission/approval to such a channel is withdrawn by the Ministry of I&B.

1.4.3 The applicant company shall abide by the general terms and conditions laid down in Para 5 below."

Similar guidelines were issued pertaining to policy of downlinking of television channels on or about 11.11.2005, clause 2 whereof provides for the eligibility criteria of registration of channels for being down linked.

The basic fact of the matter is not in dispute which we have noticed heretobefore. We have also noticed the principal contentions of the parties with regard to the maintainability of the petition. Prima facie, the parties had been working on an oral

arrangement. Indisputably, the agreement in writing entered into by them in the year 2007 is no longer in force. One of the questions which, as noticed hereinbefore, arises for our consideration is as to whether the parties should enter into an agreement in writing. The matter relating to the entering into an agreement in writing was introduced for the first time by TRAI in terms of its notification dated 17.03.2009 whereby and whereunder, the regulations were amended. Regulation 4A inserted therein mandated for the broadcasters of pay channels and distributors of TV channels to reduce all the terms of their interconnection to writing. The said provision ex facie does not apply to an agreement of placement of channels or an agreement for carriage of a channel by the distributor.

We, therefore, are of the opinion that prima facie no agreement in writing was necessary.

So far as the question of registration is concerned, there appears to be some lacunae in the notifications. It is true, as has been contended by Mr.Maninder Singh that no guideline can supercede a statute, be it a Parliamentary Act or a Subordinate Legislation; but there cannot also be any doubt or dispute that recourse to the guidelines can be taken if the Regulations are vague. The Rules as noticed hereinbefore were made in the year 1994. They were amended in the year 2007. A proviso has been inserted in sub-rule 6 of Rule 6 which reads as under:

> "(6) No cable operator shall carry or include in his cable service any television broadcast or channel, which has not been registered by the Central Government for being viewed within the territory of India

PROVIDED that a cable operator may continue to carry or include in his cable service any Television broadcast or channel, whose application for registration to the Central Government was made on or before 11th May, 2006 and is under consideration, for a period upto 10th August, 2007 or till such registration has been granted or refused, whichever is earlier

PROVIDED further that channels uplinking from India, in accordance with permission for uplinking granted before 2nd December, 2005, shall be treated as registered television channels and can be carried or included in the cable service."

The question, therefore, which would arise for consideration is as to whether in programme code would apply.

Prima facie, it is imperative in character. It uses a negative word. It furthermore uses the word "shall".

According to Mr.Chawla, there does not exist any provision for registration of transmission of a channel through cable services as the said rules having regard to the uplinking and downlinking guidelines issued by the Central Government must be held to be confined only to those channels which are being transmitted through satellite. It is true that for the purpose of registration as a cable television network or as a broadcaster, the Central Government may not be the proper authority therefor. But we are unable to agree with the submission of Mr.Chawla that even programme code would not be attracted. Indisputably, placement charges or carriage charges are required to be paid to a distributor by the broadcaster for the purpose of placement of its channel on a priority basis as also broadcasting the advertisements of the channel in question. Any channel put for transmission for the purpose of broadcasting, therefore, prima facie, appears to be necessary in terms of the programme code and the

advertisement code. We, prima facie however, are not in a position to agree with the submissions of Mr.Maninder Singh that clause 4.2 and 4.3 are to be read only with clause 3.2 and not otherwise. Submission of Mr.Chawla appears to be correct that having regard to the fact that the Regulator consciously and intentionally inserted clauses 4.2 and 4.3 of the Regulations, the distributor was bound to comply with the said provisions.

On the aforementioned premise, the question which arises for consideration is as to whether the petitioner is entitled to an order of injunction as has been prayed for. This Tribunal in the matter of grant of injunction, indisputably, will be governed by the principles contained in Order 39 Rule 1 and Order 39 Rule 2 of the Code of Civil Procedure, 1908. In exceptional circumstances and in the event the relief of injunction sought for is not covered by the aforementioned provisions, even inherent power of this Tribunal can be resorted to. We are furthermore not oblivious of the fact that while passing an order of injustice, this Tribunal is bound to take into consideration not only the interest of the parties but also the interest of the consumers and/or public interest. There cannot furthermore be any doubt or dispute that the consumers would also have a role to play in the matter. They are entitled to notice of 21 days so as to enable them either to switch over to another channel so that their right to view a particular channel is not infringed and/or either individually approach an appropriate forum or as a group of consumers approach this Tribunal, for the purpose of ventilating their grievances.

