TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Date: April 21, 2011

Petition No.174 (C)/2010

Clear Media (India) Pvt. Ltd. … Petitioner

Vs.

Prasar Bharti and 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 Respondent No.1 : Mr.Rajeev Sharma, Advocate

For Respondent No.2 : Mr.Harish Kumar Garg, Advocate

J U D G M E N T

S.B. Sinha

Introduction

Interpretation of a provision contained in an Agreement dated 3.2.2006, is in question in this petition, wherein the petitioner inter alia has prayed for the following reliefs :-

> "A) Issue an injunction, order or direction or any other appropriate writ, order or direction quashing the demand notice dated 21.4.2010 and invoices dt. 9.9.2009 issued by Respondent no.1
>
> B) Issue a direction that the obligation on part of the petitioner to pay rent for the CTI open/covered

licensed infrastructure as per agreement dt. 7.2.2006 arose from 21.8.2009, i.e. the date of commencement of FM broadcast from the CTI facility.

C) Award the costs of the instant petition to the petitioner."

Background Facts

Pursuant to an invitation of offer issued by the Central Government to issue licenses for broadcasting FM radio in Phase II in September, 2005, the petitioner amongst others submitted its tender. The said invitation to tender inter alia contained the following conditions :-

"(i) It would be mandatory for the operators to co-locate transmission facilities;

(ii) Co-location shall be done only on AIR/DD (Prasar Bharti Tower and land)

(iii) Amongst the 91 cities for which the tender was floated, in 84 cities where the towers were available, the broadcasters will have to co-locate the existing AIR/DD towers.

(iv) In the rest of the 7 cities including Delhi, new towers were be constructed by the Ministry of Information and Broadcasting through Broadcasting Engineering Consultants India Ltd (BECIL).

(v) It would be mandatory for BECIL to be the system integrator for creating the common transmission infrastructure for the private broadcasters.

(vi) pending creation of co-location facility by BECIL, the successful bidders in the 7 cities were permitted to operationalise their channels on individual basis for a period of 2 years or till the co-location facility is commissioned whichever is later, at the end of which they would be asked to shift their operations to the new facilities.

(vii) Permission to run the individual channel were to be granted to each successful bidder only after it had entered into an agreement with (a) BECIL appointing them as system integrator and making full payment towards its share in the CTI; and (b) Prasar Bharti for rental of open/ covered space to set up the CTI and make requisite payments towards the rental."

Admittedly, both the respondents herein, namely the Prasar Bharti and BECIL are statutory Corporation/Government of India Undertaking.

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The petitioner was declared one of the five successful bidders to operate an FM Radio broadcast service in Delhi upon submission of the financial bid of Rs.13 crores 33 lakhs; 50% whereof was to be deposited in advance and the rest 50% by way of Performance Bank Guarantee. The said amount was deposited by the petitioner in January, 2006.

The Ministry of Information and Broadcasting issued a letter of intent for operating an FM Radio broadcast service in Delhi on or about 17.1.2006. It directed the petitioner to comply with requisite eligibility conditions for signing a Grant of Permission Agreement (GOPA) within a period of 9 months.

The petitioner was to sign an agreement amongst others, with BECIL, make advance payment to it within 30 days of the grant of Letters of Intent, sign an agreement with Prasar Bharti and make requisite payments within 60 days of the issuance thereof.

A Project Management Agreement was signed by the petitioner for CTI at Delhi with BECIL on or about 3.2.2006. It made a 100% advance payment of Rs.1 crore 8 lakhs being its share of the

estimated costs; being Rs.43,23,09,000/- which was to be shared by the four broadcasters.

BECIL also charged project management fee of 10% on actual cost of CTI.

The petitioner signed an agreement with Prasar Bharti on or about 7.2.2006 in terms whereof open space of 220 Sq.Mtrs. was leased out for installation of CTI.

An advance payment of one year's rent amounting to Rs.15,08,000/- and security deposit of the equivalent amount was paid by the petitioner to Prasar Bharti.

On or about 13.3.2006, an agreement was entered into by and between the petitioner and the respondent no.1 herein for installation of transmission infrastructure.

A sum of Rs.18,33,000/- and a security of the similar amount was deposited by the petitioner with Prasar Bharti as one year's advance payment of rent.

The petitioner was allocated spectrum by the WPC being of the Department of Telecommunication on or about 16.3.2006. The crucial agreement i.e. GOPA was signed by the MIB with the

petitioner on or about 14.6.2006 for the purpose of establishing, maintaining and operating FM Radio broadcasting channel at Delhi. The WPC Wing of the Department of Telecommunication granted to the petitioner a license for establishing a wireless telegraph station and allocated frequency at 95 MHz on 28.6.2006. It started broadcasting its FM Radio programme from interim broadcast facilities made available to it by the Prasar Bharti on and from 1.9.2006. It is now not in dispute that BECIL purported to be acting as an agent of the petitioner herein took possession of the vacant land from the respondent no.1 on or about 2.7.2007, wherefor it issued a certificate. It appears that the respondent no.2 had not intimated the petitioner thereabout but the petitioner had been making enquiries with regard to the status of construction from BECIL from time to time.

It is not in dispute that upon completion of the tower, in relation whereto also there was some dispute, on a request of the MIB inter alia by reason of a letter dated 28.5.2009 to shift it to the CTI, the petitioner shifted thereto on or about 21.8.2009.

The impugned invoices were raised by the Prasar Bharti claiming rent towards open/covered space at CTI from 1.7.2008 to 2.7.2010. The petitioner, however, by a letter dated 5.10.2009, asked Prasar Bharti to refund the amount of security deposit as also the unutilized rent. It stands admitted that a dispute having arisen with regard to the date from which the petitioner was to pay the

rent to BECIL/ MIB in respect of the tower and/or for other reliefs, it filed a petition before this Tribunal which was marked at Petition No.248 (C)/2009.

By reason of a judgment and order dated 9.7.2010, while holding that the petitioner would be bound to pay rent on or from 13.8.2009, when the construction and handing over of the complete facilities of the broadcast to the petitioner was carried out and not prior thereto, the petitioner was found to be entitled to damages for default on the part of respondent no.2 (BECIL) so far as it failed to complete the constructions of the tower and installation of facilities within the time specified therein.

Agreements/ License

With the aforementioned backdrop of factual matrix, we may have to look at the relevant documents. First of all, we may notice the tender document dated 29.1.2005, the relevant clauses whereof are 2.10.1, 2.10.2, 2.10.3, 2.10.4 and 2.10.5. The said clauses read as under:-

> **"2.10 PAYMENT OF BID AMOUNT AND ISSUE OF LETTER OF INTENT**
>
> 2.10.1 The Successful Bidders, shall pay to the Government of India, the balance 50% of their

respective Financial Bids within a period of seven days from date of announcement of Successful Bidders by the Government of India ("**Balance Bid**"); failing which the Financial Bid Deposit Amount shall be forfeited and such defaulting Successful Bidder shall automatically stand disqualified from participating in any fresh bidding process for FM radio in India up to a period of five (5) years.

2.10.2 Upon deposit by the Successful Bidders of the balance 50% of their respective Financial Bids within a period of seven days from 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.

2.10.3 The purpose and objective of issuing the Letter of Intent would be to enable the Successful Bidder to obtain frequency allocation, SACFA clearance, achieve financial closure, appoint all key executives, enter into agreements with Prasar Bharati (DD/AIR) /BECIL, deposit the requisite amounts towards land/tower lease rent, common transmission infrastructure etc., furnish an irrevocable, unconditional and confirmed performance bank guarantee in favour of the Government of India for an amount equivalent to 10% of the Reserve OTEF ("**PBG II**" in the format to be prescribed separately) and comply with the requisite conditions of eligibility for signing the formal document for the grant of Permission. PBGII shall be initially valid

for a period of two years and shall be renewed at least one month prior to the expiry of each two years' term.

2.10.4 Each successful bidder shall enter into an agreement with Prasar Bharati (DD/AIR) for land/tower lease as referred above in the format to be prescribed separately within 60 days of the issue of LOI and agreement with BECIL within 30 days thereafter for Common Transmission Infrastructure on the format to be prescribed separately.

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."

From a perusal of the aforementioned provisions, it would be evident that the parties were to enter into a revenue share arrangement, namely, 4% of AGR by reason of the OTEAF. Indisputably, unless the petitioner has entered into agreement with BECIL and Prasar Bharti, GOPA would not have been issued. The said condition was imperative in character. The grant of FM license was also dependant thereupon.

Clauses 3.11.1 and 3.11.2 read as under :-

"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 by 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 their share in the common infrastructure for co - location."

The aforementioned provisions make a clear distinction between two different types of towns/cities, necessitating different types of co-location.

Whereas in respect of 84 cities, co-location was to be done in the towers of AIR/ DD, seven new towers including the ones at Delhi were to be constructed through BECIL.

It is furthermore not in dispute that permission had been granted to the broadcasters including the petitioner herein to carry out their program as an interim measure from the towers of the respondent No.1.

The letter of intent was given to the petitioner on 17.1.2006, paragraph 2 whereof reads as under

> "…..The purpose and objective of this LoI is to enable you, as the Successful Bidder, to comply with the requisite conditions of eligibility within nine months hereof for signing the Grant of Permission Agreement (GOPA in short), to obtain frequency allocation, SACFA clearance, achieved financial closure, appoint all key executives, enter into agreement with Prasar Bharti (DD/AIR)/ BECIL, deposit the requisite amounts towards land/ tower lease rent, common transmission infrastructure etc., and to furnish an irrevocable, unconditional and confirmed performance bank guarantee in favour of the Government of India for an amount equivalent to 10% of the Reserve OTEF ("**PBG II**") as specified in the Tender Document…"

The agreement with Prasar Bharti was entered into by the petitioner on or about 7.2.2006, Clause 3 whereof provides for the amount of consideration.

Clauses 3.1 and 3.3 of the said agreement read as under:-

"3.0 CONSIDERATION

3.1 The Licensee 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			0.00 lakhs

	applicable)			

(# Strikeout whichever is not applicable)

* This includes common area on shared basis among the Private Broadcaster.

** The license Fee/ Security deposit is subject to change and balance license Fee/ Security deposits shall be payable/ refundable as per the final measurements, which shall be determined/ measured jointly by M/s BECIL and AIR/DDK authorities after completion of Installation.

@ Licence Fee in respect of S.No. A and B is in accordance with the rates prescribed/ approved by Prasar Bharti/ Government for difference categories of cities.

3.3 For the purposes of effectiveness of the payment under this agreement, the first year shall be deemed to commence from the date the Tower aperture and Open space/ Covered space respectively, is made available to the Licensee or BECIL on behalf of the Licensee."

On a plain reading of the aforementioned paragraph, it would appear that the software/ hardware and electronic infrastructures were to be installed in open/covered space. The term for the agreement was 10 years from the date of commencement/operation of the channel allotted to the licensee.

The use of the term `operationalisation' is important which would be dealt with by us at some details a little later, keeping in view the defence raised by the respondents no.1.

Indisputably, the period of agreement was for 10 years. The licenses granted to the petitioner was also for the same term.

Clause 7.1 reads as under:-

> "7.1 All CTI equipment wherever combined with licensor's RF chain shall have a lock-in period which shall commence from the date of the execution of this agreement and remain valid for a period upto ten years from the date of operationalization."

Clause 10.2 provided for termination of agreement in the following terms:-

> "10.2 The agreement shall automatically stand terminated if:

a. the grant of permission agreement executed between the Licensee and the Government of India is terminated.

b. the SACFA clearance/ frequency authorization issued by WPC in favour of the Licensee is revoked."

Clause 11 provided for an amendment to the agreement, stating:-

"11 AMENDMENT TO THE AGREEMENT.

This agreement reflects the complete understanding between the parties and shall not be changed or modified except by written instrument duly signed by the parties to the agreement."

On or about 20.2.2006, the petitioner, by a letter issued to the respondent No.1, contended that it had made payment of one year's rent in advance as also security deposit in good faith on certain assumptions stating:

"CMI has made the above mentioned payments in good faith on the following assumptions/ basis:-

a) That the final rental chargeable by Prasar Bharti for the covered and/or open space will be as per actual calculations of area used by CMI and the shortfall or excess will be paid by CMI/ refunded by Prasar Bharti upon actual calculations taking place.

b) That the Prasar Bharti has SACFA clearance for the tower and will be forwarding this SACFA clearance forthwith.

c) That the AIR Resources, Prasar Bharti and CMI will sign an agreement for the usage of the facilities mentioned herein upon receipt of approval from Ministry of Information & Broadcasting.

d) That the commencement due for the rental amounts will be from the date the entire facilities are handed over to CMI for installation."

On or about 13.3.2006, another agreement was entered into by and between the parties hereto for different SUBs.

We may notice one of the recitals made therein :-

> "……..AND WHEREAS in terms of the Private FM Radio Policy (Phase-II) announced by the Government of India, successful bidders as per Para 3.11.2 of tender document can have **interim set up** either independently or at AIR/DD station at six places where designated

infrastructure of PB/ MIB are yet to be made available. Since tower at permanent location is not ready licenser desires to co-locate transmission facilities with existing infrastructure of the Licensor for establishing interim setup till erection of permanent tower. In the circumstances the Licensee has requested the Licensor to permit it to avail of its other infrastructure facilities i.e. Tower aperture, Open space (Land)/ Covered space (Building) and other facilities situated at **Mall Road, Delhi** (hereinafter referred to as the **Licensed Infrastructure)**…."

Consideration for the aforementioned agreement has been laid down in clause 2 thereof which reads as under:-

"2.0 Consideration

2.1 The Licensee shall pay annual License Fee in advance or at the time of signing of this agreement to the Licensor for the use of the licensed infrastructure in accordance with the rates prescribed by Government for different categories of cities as notified:

SNo.	**Licensed Infrastructure**	**Rate**	**Quantity**	**License Fee @ Per Annum**
A	Tower Aperture of 20 meters {80 -100 mtrs. Slot} On 100 mtr Maconi Tower at Mall Road, Delhi	**Rs 13.20** lacs per annum	ONE	Rs **13.20**
B	Open space		20 Sq. mtr-	Rs 1.28 lacs **

		Rs 6400 /- per sq.mt, per annum		
C	Covered space #	Rs.7600/- per sq.mt, per Annum	37.5 Sq. mtr,	Rs **2.85 lacs***
D	Common facilities	Rs.1.0 lakh per annum	LS	Rs.1.0 lakh
E	Antenna #	Rs. ---- lakh per annum	-----	Rs.0.0
F	Taxes (as applicable)	@ ….%		

(# Strikeout whichever is not applicable)** The license Fee/ Security deposit is subject to change and balance license Fee/ Security deposits shall be payable/ refundable as per the final measurements which shall be determined; measured jointly by representatives of Licensee and Licensor authorities after completion of Installation.

Note: The licensee shall also pay taxes wherever applicable **from time to time**

2.2 The annual License Fee shall be increased by

a) 10% after every two years for Open/Covered space, and common facilities or prorata i.e. 5 % after every one year.

b) 2.5 % after every year for Tower

2.3 For the purposes of effectiveness of the payment under this agreement, the first year shall be deemed to commence from the date of the execution of this agreement which will also be the deemed date of handing over of the licensed infrastructure to licensee.

2.4 Subsequent payment of License Fee (with specified increment) will become due after completion of twelve months as advance license fee for the next year. The payments for which will be made within 15 days of becoming due failing which interest is Chargeable @ prevailing SB1 PLR + 2 % per annum.

2.5 All payment shall be made in favour of "Prasar Bharti,' through a Demand Draft drawn on a Scheduled Bank payable at par at N. Delhi, to AIR resources.

Clause 2.3 provides for the rates payable for the first year stating

> "2.3 For the purposes of effectiveness of the payment under this agreement, the first year shall be deemed to commence from the date of the execution of this agreement which will also be the deemed date of handing over of the licensed infrastructure to licensee."

The said clause appears to be somewhat inconsistent with Clause 3.3 of the agreement dated 7.2.2006. So far as the said agreement is concerned, there was no role for BECIL to play.

These two agreements show that the parties had entered into two different types of agreements in asmuch as in terms of the second agreement, facilities of common infrastructure was to be provided. What were to be the components thereof had been specified therein.

The petitioner deposited the rent for the covered space on or about 3.5.2006. GOPA was executed on 14.5.2006.

We may notice Clauses 4.2 and 5.1 of the said agreement which read as under:-

> "4.2 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.
>
> 5.1 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."

GOPA provided for a resolution of disputes with third parties in Clause 16.1 thereof, which reads as under:-

"16.1 In the event of any dispute between the Permission Holder and any party other than the Grantor (including in relation to the Permission and/or Broadcasting services. Etc) due to any reason whatsoever, it shall be the sole liability of the Permission Holder to resolve such dispute amicably or otherwise with the other party and the Grantor shall have no liability whatsoever in this regard. Further, the Permission Holder hereby undertakes to indemnify and keep the Grantor harmless in respect of any action, claim, suit, proceeding, damage or notice to/against the Grantor for any act of omission or commission on the part of the Permission Holder, its agents, employees, representatives or servants. 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."

The said provision has been noticed by us, as it was contended that in a given situation Prasar Bharti may be considered to be a third party.

Clause 25 of GOPA provided for termination of permission for default in the following terms :-

> "25.1.1 The Permission Holder shall operationalise the Channel within 18 months of the date of signing of this Agreement, excluding any extension under clause 3.3 above, failure to do so, the Permission will be revoked, and Permission Holder shall be debarred from allotment of another channel in the same city for a period of five years from the date of such revocation. The frequency so released may be allotted to a fresh Successful Bidder."

Clause 25.3.1 of GOPA reds as under:-

> "25.3.1 Without prejudice to clause 23.2.1, in the event of the Permission Holder violating any of the terms and conditions of Permission or any other provisions of the FM Radio policy, the Grantor shall have the right to impose the following sanctions:

(a) For first violation, suspension of the Permission and prohibition of broadcast up to a period of 30 days.

(b) For second violation, suspension of the Permission and prohibition of broadcast up to a period of 90 days.

(c) For third violation, revocation of the Permission and prohibition of broadcast up to the remaining period of the Permission."

Clause 26 provides for the dispute resolution and jurisdiction. It states:-

"26.1 In the event of any question, dispute or **differences** arising under this Agreement or in connection thereof, except as to the matter, the decision of which is specifically provided hereunder, shall, subject to the Telecom Regulatory authority of **India** Act, 1997, be referred to sole arbitration by the Secretary, Department of Legal Affairs, Government of India or his nominee ("Arbitrator")."

Keeping in view the stand taken by the respondent, namely, that a mistake was committed in drafting Clause 3.3 which would appear from another agreement entered into by and between Prasar

Bharti and a third party for Ahmedabad co-location, we may notice the same also.

The said agreement was entered into on or about 17.3.2006, for the town of Ahmedabad with one M/s Synergy Media Entertainment Ltd.

Clause 3.1 and 3.3 whereof reads as under:-

"3.0 CONSIDERATION

3.1 The Licensee 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	Tower	Rs.5.25 lakh per annum	One	Rs.8.25 lakhs
B	Open Space	Rs.5,200/- per sq.mt. per annum	210Sq.mtr * (As per layout plan submitted by BECIL)	10.92 lakhs

C	Covered Space #	Rs.6,400/- per sq.mt. per annum	0.00 Sq.mtr * (As per layout plan submitted by BECIL)	
D	Common facilities	Rs.1.00 lakh per annum	LS	Rs. 1.00 lakh
E	Antenna #			
F	Taxes (if applicable)			
	TOTAL (A+B+C+D+E+F)			Rs.20.17 lakhs

(# Strikeout whichever is not applicable)

* This includes common area on shared basis among the Private Broadcaster.

** The license Fee/ Security deposit is subject to change and balance license Fee/ Security deposits shall be payable/ refundable as per the final measurements, which shall be determined/ measured jointly by M/s BECIL and AIR/DDK authorities after completion of Installation.

@ Licence Fee in respect of S.No. A, B, C and D is in accordance with the rates prescribed/ approved by Prasar Bharti/ Government for difference categories of cities.

Note : The licensee shall also pay taxes wherever applicable from time to time.

3.3 For the purposes of effectiveness of the payment under this agreement, the first year shall be deemed to commence from the date the Tower aperture and Open space/ Covered space respectively, is made available to the Licensee or BECIL on behalf of the Licensee."

Correspondences

We have noticed heretobefore that the impugned demand was made on 9.9.2009. It reads as under:-

"File No.14 (4) ARC/2009 (Regular)/1088 Dated 09.09.2009

Bill No.64/2009-10

Sl.No	Details	Period	Rate	Quantity	Amount (In lacs)
1.	Advance license fee for Open space	02.07.2008 to 01.07.09	Rs.6,400/- per sq. mtr. Per annum	93.2 Sq.mtr *	Rs.14.08 Lacs
2.	Common facilities	Do	Rs.1.0 Lacs. Per annum	LS	Rs.1.0 Lacs

3.	Total				Rs.15.08 Lacs
4.	Service Tax on License Fee amounting to Rs.9,83,299/-	02.07.2008 to 24.02.09	@ 12.36%		Rs.1.21536 Lacs
5.	Service Tax on License Fee amounting to Rs.5,24,701/-	25.2.2009 to 01.07.09	@ 10.30%		Rs.0.54044 Lacs
	Grand Total				**Rs.16.8358 Lacs**

(Rupees Sixteen lakhs eighty three thousand five thousand eighty

only)

NB:

(1) As per the Clause 3.2 of the Agreement annual license fee shall be increased by 10% on open space, covered space and common facilities after every two years.

(2) The advance license Fee (first/second year)/Security deposit for open space and covered space area shall be payable/refundable after final completion measurements, which shall be determined/ measured jointly by M/s BECIL and AIR/DDK authorities after completion of Installation. It is still awaited by M/s BECIL.

(3) It is requested to make the payment with in 15 days from the date of issue of this invoice otherwise penal interest will be charged @ Prevailing SBI's PLR + 2% per annum as per Clause 3.4 of Agreement."

"File No.14 (4) ARC/2009 (Regular)/1089 Dated 09.09.2009

Bill No.69/2009-10

Sl.No	**Details**	**Period**	**Rate**	**Quantity**	**Amount (In lacs)**
1.	Advance license fee for Open space	02.7.2009 to 01.07.10	Rs.7,040 per sq. mtr. Per annum	220 Sq.mtr *	Rs.15.488 Lacs
2.	Common facilities	Do	Rs.1.1 Lacs. Per annum	LS	Rs.1.1 Lacs
3.	Total				Rs.16.588 Lacs
4.	Service Tax on License Fee	Do	@ 10.30%		Rs.1.70856 Lacs
	Grand Total				**Rs.18.29656 Lacs**

(Rupees Eighteen lakhs twenty nine thousand six hundred fifty

Six only)

NB:

(1) As per the Clause 3.2 of the Agreement annual license fee shall be increased by 10% on open space, covered space and common facilities after every two years.

(2) The advance license Fee (first/second year)/Security deposit for open space and covered space area shall be payable/refundable after final completion measurements, which shall be determined/ measured jointly by M/s BECIL and AIR/DDK authorities after completion of Installation. It is still awaited by M/s BECIL.

(3) It is requested to make the payment with in 15 days from the date of issue of this invoice otherwise penal interest will be charged @ Prevailing SBI's PLR + 2% per annum as per Clause 3.4 of Agreement."