Having regard to the provisions of clause 4.2 and 4.3 read with the Explanatory Memorandum appended thereto, there cannot be any doubt that the consumers apart from the distributor will have a cause of action if the said provisions are breached. However, although the period of 21 days is over, no consumer or a group of consumers has filed any application before us.

The agreement by and between the parties hereto is an oral one. What are the terms and conditions of such agreement are not known. The parties only admit that the respondent was to receive a sum of Rs.3 lakhs towards the carriage charges from the petitioner for re-transmitting its channel. It is, however, a common law principle that ordinarily an unwilling person cannot be thrust with a contract of doing something if in relation thereto there does not exist any negative covenant. No such covenant has been brought to our notice. There is also nothing on record to show that in the event of breach of contract on the part of the respondent, the petitioner can enforce the contract. As the arrangement between the parties is an oral one, indisputably, no period is fixed therefor. The contract, therefore, could be terminated at the instance of the parties on reasonable notice. The petitioner therefor was entitled to 21 days notice as is provided under clause 4.2 of the Regulations. However, the petitioner itself has prayed for a decree for damages. Furthermore, the quantum of damages suffered by the petitioner for the alleged breach of the contract on the part of the respondent would be a matter, which can be gone into at the trial of petition. Having regard to the principles contained in Section 14(1)(a) of the Specific Relief Act, 1963, a contract, the breach of which may result in payment of damages would not be specifically enforced. If the contract cannot be specifically enforced, Section 41(1)(e) of the Specific Relief Act, 1963 also prohibits grant of an injunction. In view the aforementioned provisions, we are of the opinion that it is not a fit case where an interim order of injunction, as has been prayed for by the petitioner, should be granted.

In G.D. Green Flora Resorts Pvt. Ltd. Vs. M/s Kuhn-Rikon Asia Pte Ltd. – AIR1999 Delhi 229, it has been held as under:

> "7. In M/s. Pepsi Foods Limited Vs. Jai Drinks Private Limited 1996 1 A.D. (Delhi) 1097 while referring to the contentions of the counsel in that case that the contract being for a period of 10 years could not be terminated and the defendant was estopped from terminating it on account of the plaintiff having changed its stand by investing

considerable amount for its bottling plant for manufacturing and marketing the products for which a license had been given by the defendant and that there being no complaint against the plaintiff, there was no occasion for the defendant to terminate the contract, this Court held that those were not the questions which had to be gone into at that stage of the suit and moreover, in case it was ultimately held that the termination of the agreement was wrongful, the only relief to which the defendant could be entitled was the damages for such wrongful termination. In such type of a contract, in case two parties have fallen out, it was within the right of one of the parties to terminate such type of contract. In case, the termination was wrongful, the party would be entitled to damages, however, the party cannot compel the other party to continue to act under the agreement as it would have amounted to specific performance of an agreement which under the law could not be specifically enforced. In a private commercial transaction, the party could terminate the contract even without assigning any reason with a reasonable period of notice in terms of clause under the agreement."

In Rajasthan Breweries Ltd. Vs. The Stroh Brewery Company – AIR2000 Delhi 450, it has been held as under:-

"19. Even in the absence of specific clause authorising and enabling either party to terminate the agreement in the event of happening of the events specified therein, from the very nature of the agreement, which is private commercial transaction, the same could be terminated even without assigning any reason by serving a reasonable notice. At the most, in case ultimately it is found that termination was bad in law or contrary to the terms of the agreement or of any understanding between the parties or for any other reason, the remedy of the appellants would be to seek compensation for wrongful termination but not a claim for specific performance of the agreements and for that

view of the matter learned Single Judge was justified in coming to the conclusion that the appellant had sought for an injunction seeking to specifically enforce the agreement. Such an injunction is statutorily prohibited with respect of a contract, which is determinable in nature."