Whereas the first invoice was for the period for 2.7.2008 to 1.7.2009, the second one was for the period 2009-2010.

The petitioner protested thereagainst by its letter dated 4.12.2009, stating:-

> "1) Open space has not been handed over by Prasar Bharti to CMIPL and even after numerous requests by CMIPL intimation with regard to Handover of Open Space by Prasar Bharti to BECIL has not been given to CMIPL either by Prasar Bharti or BECIL and
>
> 2) the Tower Aperture has not been handed over along with a copy of Tower approvals from the Municipal Corporation of Delhi and other local authorities, the payment of Licence Fee demanded by Prasar Bharti is not due by CMIPL. The Licence Fee can only become due to Prasar Bharti once **BOTH** the above mentioned conditions are fulfilled.
>
> 5) Further, CMIPL would like to bring to the notice of Prasar Bharti that it has commenced Broadcast from an incomplete Co-located transmission facility on 21.8.2009 only due to the pressure put by the Ministry of Information and Broadcasting and BECIL on CMIPL, and it cannot be liable for, nor be asked to bear the cost for both interim and CTI facility at the same time. It is both arbitrary and inequitable.
>
> 6) As per Clause 12 of the Agreement dt. 7.2.2006, we would like to resolve this issue through mutual consultation. We hereby authorize Sh.Nikhil Majithia to act as our representative to interact with Prasar Bharti for the said purpose. An early response on this count shall be appreciated."

The respondent no.1, however, by its letter dated 22.12.2009, contended:-

> "……It is regretted that M/s Clear Media instead of making payment of annual rentals, has raised issues which do not have any bearing on the rentals to be paid by M/s Clear Media to Prasar Bharati. The fact of the matter is that M/s BECIL has constructed (CTI) on the Open/Covered space provide by Prasar Bharati. M/s Clear Media in their letter have stated that they have written numerous letters to Prasar Bharati requesting for intimation regarding the handing over of Prasar Bharati infrastructure to M/s BECIL. AIR Resources has checked its records and it does not find even a single letter from M/s Clear Media on this subject. It would be appreciated if copies of all such letters are provided to AIR Resources.
>
> The basic issue raised by M/s Clear Media vide their above referred letter relates to their not having any information regarding the handing over of Prasar Bharati infrastructure to M/s BECIL on behalf of the Pvt Broadcasters as per clause 3.3 of the agreement signed by them with Prasar Bharati. The site/ infrastructure at HPT, Kingsway Delhi was handed over to M/s BECIL, the system integrator for Pvt Broadcasters, vide AIR Kingsway Delhi letter no.H.P.T.K.Pvt-.Broadcasters/FM1/07-08 dated 05.03.2009. M/s Clear Media are aware that Prasar Bharati has provided only the Open/Covered Space for the construction of CTI. M/s BECIL have erected a new tower for CTI out of the funds provided by the Ministry of I & B. As such Prasar Bharati

has raised invoices for Annual Rentals for Open & Covered space only.

M/s Clear Media vide Para 5 of their letter have stated that they have shifted to incomplete CTI setup under duress from Ministry of I & B and M/s BECIL. M/s Clear Media are well aware that Prasar Bharati's role in the setting up of CTI is limited in providing its infrastructure for CTI and charge annual rentals thereof. As such all such issues need to be taken up with the concerned parties only…."

Meetings between parties were held on 4.3.2010. Minutes of meeting thereof were drawn up. When it was pointed out that the open space had not been handed over or any intimation thereabout was communicated to the petitioner, Prasar Bharti contended that it was the job of BECIL.

The Respondent no.1 however, by a letter dated 8.3.2010, stated:-

"… The representatives of M/s Clear Media had a meeting with the General Manager (Com.). AIR Resources on 4.3.2010 to discuss issues related to the CTI at Delhi. During the course of the meeting, the representatives of M/s Clear Media also raised the issue that M/s BECIL, the System Integrator, who had taken over the Prasar Bharti infrastructure on their behalf have not informed them the date of taking over of the Prasar Bharti infrastructure.

> M/s BECIL are requested to inform M/s Clear Media, the date of taking over of Prasar Bharti infrastructure alongwith a copy of handing over/ taking over of document."

According to the petitioner, BECIL did not respond to the said letter.

It now transpires that Prasar Bharti has adjusted the arrears for the year 2007-2008 from the advance license fee sometimes in the year 2009 but according to the petitioner, no intimation thereabout had been given to it.

By a letter dated 9.4.2010, the petitioner asked Prasar Bharti to clarify thereabout. The petitioner however, received a letter from Prasar Bharti on or about 21.4.2010, stating as under:-

> **"...**Further, as per Clause-3.3 of the Agreement, the annual rentals become due from the date Prasar Bharati infrastructure is handed over to Private Broadcasters or M/s BECIL on their behalf. Accordingly, in the instant case the annual rentals became due w.e.f 02.07.2007. The advance annual rentals deposited by M/s Clear Media with Prasar Bharati at the time of signing the Agreement have been adjusted against the annual rentals due for the first year i.e. for the period 02.07.2007 to 01.07.2008.
>
> Prasar Bharati has already sent invoices No. 64/2009-10 and 69/2009-10 dated 9.9.2009 for the annual rentals for the second year (2.7.2008 to

1.7.2009) and the third year (2.7.2009 to 1.7.2010) respectively to M/s Clear Media. These invoices do not need any further revision.

M/s Clear Media are, accordingly, requested to release the payment of annual rentals for the sharing of Prasar Bharati infrastructure at Kingsway, Delhi as mentioned in the invoices referred above urgently…"

BECIL –Whether a Proper Party ?

The petitioner, as noticed heretobefore, has not prayed for any relief against BECIL.

According to the petitioner, it is merely a proper party as the dispute should be determined in its presence. According to BECIL, however, it is neither a necessary nor a proper party.

We may furthermore place on record that although the BECIL's conduct of not intimating the petitioner in regard to the taking over of the open space vis-à-vis the certificate granted was in question, the same had not been pressed at a later stage of these proceedings.

We may furthermore place on record that the learned counsel had proceeded on the basis that BECIL in terms of the agreements was its agent.

BECIL, therefore, is not a necessary party. However, as we have heard the learned counsel for Respondent No.2 also on the merit of the matter, we would proceed on the basis that keeping in view various contentions raised before us, it was necessary to hear the said respondent.

Contentions

The Respondent no.1 in its reply primarily raised two contentions:-

(i) That this Tribunal has no jurisdiction to determine the dispute as the dispute is principally a landlord and tenant dispute and has nothing to do with a dispute between a service provider and a service provider, in respect of their activities in the said capacities.

(ii) Clause 3.3, shall not be given a plain meaning as, the same would result in gross anomaly and/or lead to absurd it.

The respondent no.2, however, principally contended that it was not a necessary party and in any event :-

(a) It had taken possession from Prasar Bharti for construction of the CTI on or about 2.7.2009, pursuant to or in furtherance of the authorization granted to it in terms of clause 3.3 of the agreement dated 7.2.2006.

(b) It was not necessary for it to intimate the petitioner thereabout.

(c) In any event the petitioner was aware of taking over of possession of the land as it had been asking for status of construction.

(d) The cross-examination of its witness Ram Singh would categorically go to show that the petitioner has accepted the said fact.

Issues

By reason of an order dated 23.8.2010, this Tribunal has framed a large number of issues, the principal ones, however, are the following:

1. Whether this Tribunal has jurisdiction to try and adjudicate upon the dispute involved in the present case?

2. What is the effective date for the purposes of obligation to pay rent for the CTI open/covered space as per the Agreement dated 7.2.2006?

3. What would be the true and correct interpretation of Clause 3.3 of the Agreement dated 7.2.2006.

Jurisdiction Issue

This Tribunal has been constituted in terms of provisions of the TRAI Act, 1997 (the Act).

The Preamble of `the Act' reads as under:-

> "An Act to provide for the establishment of the Telecom Regulatory Authority of India to regulate the telecommunication, and services, and for matters connected therewith or incidental thereto. Be it enacted by Parliament in the Forty-eighth Year of the Republic of India as follows:-"

This Tribunal has both original jurisdiction as also appellate jurisdiction having been constituted in terms of Chapter IV of the said Act for the purpose of adjudicating any dispute between a licensor and licensee, between two or more service providers, and between a service provider and a group of consumers.

Indisputably in view of a judgment of this Tribunal which has been upheld by the Delhi High Court, Prasar Bharati constituted under the Prasar Bharati Act has been held to be a licensee within the meaning of provisions of the Act.

Both the parties hereto admittedly are broadcasters and thus, services providers within the meaning of the provisions of Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004 as amended from time to time (The Regulations).

We may notice the definition of `Broadcaster' and `Broadcasting Services' as defined in clauses 2(e) and 2 (f) of the Regulations which are as under:

> "(e) **"broadcaster"** means any person including an individual, group of persons, public or body corporate, firm or any organization or body who/which is providing broadcasting service and includes his/her authorised distribution agencies;
>
> (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 electromagnetic 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"

Admittedly co-location of a facility would come within the purview of the broadcasting services. The TRAI, we may notice, had made a regulation known as International Telecommunication Communication Excess of Essential Facilities at Cable Landing Station Regulation for providing co-location facilities, although, the said Regulations have no direct relevance for our purpose.

The jurisdiction of this Tribunal to entertain the dispute of the present nature was raised by Mr. Sharma, initially on two grounds:

(i) The dispute is essentially between a licensor and a licensee and thus does not pertain to the activities of a service provider or the licensee.

Prasar Bharati wears many hats and as in this case it is not wearing the hat of a broadcaster, and thus, the jurisdiction of the Tribunal is ousted.

It is not a case where despite the fact that the parties hereto are broadcasters within the meaning of definition of the term the 1995 Act as also the Telecommunication Broadcasting and Cable Services Interconnections Regulation, 2004, the dispute relates thereto and, thus, the present dispute having nothing to do with broadcasting, Section 14 and 14(A) of the TRAI will have no application.

(ii) The parties in terms of the agreement should have taken recourse to arbitration.

So far as the second objection raised by Mr. Sharma is concerned, the same, in our opinion, ex facie, have no substance in view of the decision of this Tribunal in Aircel Digilink India Ltd. v. Union of India (UOI) and Anr. and Connected Matters reported in (2005) 3 CLJ 461 wherein it was clearly held :-

> "22. …..It will also have the jurisdiction if dispute arises in respect of direct activities in telecom sector i.e. those relating to the telecom services. Dispute between two service providers as landlord and tenant would certainly be outside the ambit of the Act. Those disputes over which TDSAT has no exclusive jurisdiction and where the third party's interest like the consumers is not in issue or where there does not exist any public interest, the domestic forums chosen by the parties by way of an arbitration agreement may be held to be valid."

The said decision has been followed by this Tribunal in Star India Pvt Ltd vs. BSNL being Petition no.172/2009.

So far as the jurisdiction of this Tribunal is concerned, the dispute between the parties cannot be said to be a plain and a simple dispute between a landlord and tenant. It is not a case where the respondent no.1 has no role to play as a service provider and/or a broadcaster.

We have noticed heretobefore that all the agreements as well as the tender document issued by the Government of India, the GOPA and the Project Management Agreement entered into by and between the petitioner and the respondent no.2 were required to be construed so as to give effect to the object and purpose for which the same were entered into.

We have also noticed heretobefore that the respondent No.1 itself has in the agreement used the words 'Tower aperture' `operationalisation' of the `tower' etc. which have a significant bearing on the construction of the agreement. The technicalities involved in FM Broadcast have a direct bearing on the construction of the agreement.

In this proceedings, we not only are required to consider the respective rights and obligations of the parties to pay rent but also to construe them having regard to the role of respondent no.1 as a `broadcaster' as also as an arm of the Central Government.

It is not a case where the parties entered into an agreement of tenancy on their own volition. The petitioner was forced to enter into the agreement as a pre-condition of tender documents.

The respondent no.2 was either acting in its own capacity or as an agent of the petitioner. Whereas for the purpose of construction of the tower and providing common facilities to all the four broadcasters, apart from the petitioner, BECIL was nominated as the contractor, for certain other purposes i.e., it was required to act as an agent of the petitioner.

Keeping in view clause 3.3 of the agreement dated 7.2.2006, we are of the opinion that the contention of the respondent cannot be accepted.

It would be of some assistance to us if we note the decisions of the Supreme Court of India at this juncture.

In Cellular Operators Assn. of India v. Union of India reported in (2003) 3 SCC 186 the Supreme Court of India opined that this Tribunal has wide jurisdiction to enter into the merit of the order or direction passed/issued by the TRAI.

Yet again in UOI vs. Tata Tele Services 2007 7 SCC 517, the Supreme Court held:

> "22. We have already indicated that a specialised tribunal has been constituted for the purpose of dealing with specialised matters and disputes arising out of licences granted under the Act. We therefore do not think that there is any reason to restrict the jurisdiction of the tribunal so constituted by keeping out of its purview a person whose offer has been accepted and to whom a letter of intent is issued by the Government and who had even accepted that letter of intent. Any breach or alleged breach of obligation arising after acceptance of the offer made in response to a notice inviting tender, would also normally come within the purview of a dispute that is liable to be settled by the specialised tribunal.
>
> 23. We see no reason to restrict the expressions "licensor" or "licensee" occurring in Section 14(a)(i) of the Act and to exclude a person like the respondent who had been given a letter of intent regarding the Karnataka Circle, who had accepted the letter of intent but was trying to negotiate some further terms of common interest before a formal contract was entered into and the work was to be started. To exclude disputes arising between the parties thereafter on the failure of the contract to go through, does not appear to be warranted or justified considering the purpose for which TDSAT has been established and the object sought to be achieved by the creation of a specialised tribunal."

The aforementioned decision was rendered in a case where an original petition vis-à-vis the counter claim to be filed by the respondent therein arising out of tender which did not result in a contract and no licence was granted in lieu of Section 4 of the Indian Telegraph Act, 1885. In that case, a counter claim against a prospective license was also held to be maintainable.

Mr. Sharma, would urge that the dispute between the parties does not pertain to the activities of service providers.

So far as the jurisdiction issue is concerned, what is necessary to be considered is the entire material placed before us. While doing so, we may not forget that a special Tribunal has been created for this purpose and in a case of this nature, a comprehensive agreement with various others providing for broadcasting services are required to be interpreted.

The dispute between the parties is, thus, not a traditional dispute between a licensor and the licensee.

Section 14 (A) of the Act clearly provides that the Central Government would be the licensor. It may also be a service provider. In a situation of this nature, particularly, having regard to the fact that the petitioner was forced to enter into agreements in terms of the tender documents with Prasar Bharti and respondent

no.2, we are of the opinion that Tribunal has the requisite jurisdiction to determine the issues between the parties.

Construction of Document

In Rohtash Industries Ltd vs. State of Bihar reported in AIR 1963 SC 347 it was held as follows:

> "The true nature of a transaction evidenced by a written agreement has indeed to be ascertained from the covenants and not merely from what the parties chose to call it. The words of an agreement must be carefully scrutinized in the light of the surrounding circumstances."

The core question, is as to whether the construction of a document will depend upon the nature thereof and/or the context in which the same has been drawn up.

In this case we have to construe a commercial document entered into by and between the parties, although, in a standard form.

It must be noticed that this is one of the cases where there was no element of negotiation between the parties at all. The

contract was imposed by the UOI on the petitioner. Entering into the said agreement was imperative for the petitioner to obtain a GOPA. Compliance of the terms and conditions of the agreement entered into by and between the petitioner, on the one hand, and the respondents, on the other, was imperative so as to enable it to carry on its broadcasting operations, or otherwise it could have been served with a termination notice from the UOI which it could ill afford.

It is a well settled principle, having regard to the fact that we have a civilized legal system, difficult questions arising in cases like the present one must be answered with sufficient reasons.

Construction of a document gives rise to a question of law.

It is only from that point of view we are required to notice the general principles of construction of a document.

The question is as to whether Clause 3.3 is to be read as a stand alone clause or in the light of the another contract in which the petitioner is not a party.

For the said purpose we may have to notice the circumstances in which the transactions were entered into as well as the nature thereof.

The transactions between the parties, it would bear repetition to state, arose not out of a voluntary negotiation between them but in effect and substance having regard to the conditions of tender issued by the Central Government. The respondents herein were not parties to the tender process. The petitioner, however, by reason of the tender document which formed part of the contract by and between it and the Government of India was bound to take the services of the respondents herein wherefor it had to enter into separate contracts with them. It is, therefore, not a case where the agreement dated 7.2.2006, alone can be taken into consideration for the purpose of construction of document.

For the aforementioned purpose, we may have to take into consideration the mode and manner in which the broadcast of FM channel was to take place. We have noticed heretobefore that out of the six licenses sought to be granted by the Government of India, five responded being Radio 1 FM, Big 95 FM which is the channel of the petitioner, Big 92.7 FM, Fever 104 FM and 104 FM.

The frequencies allotted to each of them being 92.7, 94.3, 95, 104 and 104.8 were to be transmitted from the Combiner Room. The signals released by them were first to go to the Combiner Room and then to the antenna. For the aforementioned purpose the AMF Panel Room was to be connected with two diesel generator sets, which were also to be connected by cables to the broadcasting rooms. From the Combiner Rooms, the cables from each of the

rooms were to travel to the Control Panel and to the antennas. There were to be common transmission. There were to be CTI for the aforementioned purpose.

The tower was to be constructed by the Ministry of Information and Broadcasting through BECIL. The CTI was also to be constructed by BECIL at the cost of the broadcasters. The respondent no.1 was to provide for the requisite tower for broadcasting not only for the interim period but also the land and covered space so as to enable the broadcasters to shift to the new tower to avail the common transmission facility at the new site. The petitioner and the respondent entered into two agreements, one for the interim period and the other for construction of the tower and for providing other common transmission facilities.

The petitioner also entered into a Project Management Agreement with respondent no.2. The respondent no.2 was also to work in co-operation with the Government of India and Prasar Bharti. GOPA was to be issued only on certain conditions. In the event of failure on the part of the petitioner to abide by the conditions laid down therein, GOPA could be cancelled resulting in huge loss of investment on the part of the petitioner. We are, therefore, required to consider the entirety in the situation and not a clause alone; not even the agreement dated 7.2.2006 in isolation.

Another significant aspect of the matter is that the agreements entered into by and between the petitioner and the respondent no.1 as also GOPA were for a period of 10 years. The agreement in question was to remain valid for a period of 10 years from the date of operationalisation of the FM channel allotted to the licensee.

The agreement specifically refers to the backdrop of events, namely, the bid, the notice inviting tender issued by the Government of India, tendered by the petitioner, it having become successful and the fact that the successful bidders were required to co-locate the transmission facilities with the existing infrastructure of the licensor and common facilities which were required to be integrated by BECIL. The infrastructure was to be the licensed one.

If it was a simple case of landlord and tenant as was argued by Mr.Sharma, there was no reason as to why the agreement was kept in force for a period of 10 years from the date of operationalisation of the FM channel as the respondent no.1 would not be concerned therewith. The document in question was for licensed infrastructure. The licensed infrastructure not only related to the open space but also covered space and common facilities. The purpose for which the petitioner was to avail the same was to enable it to broadcast its FM channel.

So far as the open space is concerned, it included the common area on a shared basis amongst the private broadcasters. The determination of covered space required final measurement jointly by BECIL and the AIR/DD Authorities after completion of installation. Installation of equipments and providing for the tower as also providing of the common facilities where imperative in character for each of the successful bidders to commence broadcasting of their respective channels.

Contention of respondent no.1, however, is that a mistake had been committed in referring to the tower Aperture in clause 3.3 and 5.3, as the same was not necessary.

Reliance has been placed on an agreement entered into by and between the respondent no.1 and third party in relation to Ahmedabad Broadcasting centre.

According to Mr.Sharma, providing `tower aperture' was not a subject matter of the lease and, thus, the said clause 3.3 read with clause 3.1 contains an apparent absurdity or anomaly which is evident on the face thereof.

There are certain basic principles of construction of document which we may take note of.

There lies a difference in approach in regard thereto. Whereas most of the documents deserve a literal approach, a commercial document may require a commercial approach.

Such a change in the approach started with Prenn vs. Simmonds reported in [1971] 1 WLR 1381 (HL) and Reardon Smith Line Ltd. vs. Hansen- Tangen [1976] 1 WLR 989 (HL) at 996.

The change was limited and not significant.

Then came the decision of Hoffmann, J (we are not taking into consideration other decisions which have been rendered in the meantime) in Mannai Investment Co. Ltd. vs. Eagle Star Life Assurance Co. Ltd. reported in [1997] 3 All ER 352. It was concerned with the construction of a notice issued under a commercial lease wherein the background theory was introduced by laying emphasis on the proposition that sometimes the context of a statement can show that the plain meaning of the words used in a contract may be wrong and found that in the context of the lease, a reasonable recipient of the notice would have to be understood, as being a notice to terminate the correct day in accordance with the terms of the lease.

The background of the contract was held as a new approach and applied in the Investors Compensation Scheme Ltd. vs. West Bromwich Building Society [1998] 1 All ER 98, stating as under:-

> "….the background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see Mannai Investments Co. Ltd vs. Eagle Star Life Asurance Co. Ltd. [1997] 3 All ER 353…."

The said decision had been followed world wide which we may notice hereinafter but then there had been criticism as regards the interpretation of commercial contracts by Sir Staughton published in [1999] CLJ 303, pointing out that the background material which should be looked at is considerably narrower. He emphasized that the enquiry must focus on the language of the written contract used by the parties.

Lord Hoffmann, however, in Bank of Credit and Commerce International SA (in liquidation) vs. Ali and Ors. reported **in [2001] 1 All ER 961** sought to explain his earlier decision, stating:-

> "I should in passing say that when, in Investors Compensation Scheme Ltd v West Bromwich Building Society, I said that the admissible background included 'absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man' I did not think it necessary to emphasise that I meant anything which a reasonable man would have regarded as relevant. I was merely saying that there is no conceptual limit to what can be regarded as background. It is not, for example, confined to the factual background but can include the state of the law (as in cases in which one takes into account that the parties are unlikely to have intended to agree to something unlawful or legally ineffective) or proved common assumptions which were in fact quite mistaken. But **the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage**: '… we do not easily accept that people have made linguistic mistakes, particularly in formal documents.' I was certainly not encouraging a trawl through 'background' which could not have made a reasonable person think that the parties must have departed from conventional usage."

The danger of a wide ranging approach, however, had been pointed out in certain decisions by the New Zealand Courts. We may, in this connection, refer to Amcor Packaging (New Zealand) Ltd. vs. Forklift Rental Systems Ltd. (High Court Auckland, 13 June

2000, AP 404/26/00) and Benjamin Developments Ltd. vs. Rober Jones (Pacific) Ltd**. [1994] 3 NZLR 189 at 203.**

We may also notice that the Privy Council while sitting in Appeal from a judgment in the case of Yoshimoto vs. Canterbury Golf International Ltd. reported in **[2001] 1 NZLR 523** did not take into consideration the background or purpose of deflect from the primary task of construing the words of agreement.

It was stated:

> "Their Lordships do not think it is helpful to try and construe the earlier version of clause 6.3 because it was dropped and the present clause substituted. It seems pointless to try and speculate on why the change was made. No doubt each party had their reasons for proposing it on the one hand and accepting it on the other. All a court can do is to decide what the final contract means. Their Lordships do not think that negotiations cast any doubt upon what Pankhurst J regarded as a plain and obvious meaning of "necessary consent"."