In any view of the matter, granting of an order is mandatory for stands on a different footing vis-à-vis an order in prohibition form, for which a strong prima facie cases required to established and not a merely a trioble issue. Even otherwise we can satisfied the balance of convenience also lies against grant of order on injunction. Moreover, damages payable if this petition ultimately succeeds.

Before parting with this case, however, we may notice that Mr.Maninder Singh has relied upon a decision of this Tribunal in Petition No.113(C) of 2007 – Total Telefilms Pvt.Ltd. Vs. Tata Sky Ltd. (DTH Licensee) disposed of on 25.07.2008 and a decision of ours in Petition No.80(C) 0f 2010 in Grand Bhatia Entertainment Pvt. Ltd. Vs. Star Den Media Services Pvt. Ltd.& Ors. disposed of on 22.04.2010.

In Grand Bhatia(supra), we have held as under:

"16. In absence of any contract, prima-facie the petitioner has no legal right to obtain supply of signals from the broadcasters. Admittedly the relationship of supplier and receiver of signals is by and between the broadcaster and the respondent no. 3. No transfer of the said agreement is permissible without the approval of the broadcasters. Except making some payment in favour of MSM Discoveries, no payment has also been made in

favour of other broadcasters. Such payment to MSM discovery has been made on behalf of the existing licensee and not by the petitioner on its own behalf. No relationship by and between the petitioner with any of the broadcasters, thus has come into being.

17. Prima-facie on interpretation of clause 3.2, 4.1 and 4.3 of the Interconnect Regulations, it is difficult to hold that even a trespasser or a person without any legal right would be entitled to an interim order from this Tribunal.

An interim order can be granted provided the applicant establishes a prima-facie case in its favour. The petitioner has failed to do so.

Even assuming that the petitioner could validly enter into an agreement with one of the partners of respondent no. 2, it could not have acquired more than 20% share in the said business."

In Total TV (supra), it was held:

"The said Regulation does not contain any provision in the nature of "must carry" i.e. that the service provider including DTH operators must carry channels offered by broadcasters. In this connection reliance has also been placed by the counsel for petitioner on Clause 7.6 of the License granted by the Ministry of Information & Broadcasting, Government in favour of the DTH Operators. The said Clause reads as under:-

"the Licensor shall provide access to various contents providers/channels on a non-discriminatory basis."

This clause has also been considered in the said judgment of this Tribunal where we declined to accept the interpretation being put forth by the learned counsel for the petitioner now before me. Reading the said Clause, I reiterate that at best it can be said that the licensor has to provide access to various content providers/channels on a non-discriminatory basis but that does not mean that it has to carry all the channels of all the broadcasters. That will be asking for something impossible. Clause 7.6 does not use the word "must carry". While on this issue, one has also to take into account the technical aspect i.e. transponder capacity constraints and limitation arising from the fact that it is physically not possible to carry all more than 300 channels which today are available. Tomorrow the number of channel may go up further. If the gates are opened for inclusion of all channels on DTH platforms as and when a broadcaster approaches the DTH operators, there will be no limit and every channel will have to be accepted because there is to be non-discrimination. Such an unreasonable interpretation of Clause 7.6 cannot be accepted."

Mr.Chawla, however, sought to distinguish the same stating that in that as case for the first time in Grand Bhatia applied for connection and, thus said judgment is not applicable.

We, at this stage, however, are of the opinion that no case has been made out for grant of an order of injunction. We, however, hasten to add that the findings recorded by us are prima facie in nature and all contentions of the parties shall remain open. The petitioner may file its rejoinder within a period of two weeks from date.

In the facts and circumstances of this case, we also direct that the hearing of this petition shall be expedited.

Put up for further directions and/or framing of issues on 2.7. 2010.

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

**……..**
**(G.D. Gaiha)**
**Member**

**……**
**(P.K. Rastogi)**
**Member**