The Privy Council decision has also been criticized as not being purposive enough. In a very interesting article "Construing commercial contracts, the background, the purpose of words?," by Paul David it was stated:

> "This decision represents a strong conventional approach to the interpretation of a contract. It does not allow a particular view of purpose to lead to the disregard of the contractual provisions and their natural and ordinary meaning. The decision has been criticised as not being "purposive" enough. However, it can be seen as a clear principled approach which keeps background and purpose, or a view of purpose, in their proper place and upholds the meaning of the words used by parties in their bargain.

The learned author concluded:-

> "The recent decisions in the courts indicate that the element of controversy surrounding the principles which should be applied in the interpretation of contracts has subsided. While there remains a need for clarification in certain areas, the principles seem fairly well established. The task of the courts, given that reference can be made to purpose and background, is to ensure that the main focus remains on the meaning of the words used by the parties in the contract. Such an approach represents the best way of giving commercial parties what they want from the courts."

Learned author in a later article, entitled "The Principles of Contractual Interpretation Business As Usual", noticed a large number of other decisions as also the recent decisions, to opine:-

> "In the past year we have seen the application of the established principles of contractual interpretation

> to a range of contractual relationships. There has been an important underlining of the limits on the use of extrinsic evidence as an aid to interpretation. While the precise scope of the relevant background will vary in different contractual contexts, it can and should, be quite confined in most contractual settings. Extrinsic evidence of matters which were within the mutual contemplation of the parties to support a particular interpretation of the contract should only come into play if the contract can properly be described as ambiguous.
>
> It is to be hoped that a clearer attitude to the admissibility of extrinsic evidence may lead to a more efficient disposal of contractual disputes in the courts if such disputes arise."

Ordinarily, a plain and/or literal meaning has to be given particularly, in regard to a commercial document.

In the Central Bank of India, Ltd. Amritsar vs. The Hartford Fire Insurance Co. Ltd. AIR 1965 SC 1288, the Apex Court has held:-

> "5. The contention of the appellant is based on the interpretation of Clause 10. Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention

> correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words, however it may dislike the result. …
>
> …
>
> 6. None the less learned counsel for the appellant referred us to various authorities which, according to him, showed that it was a fit case for implying a term in the clause and to these we now turn. We were first referred to Halsbury's Laws of England, 3rd edition, volume II, paragraph 640, page 391, where it is said that "
>
> > "In order to give effect to a contract according to what appears to have been the intention of the parties, the court may imply a term or condition or a qualification of a clause which is not inconsistent with the general tenor of the document."

In regard to a commercial document, it has been held in the case of State Bank of India and Anr. vs. Mula Sahakari Sakhar Karkhana Ltd. (2006) 6 SCC 293 as under:-

> "22 A document, as is well known, must primarily be construed on the basis of the terms and conditions contained therein. It is also trite that while construing a document the court shall not supply any words which the author thereof did not use.

> 23 The document in question is a commercial document. It does not on its face contain any ambiguity. The High Court itself said that ex facie the document appears to be a contract of indemnity. Surrounding circumstances are relevant for construction of a document only if any ambiguity exists therein and not otherwise.

A document as is well-known, however, must be read in its entirety.

In P.S. Ranakrishna Reddy vs. M.K. Bhagyalakshmi and Anr. 2007 (10) SCC 231, it was held:

> **"13.** A document, as is well known, must be read in its entirety. The intention of the parties, it is equally well settled, must be gathered from the document itself. All parts of the deed must be read in their entirety so as to ascertain the nature thereof."

In Hindustan Fasteners (P) Ltd. v. Nasik Workers Union, reported in (2007) 11 SCC 660, it was held:

> **"26.** Construction of a document so as to ascertain the intention of the parties is in no way controlled by the provisions of Section 91 or 92 of the Evidence Act. The document has to be interpreted applying the known principles of construction and/or canons."

In Bay Berry Apartments (P) Ltd. v. Shobha, reported in (2006) 13 SCC 737, the Apex Court has held:

> **"34.** When a document is not uncertain or does not contain an ambiguous expression it should be given its literal meaning. Only when the contents are not clear the question of taking recourse to the application of principles of construction of a document may have to be applied. "

Yet again in B.K. Muniraju v. State of Karnataka, reported in (2008) 4 SCC 451 it was held:

> **"18.** …… In order to know the real nature of the document, one has to look into the recitals of the document and not the title of the document. The intention is to be gathered from the recitals in the deed, the conduct of the parties and the evidence on record. It is settled law that the question of construction of a document is to be decided by finding out the intention of the executant, firstly, from a comprehensive reading of the terms of the document itself, and then, by looking into—to the extent permissible—the prevailing circumstances which persuaded the author of the document to execute it. With a view to ascertain the nature of a transaction, the document has to be read as a whole. A sentence or term used may not be determinative of the real nature of transaction."

Yet again in Ram Dev Food Products vs Arvind Bhai Ram Bhai Patel reported in 2006 8 SCC 726, the Apex Court opined.

> **"32. ….**
>
> 6.09. Where the words of a contract are capable of two meanings, one of which is lawful and the other unlawful, the former construction should be preferred.

Sir Edward Coke [Co. Litt. 42a] expressed the proposition thus:

> "It is a general rule, that whensoever the words of a deed, or of one of the parties without deed, may have a double intendment and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken." ' "

33. It is further stated: (SCC pp. 562-63, para 22)

> "For that purpose, he referred to the following observations of Buckley, J. from the paragraphs which are sought to be relied upon from The Interpretation of Contracts by Kim Lewison, Q.C.:
>
> 'My first duty is to construe the contract, and for the purpose of arriving at the true construction of the contract, I must disregard what would be the legal consequences of construing it one way or the other way.' "

Moreover, the document is to be read as a whole. It is equally well settled that the deed has to be construed keeping in view the existing law.

34. It is now a well-settled principle of law that a document must be construed having regard to the terms and conditions as well as the nature thereof. [Union of India v. Millenium Mumbai Broadcast (P) Ltd.[5]]"

In Reliance Natural Resources Ltd vs. Reliance Industries Ltd. the Bombay High Court 2009 (149) Company Cases 129 noticed :-

"94. The Interpretation of Contracts, Second Edition by Kim Lewison, Q.C., 1997, in reference to the intention of the parties, the author has expressed as under:

1.02 The object sought to be achieved in construing any contract is to ascertain what the mutual intentions of the parties were as to the legal obligations each assumed by the contractual words in which they sought to words in which they sought to words in which they sought to express them.

It is commonly, though inaccurately, thought that the purpose of interpreting a contract is to discover the actual intentions of the contracting parties. In Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd. [1982] A.C. 724 Lord Diplock said:

"The object sought to be achieved in construing any contract is to ascertain what the mutual intentions of the parties were as to the legal obligations each assumed by the

> contractual words in which they sought to express them."

Thus, in Reardon-Smith Line Ltd. v. Hansen-Tangen [1976] 1 W.L.R. 989, Lord Wilberforce said:

> "When one speaks of the intention of the parties to the contract one speaks objectively-the parties cannot themselves give direct evidence of what their intention was-and what must be ascertained is what is to be taken as the intention which reasonably people would have had if placed in the situation of the parties."

A similar point was made by Lord Reid in Mc. Cutcheon v. David MacBrayne Ltd. [1964] 1 W.L.R. 125 approving the following quotation from Gloag on Contract:

The judicial task is not to discover the actual intentions of each party it is to decide what each was reasonably entitled to conclude from the attitude of the other.

It is therefore more accurate to say that the object of a court of construction is to ascertain the presumed intention of the parties, on the assumption that both parties are reasonable. In Codelfa Construction Pty Ltd. v. State Rail Authority of New South Wales (1982) 149 C.L.R. 337 Mason J. said:

> "...when the issue is which of two or more possible meanings is to be given to a contractual provision we look not to the actual intentions, aspirations or expectations of the parties before or at the

> time of the contract, except in so far as they are expressed in the contract, but to the objective framework of facts within which the contract came into existence, and to the parties' presumed intention in this setting. We do not take into account the actual intentions of the parties and for the very good reason that an investigation of those matters would not only be time consuming but would also be unrewarding as it would tend to give too much weight to these factors at the expense of the actual language of the contract."

The said author has also been quoted in Sandvik Asia Pvt. Ltd. vs. Vardhman Promoters Pvt. Ltd. reported in 2006(2)CTLJ305(Del) in the following terms:

> "19. This principle is further substantiated by Kim Lewison, QC in his book The Interpretation of Contracts, 2nd Edition:
>
> 6.02. 'In order to arrive at the true interpretation of a document, a clause must not be considered in isolation, but must be considered in the context of the whole of the document.
>
> In Chamber Colliery Ltd. v. Twyerould (supra), Lord Watsons said:
>
> 'I find nothing in this case to oust the application of the well-known rule that a deed ought to be read as a whole in order to ascertain the true meaning of its several clauses, and that the words of each clause should be interpreted so as to bring them into

harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible.'

The expression of this principle of construction is no more than an enlargement of the general proposition that an individual word takes its meaning from the context in which it is found. So too an individual clause takes its meaning from the context of the document in which it is found. Thus, in Batron v. Fitz Gerald (1812) 15 East 530, Lord Ellenborough, CJ said:

'It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected ex antecedent bus et consequent bus ; every part of it may be brought into sense, if that may be done.'

In Re. Strung Music Hall Co. Ltd. Lord Romilly MR (1865) 35 Beav 153 said:

The proper mode of construing any written instrument is to give effect to every part of it, if this be possible, and not to strike out or nullify one clause in a deed, unless it be impossible to reconcile it with another and more express clause in the same deed'.”

Further in State of Orissa v. Titaghur Paper Mills Co. Ltd. reported in 1985 Supp SCC 280 it has been held:

“117. We are unable to agree with the interpretation placed by the Court on the document in Orient Paper Mills case.We find that in that case this Court as also the High Court adopted a wrong approach in construing the said document. It is a well-settled rule of interpretation that a document must be construed as a whole. This rule

is stated in Halsbury's Laws of England, Fourth Edn., Vol. 12, para 1469 at p. 602, as follows:

> "Instrument construed as whole.—It is a rule of construction applicable to all written instruments that the instrument must be construed as a whole in order to ascertain the true meaning of its several clauses, and the words of each clause must be so interpreted as to bring them into harmony with the other provisions of the instrument, if that interpretation does no violence to the meaning of which they are naturally susceptible. The best construction of deeds is to make one part of the deed expound the other, and so to make all the parts agree. Effect must, as far as possible, be given to every word and every clause."

Mr.Sharma, however, would strongly rely upon a decision of the House of Lords in Investors Compensation Scheme Ltd. v. West Bromwich Building Society reported in 1998 1 All.ER 98, wherein Lord Hoffmann speaking for the majority stated as under :-

> "My Lords, I will say at once that I prefer the approach of the judge. But I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in Prenn v. Simmonds [1971] 1 WLR 1381, 1384-1386 and Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen [1976] 1 WLR 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost

all the old intellectual baggage of "legal" interpretation has been discarded. The principles may be summarised as follows.

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] A.C. 749.

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera S.A. v. Salen Rederierna A.B. [1985] A.C. 191, 201:

> "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

The aforementioned decision of the House of Lords has been noticed in several jurisdictions. We may notice that referring to the individual case laws following the said decision in an overview by Sir Kim Lewison in his famous treatise `Interpretation of a Contracts, 2007 Edition, stated the law in the following terms :-

"In BCCI v. Ali, Lord Bingham of Cornill summarized the principles as follows:

> "To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified.""

In the Supplement to the said authority issued in 2010, the learned author, however, stated –

"**1.01** In Pratt v Aigaion Insurance Company SA Sir Anthony Clarke MR warned against over-elaboration of the relevant principles; and said that they were to be found in Investors Compensation Scheme Ltd v West Bromwich Building Society. In Bull v Nottingham and Nottinghamshire Fire and Rescue Authority Buxton L.J. also warned against "a degree of elaboration that the case does not require" even by reference to Lord Hoffmann's five principles themselves.

In Reilly v National Insurance & Guarantee Corp Ltd Moore-Bick L.J. said:

> "The principles to be applied in the construction of a clause of this kind were not in dispute. . . . It is unnecessary to repeat them here, but it is worth noting that they include the following: a presumption that the words in question should be construed in their ordinary and popular sense; that a commercial document, such as an insurance policy, should be construed in accordance with sound commercial principles and good business sense; that the commercial object of the contract as a whole, or the particular clause in question, will be relevant in resolving any ambiguity in the wording; and that in a case of true ambiguity, the construction which produces the more reasonable result is to be preferred. I would only add by way of comment that difficulty of construction is not the same thing as ambiguity."

The summary of principle in Absalom v TCRU (see main text p.3, fn.7) was applied in Re Coromin Ltd v AXA and Lediaev v Vallen. There is a further short statement of the applicable principles in Chartbrook

Ltd v Persimmon Homes Ltd, applied in Investec Bank (Channel Islands) Ltd v The Retail Group Plc. It should be noted, however, that the decision of the Court of Appeal in Chartbrook Ltd v Persimmon Homes Ltd was reversed by the House of Lords although it is not thought that the statement of general principle was disapproved.

1.02 Lord Bingham. speaking extra-judicially, has commented that Lord Hoffmann's five principles are more a change of emphasis than a fundamental change: A New Thing under the Sun?

The adoption of Lord Hoffmann's five principles by courts outside England and Wales (see main text p.4) has continued. In Marble Holding Ltd v Yatin Development Ltd they were again applied by the Court of Final Appeal in Hong Kong.

Lord Hoffmann's five principles also represent the law in Scotland. Thus in **City** Wall Properties (Scotland) Ltd v Pearl Assurance Plc, Lord Philip, having cited ICS, said:

> "The effect of the passages I have cited is, it seems to me, that the court begins its consideration of the construction of a contractual provision already equipped with the information available as to the circumstances surrounding the contract, and that information is brought to bear on the court's consideration from the beginning. The court does not begin by looking at the words themselves, as it were in a vacuum, without reference to the surrounding circumstances, in order to ascertain whether

> they have a plain meaning or whether there is an ambiguity. To adopt that approach, it seems to me, is to assimilate so far as possible, the way in which the document is interpreted to the common sense principles by which any serious utterance would be interpreted in ordinary life, and to discard 'the old intellectual baggage of "legal" interpretation'."

Lord Hoffmann's five principles also represent the law in Singapore. In Seiko Epson Corp v Sepoms Technology Pte Ltd' Andrew Phang Boon Leong J.A. said:

> "The principles of contract interpretation articulated by Lord Hoffmann in the oft-cited House of Lords decision of Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 W.L.R. 896 are, in fact, now established law and have been adopted locally in cases such as Sandar Aung v Parkway Hospitals Singapore Pie Ltd [2007] 2 S.L.R. 891 and China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd [2005] 2 S.L.R. 509."

The High Court of Australia continues to take a more conservative line. In International Air Transport Association v Ansett Australia Holdings Ltd Gleeson C.J. said:

> "In giving a commercial contract a businesslike interpretation, it is necessary to consider the language used by the parties, the circumstances addressed by the contract, and the objects which it is intended to secure. An appreciation of the

> commercial purpose of a contract calls for an understanding of the genesis of the transaction, the background, and the market. This is a case in which the Court's general understanding of background and purpose is supplemented by specific information as to the genesis of the transaction. The Agreement has a history; and that history is part of the context in which the contract takes its meaning."

Although the quoted extract refers to "background", the case law referred to in cupport of that proposition does not include ICS. Moreover the majority judgment applied the slightly more restrictive formulation of the principle in Toll (FGCT) Pry Ltd v Alphapharm Pty Ltd (quoted in the main text). The dividing line between the admissible and the inadmissible in Australia is difficult to identify: Kimberley Securities Ltd v Esber'6 per Allsop P. and MacFarlan J.A. However, in Synergy Protection Agency Pty Ltd v North Sydney Leagues' Club Li,nited'7 the New South Wales Court of Appeal held that there was no need to find an ambiguity in a contract before resorting to background."

It may be noticed that the decision of the House of Lords in Investors Compensation Scheme (supra) has also been noticed by the Bombay High Court in Vodafone International Holdings B.V. vs. Union of India (UOI) and Anr. reported in 2010 (112) BomLR 3792.

What should be the business common sense in a case of this nature is the question? The respondent states that a mistake has been committed. No such specific plea has been raised in the reply.

Mr.R.R. Prasad, who has been examined on its behalf sought to prove the said fact. He, however, has been dealing with the FM industry only. He did not take part in the negotiations. He, therefore, cannot be said to be a competent witness to depose as to what had transpired between the parties and why the said term was used.

Moreover, the mistake said to have been occurring in a document, which even according to Mr.R.R. Prasad had been pointed out by the Law Department, cannot be accepted in view of the fact that the contract was of vital importance. Such a mistake is not to be easily presumed.

In BSNL v. BPL Mobile Cellular Ltd., reported in (2008) 13 SCC 597 the Supreme Court held that :

> **"52.** ….. Indisputably, mistakes can be rectified. Mistake may occur in entering into a contract. In the latter case, the mistake must be made known. If by reason of a rectification of mistake, except in some exceptional cases, as for example, where it is apparent on the face of the record, mistake cannot be rectified

> unilaterally. The parties that would suffer civil consequences by reason of such act of rectification of mistake must be given due notice. Principles of natural justice are required to be complied with. The fact that there was no mistake apparent on the face of the records is borne out by the fact that even the officers wanted clarification from higher officers. The mistake, if any, was sought to be rectified after a long period; at least after a period of three years. When a mistake is not rectified for a long period, the same, in law, may not be treated to be one."

In W.B. State Electricity Board v. Patel Engg. Co. Ltd., reported in (2001) 2 SCC 451, at page 466 the law was laid down in the following terms:

> "21. The appellant could not have ignored these letters. Had the appellant taken note of these letters and the mistakes occurring due to repetition of entries in 37 items in the bid documents, it would not have proceeded with correction of such mistakes and evaluation of their bid without first seeking clarification from Respondents 1 to 4 under clause 27.1. We have already referred to the gist of that clause. The only prohibition contained therein is that no change in the price or substance of the bid after its opening can be sought, offered or permitted. In that regard they had made their position clear. The prohibition is, therefore, not attracted. In these circumstances any reasonable person in the position of the appellant would have sought clarification from Respondents 1 to 4 under clause 27.1. Even assuming that after the letter of 17-12-1999, no further clarification was required to be sought by the appellant, we cannot but hold that

> correction of the errors taking note of the unit rates which are mere repetition of the unit rates quoted for a different work item, is mechanical and without application of mind by the appellant. In our view such a correction is far beyond the scope of clause 29. From the description of the mistakes, noted above, and the correction and evaluation made by the appellant, it is evident that except the error in the first line against the work item "Rock excavation" and Schedule 'N' day work, all other mistakes/errors are beyond the scope of clause 29.1, so clause 29.2 will not be attracted."

In this case there was a provision for amendment to the agreement being clause 11 thereof. Liability to pay rent cannot be on the basis of an act of a third party. Considering the backdrop of events and in particular the factors laid down in GOPA that broadcasting must commence within a period of 18 months and even in terms thereof the 1st year was to be out of the 10 years as would appear from clause 7.1 as whole defining the word `term', we must take into consideration the fact that both the agreements contain identical terms. If a different intention was to be given effect to, the parties could have said of `open space' in stead and in place of `licensed infrastructure'. Similar clause also exists in relation to Ahmedabad contract. We may at this juncture furthermore notice that the Supreme Court in Grasim Industries Ltd. v. Agarwal Steel, reported in (2010) 1 SCC 83 opined :-

> **"6.** In our opinion, when a person signs a document, there is a presumption, unless there is proof of force or fraud, that he has read the document

> properly and understood it and only then he has affixed his signatures thereon, otherwise no signature on a document can ever be accepted. In particular, businessmen, being careful people (since their money is involved) would have ordinarily read and understood a document before signing it."

On the said issue, we may notice another opinion of the Supreme Court of India in Polymat India (P) Ltd. v. National Insurance Co. Ltd. reported in (2005) 9 SCC 174, which is in the following terms:

> **"21.** Therefore, the terms of the contract have to be construed strictly without altering the nature of the contract as it may affect the interest of parties adversely."

Reference therein was made to the decision in the case of United India Insurance Co. Ltd. v. M.K.J. Corpn. reported in (1996) 6 SCC 428 wherein it was observed as under: (SCC p. 431, para 7)

> "After the completion of the contract, no material alteration can be made in its terms except by mutual consent.""

Having regard to the aforementioned authoritative pronouncements there cannot be any doubt whatsoever that it is necessary to give effect to the intention of the parties, as expressed

in the contract itself. It is so stated in Halsbury Laws of England Vol 9 (1) page 523 as under:

> "If the intention of the parties can be ascertained from the writing, the court will give effect to that intention, notwithstanding ambiguities in the words used or defects in the operation of the contract. But, where the intention of the parties isn't sufficiently clear, the court won't make a contract for them in order to prevent the whole agreement failing on grounds of uncertainty or otherwise. Where a document is contradictory, later provisions prevail over earlier ones. The wording of clauses prevails over headings.

We have noticed heretobefore that all the agreements were inter linked. They were entered into for the purpose of achieving broadcasting of FM radios on an integrated basis. BECIL was appointed not only as a contractor pure and simple for construction of the tower in seven cities but also as a system integrator. Prasar Bharti another public sector undertaking had also a very important role to play. It was not only interested in providing the basic infrastructure at initial stage but also continued to contribute to the achievement of the ultimate objective of the parties hereto. It is with the aforementioned purpose, the intention of the parties for entering into the agreements in question should be kept in mind.

The disputed clause, namely, Clause 3.3 is required to be construed on its own terms. It deals with a particular subject i.e. the date from which the payment under the agreement for the 1st year shall become effective. A legal fiction had to be raised. It is not a case where a landlord or a licensor becomes entitled to the rent and/or license fee for grant of lease/ license in respect of `land' on and from the date it ceases to use the same for itself. The annual license fee although had been provided for in clause 3.1 but the same was to be increased. The annual license fee was to be increased by 2.5% every year for the tower. It is on the aforementioned premise the importance of the `tower aperture' so as to enable the broadcaster to use the same must be taken into consideration.

The matter might have been different if the lease was for a tenure of only 10 years. In all the agreements referred to by us heretobefore, the 10 years' term begins from its operationalisation. It is, thus, evident that the payment of rent would start from a point of time when the 1st year of operationalisation of tower begins.

It is now a well-settled principle of law that the legal fiction must be given its full effect.

See East End Dwelling Co. Ltd. vs. Finsbury Borough Council, [1951 (2) All ER 587].

Apart from raising a legal fiction, the liability to pay rent arises not only from the date the `tower aperture' is made available but also from the date when `open space/ covered space' respectively is made available.

The term `and' as is well-known should ordinarily be read conjunctively and not disjunctively. It is however well-settled that in given case the word `and' may be read as `or' and vice-versa.

In Oxford Dictionary the word `and' has been defined as :-

> **"And conj.** 1. Used to connect words of the same part of the speech, clauses, or sentences. Connecting two identical comparatives, to emphasise a progressive change. Connecting to identical words, implying great duration or great extent."

In Webster's Dictionary, it has been defined as under :-

> **"And 1.** In addition; also; as well as: used to join elements of similar syntactic structure (apples and pears; a red and white dress; he begged and borrowed)"

In Ramanathan Aiyyer Law Lexicon, the meaning of the said word is stated as under:-

> "the word "and" a cumulative sense requiring the fulfillment of all the conditions that it joins together, and herein it is the antithesis of 'or'."

The question arises as to what would "aperture of tower" mean. It is a large hole from which the antenna hangs out. Although, by reason of such a provision, the tower itself may not be sufficient for a broadcaster to broadcast its channel but it is pointer to show that completion of construction as also other facilities have a direct bearing on the same. The `No Objection Certificate' for interim measure was issued on 22.2.2006 by the Director General of Prasar Bharti.

It was in the following terms:-

> "…Govt. of India, Ministry of I& B vide their notification dated 13.7.2005 have approved the co-location of all Private FM Broadcasters at a common location in each city, using Prasar Bharati's Infrastructure for setting up of FM transmission facilities, the licenses for which are being issued by the Government of India, Ministry of I & B under Phase-II scheme. As per the licensing contract proposed to be entered with private broadcasters the infrastructure of Prasar Bharati such as Tower, Building and Land will be shared among all Private FM Broadcasters on license fee basis for all 91 cities. In compliance to this, Prasar Bharati have entered into an agreement with M/s Clear Media Pvt. Limited, for using our infrastructure facilities at Mall

> road, Delhi. Accordingly CMIL will be mounting their FM Antenna on existing AIR 100 mtr, Tower (80-100 mtr slot) at Mall Road, Delhi…"

The parties entered into another agreement for grant of/availing different facilities on 13.3.2006. Different agreements have been entered into by and between the parties hereto laying down the mode and manner in which the things were to be done. There is a distinction between an agreement for CTI and one for the infrastructure. There is no controversy in relation thereto. We may, however, notice that Clause 2.3 of the aforementioned agreement dated 13.3.2006 was on the same terms. In the said agreement again there was no role for BECIL, although, in the agreement dated 7.2.2006, some role of BECIL was contemplated.

The second agreement related to common infrastructure. It is laid down therein :-

> "AND WHEREAS in terms of the Private FM Radio Policy (Phase-II) announced by the government of India, successful bidders as per para 3.11.2 of tender document can have **interim set** up either independently or at AIR/DD station at six places where designated infrastructure of PB/MIB are yet to be made available. Since tower at permanent location is

not ready licenser desires to co-locate transmission facilities with existing infrastructure of the licensor for establishing interim setup till erection of permanent tower. In the circumstances the licensee has requested the licensor to permit it to avail of its infrastructure facilities i.e. Tower Aperture, Open Space (Land)/Covered space (Building) and other facilities situated at Mall Road, Delhi (hereinafter referred to as the Licensed Infrastructure)."

We have noticed heretobefore that only on completion of certain facilities and compliance of certain conditions, GOPA was granted on 14.6.2006. The matter relating to dispute resolution with the third parties in terms of GOPA was laid down in clause 16.1.

It reads as under:-

"16. <u>Disputes with Other Parties</u>

16.1 In the event of any dispute between the Permission Holder and any party other than the Grantor (including in relation to the Permission and/or Broadcasting services, etc) due to any reason whatsoever, it shall be the sole liability of the Permission Holder to resolve such dispute amicably or otherwise with the other party and the Grantor shall have no liability whatsoever in this regard.

> Further, the Permission Holder hereby undertakes to indemnify and keep the Grantor harmless in respect of any action, claim, suit, proceeding, damage or noticeto/against the Grantor for any act of omission or commission on the part of the Permission Holder, its agents, employees, representatives or servants. 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.

By reason of the GOPA, therefore, the Government was entitled to settle the disputes by and between the petitioner and Prasar Bharti, it being a third party to GOPA.

We may notice also the termination clause contained therein being clause 25.1.1 which is in the following terms:-

> **"25.1.1.** The Permission Holder shall operationalise the Channel within 18 months of the date of signing of this Agreement, excluding any extension under clause 3.3 above, failure to do so, the Permission will be revoked, and Permission Holder shall be debarred from allotment of another Channel in the same city for a period of five years from the date of such revocation. The frequency so released may be allotted to a fresh Successful Bidder"

The co-location facility was to be provided within a period of two years and when it was ready. On petitioner's failure to broadcast, the license was to be cancelled and a penalty of debarment for five years could have been imposed. The effect of violation of eligibility condition is laid down in 23.5.1. The clause provides for forfeiture of 50% of OTG which has a bearing on the agreement with Prasar Bharti. Clause 26.1 provides for `dispute resolution and jurisdiction'.

It is important to notice that by a letter dated 7.3.2007, only a demand for rent was raised i.e. after commencement of one year of broadcasting, although, according to the petitioner, the co-location facility was not available.

According to the petitioner, it had put up a separate review transmitor microwave dish antenna connecting its studios and signals to antenna for the entire period for which it had been paying separately. We may notice that whereas with the letter dated 7.3.2007, the rent from 15.3.2007 was demanded, by reason of the invoice attached with its letter dated 12.3.2007, rent covering for the same period was demanded.

They are as under :-

Dated: 07.03.2007

INVOICE(Amended)

(For Prasar Bharati Infrastructure (Interim setup at Delhi)

S No	Details	Period	Quantity	Amount
1	Advance annual license fee for tower (Rs. 13.53 lacs per annum)	13.3.2007 to 12.03.2008	One slot	Rs.13.53lacs
2.	Advance license fee for open space (Rs. 6720/-- peer sq. mtr. Per annum)	—do-	58. 84 sq.mtr.	3.95405 lacs
3	Advance license fee for covered space (Rs 7980/- per sq. mtr. per annum)		50.9 sq_mtr.	4.06182 lacs
4	Common facilities (Rs.1.05 lac	-do-	LS	Rs.1.05

	per annum)			
5	Taxes** (if **applicable)**			
	Total			**Rs.22.59587 lacs**

Dated 15.3.2007

INVOICE

(For Prasar Bharati Infrastructure (Interim setup at Delhi)

SNo	**Details**	**Period t**	**Amount**
1	Annual license fee for P.B. Tower at **AIR, Mall Road, Delhi** for mounting STL microwave dish antenna for **Pvt.** FM Ph-II **(interim set up)** (**Rs. 1.5375 lacs per annum)***	13.03.2007 to 12.02.2008	Rs.1.5375 lakhs
2	Security deposit (refundable)	-	Rs.1.5375 lakhs
3	Taxes ** (if applicable)		
	Total		Rs.3.075

			lakhs

(Rs.Three lakhs seven hundred fifty only)

* Including 2.5% escalation charges

** The service tax and other taxes, if any applicable on above shall be paid by the licensee at the prevailing rates.

It is, however, accepted that for the 3rd year again a demand was raised by the respondent no.1 by letter dated 15.2.2008, which reads as under:-

"Sir,

Please find enclosed herewith invoice 491/2007-08 dated 15. 2. 2008 amounting to RS. 28, 04, 882 towards sharing of PB infrastructure at AIR, Mall Road, Delhi under FM Ph-II for interim setup for the period 13 . 03 . 2008 to 12 . 03 . 2009.

Now since we are entering into third year of agreement, as per the agreement clause 2.2 the annual license fee shall be increased by 5% on open space and common facilities and 2.5% on tower after every year.

You are requested to make the payment with due date latest by 27 . 03 . 2008 otherwise penal interest will be charged @ prevailing SBI' S + 2% per annum."

The invoice reads as under :

INVOICE

Bill No. 491/2007-08

(Sharing of Prasar Bharati infrastructure at AIR, Mall Road, Delhi for interim setup)

SI . No	Details	Period	Quantity	Amount
1.	Advance annual license fee for tower (Rs. 13 . 86825 lacs per annum)	13.03.2008 to 12.03.2009	One slot	Rs. 13.86825 lacs
2.	Advance additional annual license fee for tower for mounting of STL/MW Dish (Rs. 1.57594 Lacs per annum)	-do-		Rs. 1.57594
3.	Advance license fee for open space (Rs. 7056/-per sq. mtr. per annum)	-do-	58.84 sq. mtr.	Rs. 4.15175

4.	Advance license fee for covered space (Rs. 8379/- Per square metre per annum)		50.9 sq. mtrs.	Rs. 4.26491
5.	Common facilities (Rs. 1.1025 lakh per annum)	-do-	LS	Rs. 1.1025
	Total			Rs. 24.96335 lacs
	Service tax @ 12 . 36%			Rs. 3.08547 lacs
	GRAND TOTAL			Rs. 28.04882 lacs

(Rs. twenty-eight lakh four thousand eight hundred eighty two only)

The impugned invoices are dated 9.9.2009, which read as under:

INVOICE

Bill no. 64/2009-10

(For Prasar Bharti Infrastructure at Delhi)

SI .	Details	Period	Rate	Quantity	Amount

No					(In lacs)
1.	Advance license fee for open space	02.07.2008 to 01.07.2009	Rs. 6400/- per sq. mtr. Per annum	93.2 Sq. mtr	Rs. 14.08 Lacs
2.	Common facilities	-do-	Rs. 1.0 Lacs per annum	LS	Rs. 1.0 Lacs
3.	Total				Rs. 15.08 lacs
4.	Service tax on license fee amounting to	02.07.2008 to 24.02.2009	@12.36%		Rs. 1.21536 Lacs
5.	Service tax on license fee amounting to	25.02.2009 to 01.07.2009	@10.30%		Rs. 0.54044 lacs
	Grand total				Rs. 16.8358 Lacs

(Rupees Sixteen Lakhs Eighty Three Thousand five thousand eighty only)

INVOICE

Bill no. 69/2009-10

(For Prasar Bharti Infrastructure at Delhi)

SI . No	Details	Period	Rate	Quantity	Amount

					(In lacs)
1.	Advance license fee for open space	02.07.2009 to 01.07.2010	Rs. 7,040/- per sq. mtr. Per annum	220 Sq. mtr	Rs. 15.488 Lacs
2.	Common facilities	-do-	Rs. 1.1 lacs per annum	LS	Rs. 1.1 Lacs
3.	Total				Rs. 16.588 Lacs
4.	Service tax on license fee	-do-	@ 10.30%		Rs. 1.70856 Lacs
	Grand total				Rs. 18.29656 Lacs

(Rupees Eighteen Lakhs twenty Nine thousand six hundred fifty six only)

According to the petitioner, the liability to pay rent of CTI i.e. open space and covered space commences from the date of handing over not only `the open space and covered space' but also the `tower aperture' and the petitioner having been broadcasting from 24.8.2009 arises on and from the said date; whereas according to the respondent the liability commences form 2.7.2007 when the possession of the land was handed over to BECIL.

Indisputably, the petitioner has been paying all dues promptly and in some cases on the same date on which the demand was made.

In this case, however, the rent was not demanded immediately. The petitioner contends that the post facto liability has been created by way of an after thought. We need not go into the said question at this stage. We may, however, notice that alternatively it has been argued that the respondent no.1 has not stated as to when `tower aperture' was made available. Respondent however contends that providing of tower aperture was not necessary.

An usual protest was made by respondent no.1 in terms of its letter dated 22.12.2009, stating that the liability to pay rent shall commence from the date of handing over the site to BECIL.

We may notice the relevant paragraph thereof:-

> "The basic issue raised by M/S clear media vide their above referred letter relates to their not having any information regarding the handing over of Prasar Bharati infrastructure to M/S BECIL, on behalf of the Pvt broadcasters as per clause 3.3 of the agreement signed by them with Prasar Bharti. The

site/infrastructure at HPT, Kingsway Delhi was handed over to M/S BECIL, the system integrator for Pvt broadcasters, vide AIR Kingsway Delhi letter number H . P . T . K-private broadcasters/FM/07-08 dated 05 . 03 . 2009, M/S clear media are aware that Prasar Bharati has provided only the open/covered space for the construction of CTI. M/S BECIL have erected a new tower for CTI out of the funds provided by the Ministry of I & B. As such Prasar Bharati has raised invoices for annual rentals for open & covered space only."

A meeting of the parties took place. We are not concerned with the contention of the petitioner that BECIL did not intimate to it with regard to grant of certificate by BECIL to the respondent no.1 for taking over the possession as indisputably in terms of clause 3.3, BECIL was the agent of the petitioner and that it had exceeded its authority. Even no such claim has been made in respect thereof. We have set out the relevant facts of the matter in great deals.

The backdrop of the events and the purpose and object for which the agreements have been entered into not only by and between the petitioner and the Government of India but also between the petitioner and respondent no.1 and the petitioner and respondent no.2. They have a common bearing. The respondent contends that a mistake has occurred but why the same has

occurred has not been explained. An agreement of this nature which is of immense importance for effecting monitory liabilities was required to be carefully drafted.

The submissions of Mr.Sharma that Clause 3.3 if given a plain meaning would lead to an absurdity may now be considered. The plea of absurdity has been raised on the ground that the rent was for open space/covered space and common facilities and the same has nothing to be do with the tower aperture. The purpose for such a clause was inserted in the agreement to provide for the effect of payment of rent for the first year. If a legal fiction was created, there is absolutely no reason by the same shall not be given effect to. If handing over of open space/ covered space was the starting point for commencement of rent there was no necessity for raising a legal fiction. It is not the case of the respondent no.1 that there was no necessity to raise a legal fiction. If that be so, it is the duty of the interpreter of the document that the same be given effect to, as it is well-known that subject to upholding a plea for absurdity or anomaly a clause in an agreement not only is required to be read in its entirety for the purpose of finding out the intention of the makers thereof but also for the purpose of ensuring that no part of it becomes otiose.

It is in the aforementioned situation that the decision in Investors Compensation Scheme (supra) whereupon strong reliance has been placed may have to be considered.

We have noticed heretobefore that Lord Hofman's decision although has been accepted in different jurisdictions it is not without controversy. That may be so.

But, however, it was to give effect to the common sense principle. The common sense principle of a reasonable man became necessary if a document is badly drafted. The document was in respect of an investment scheme; in terms of which an ordinary investor was to make an application. The scheme for grant of compensation was limited to undue influence and not to a misrepresentation or similar such grounds. However, Lord Barwik in his "dissenting" opinion laid emphasis on the features which seemed very odd and thus the avoidance of "ridiculous commercial result with the parties to the claim" forces were quite unlikely to have intended.

The principles/ cannons of interpretation although in legal parlance stricto sensu cannot be equated with each other must depend not only on the nature of the document but also on the text and context in which the same has been used. The object of

construction of a document is to find out the real intention of the parties. In a given case by way of an exceptional measure, clauses may be held to be `abandoned' or `otiose' and furthermore in some cases even application of the doctrine of `reading down' would be permissible. Indisputably, as Lord Hoffman puts it, `the common sense principles' by which any serious uttences would be interpreted in ordinary life should be given but then in this case Prasar Bharti was the direct nominee of the Central Government.

The petitioner had no other option but to enter into the agreement with the Prasar Bharti and BECIL. They were not parties to the bid. There is nothing on record to show that the Government has taken their consent before lying down the terms and conditions in the tender document. Their involvement were preempted sofar as the petitioner is concerned. The Government was the licensor and, thus, being in a position to lay down not only the terms and conditions of the license but also other terms and conditions on the basis of which the terms of the contracts were be performed and, thus, for all intent and purport forced the petitioner to accept the same without any demur whatsoever. Failure on its part to do so was to invite levy of penalty of huge amount and revocation of the license for which it had to make a huge investment. The respondents herein had acted as an arm of the Government. The Government has set a role for them. It had an upper hand.

We have noticed heretobefore that Mr.Sharma himself contended relying on/or on the basis of the decision of the House of Lords in the case of Investors Compensation Scheme Ltd. (supra) that for the purpose of construction of a document the factual matrix involving the background facts should be taken into consideration.

Lord Hoffman also said that words should be given their natural and ordinary meaning, if they reflect the common sense proposition. The matter would have been different if it was found "if one would nevertheless conclude from the background that something must have gone wrong with the language"; but even following the rule of Lord Hoffman, "a bare reading of the document would show that the intention of the parties attributed to them was clearly out of place."

We, in this case may also invoke `the common sense principle' which would mean giving effect to the common sense meaning of the words. We may invoke and in fact have invoked the backdrop of events. We have noticed as to why making a provision for the tower aperture was necessary.

According to us, keeping in view the composite object, the Central Government did not want and consequently it was

undesirable even for the Prasar Bharti to impose conditions of payment of rent on the broadcaster which would otherwise be burdensome. We, therefore, do not see any reason as to why the plain meaning doctrine should be avoided in this case.

Conduct

Furthermore the conduct of the respondent no.1 becomes also important. Whereas on all earlier occasions it had been raising demand promptly, accepting the payments promptly and answering to the petitioner's letters promptly; there was absolutely no reason as to why the payment of rent for open land had not been demanded immediately. It is not in dispute that the petitioner raised a dispute with BECIL and the Central Government leading to filing of another petition wherein the petitioner has succeeded in part. The impugned demands were made only after the said disputes were raised. It is wholly unlikely that a public sector undertaking would not raise any demand promptly. It is expected to do the same. We, therefore, agree with the submissions of learned counsel for the petitioner that the construction sought to be put forward is by way of an after thought.

Having regard to the decisions of the Supreme Court of India and in particular the case of State of West Bengal (supra), we do

not see any reason as to why in a case of this nature the `mistake doctrine' shall be applied. We, therefore, reject the contention of the respondent in this behalf.

Literal meaning

These discussions pose a question. Should a contract be only construed as a commercial document on the background material or be given a literal meaning?

Clause 3.3 deserves a literal meaning. The burden to prove that an exceptional situation has been made out to rely only on the background material vis-à-vis other documents was on the respondent.

The contentions of the respondent could have been accepted if the agreement in respect of the Ahmedabad network as also the present one could have been shown to have been arrived at on prolonged negotiations.

Although, Mr.R.R. Prasad stated that he is incharge of all broadcast or FM broadcast, he did not hold any negotiation.

We are not oblivious of the discussions rendered in some other jurisdictions and in particular England and New Zealand, to construe the transactions between the parties upon taking into consideration the whole context even though the immediate object of enquiry is the manner of an isolated word or clause (see Chitly on Contract para 12.053)

In Durham v. BAI (Run Off) Ltd (in scheme of arrangement) and other cases reported in (2009) 2 All ER 26, it was held as follows:

> "(203)A summary of helpful principles, drawn largely from the words of Longmore LJ in Absalom (on behalf Lloyd's Syndicate 957) v. TCRU Ltd. (2005) EWCA Civ 1586 at (7) : (2006) 1 All ER (Comm) 375 at (7) : (2006) 2 Lloyd's Rep 129 and based upon submissions to me by counsel, which I had approved, in the recent case of Reilly v. National Insurance Guarantee Corporation Ltd (2008) EWHC 722 (Comm) at (13) : (2008) 2 All ER (Comm) 612 at (13) was again the subject matter of agreement, and I repeat and incorporate it:
>
> > (a) Ordinary Meaning. There is a presumption that the words to be construed should be construed in their ordinary and

popular sense, since the parties to the contract must be taken to have intended, as reasonable men, to use words and phrases in their commonly understood and accepted sense. (See also para (7) (i)(iii) in the judgment of Longmore LJ and in particular:

The object of the inquiry is not necessarily to probe the 'real' intention of the parties, but to ascertain what the language they used in the document would signify to a properly informed observer.)

(b) Businesslike Interpretation. It is an accepted canon of construction that a commercial document, such as an insurance policy, should be construed in accordance with sound commercial principles and good business sense, so that its provisions receive a fair and sensible application. (See also the words of Lord Diplock in Antaios Cia Navieras SA v. Salen Rederierna AB, The Antaios (1984) 3 All ER 229 at 233 : (1985) AC 191 at 201 cited at (7)(iv) by Longmore LJ: If a "detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts

business common sense, it must be made to yield to business common sense".)

(c) Commercial Object. The commercial object or function of the clause in question and its relationship to the contract as a whole will be relevant in resolving any ambiguity in the wording.

(d) Construction to avoid unreasonable results . If the wording of a clause is ambiguous, and one reading produces a fairer result than the alternative, the reasonable interpretation should be adopted. It is to be presumed that the parties, as reasonable men, would have intended to include reasonable stipulation in their contract."

We, however, do not intend to keep our enquiry confined to literal rule of construction alone.

Background Material

Let us take into consideration the background material vis-à-vis the factual matrix (which even otherwise was necessary for us to determine the question of jurisdiction of this Tribunal)

The Learned Counsel for the parties have raised various contentions with regard to the construction of a document of the nature of clause 3.3. Whereas according to Mr.Sharma, learned counsel appearing on behalf of the respondent, clause 3.3 should not be construed having regard to the entirety and as a `stand alone' clause of the agreement dated 7.2.2006, Mr. Majithia would urge that the entirety of the situation should be taken into consideration.

Thus, upon taking into consideration both `application of literal meaning', on the one hand, and `the contractual purpose and commercial background', on the other, we are of the opinion that both lead to the same answer, i.e. even if the other materials are taken into account. We do not find that a sufficient case has been made out to arrive at a conclusion that a mistake was committed by the respondent in not deleting the word `tower aperture' in clauses 3.3 and 5.3 of the agreement dated 7.2.2006. The said words have been used knowingly and purposely so as to see that the petitioner does not have to pay any unnecessary rent both for interim arrangement as also for final arrangement.

If a plain meaning i.e. literal rule is assigned, the same would not lead to `commercially unjust' result. It would not lead to the conclusion that the respondent would suffer even `undue hardship' (although the same by itself may not give rise to a different construction).

Liability of the Respondent No.2

We have noticed heretobefore the fact of the matter. The involvement of respondent no.2 although was in relation to the entire operation but admittedly the petitioner has not prayed for any relief as against it.

Mr.Majithia, contends that the respondent no.2 had been impleaded only as a proper party and not as a necessary party.

Mr.Harish Tandon, learned counsel appearing on behalf of respondent no.2 urged :

> (i) Rent in respect of land as contradistinguished from the rent for tower rent was payable to respondent no.1;
>
> (ii) the tower rent being payable to MIB with which the respondent no.1 had no concern, its role is limited.

However, our attention in this behalf has been drawn to clause 2.10.3 and 2.10.4 of the Agreement tendered dated 21.9.2005. Our attention was further drawn to a Project Management Agreement by the learned counsel and in particular clause 3.1 and 3.2 thereof which deal with the Project Management Services, to contend that the respondent no.2's functions were confined to the completion of tower and supply the Project Management Services on 10% commission wherefor a time frame had been set as envisaged in terms of Annexure 3 appended thereto.

The learned counsel pointed out that there having been some delay in construction of the tower and the petitioner having released the amount of penalty envisaged thereunder, the respondent no.2 cannot be said to have any liability whatsoever.

We agree with the said contention.

Intimation to the Petitioner issue

One of the issues, which has been raised, we may notice, is issue no.4, namely, as to whether the petitioner had been intimated or informed with regard to the handing over/ taking over of the CTI covered space by the respondents.

The respondent no.1 in terms of the provisions of the Agreement dated 7.2.2006 or otherwise had no contractual liability to intimate to the petitioner so far as handing over of the open space/ covered space is concerned.

Although, at one point of time, an issue had been raised with regard to the said question, keeping in view the provisions contained in clause 3.3 thereof, Mr.Majithia agreed that the respondent no.2 for the said purposes would be deemed to be its agent. If that be so, in our considered opinion, there cannot be any doubt or dispute that handing over of possession of open space/ covered space to it would also come within the purview of the said `agency'.

It is not the case of the petitioner that the respondent no.2 has acted beyond its authority as an agent of the petitioner. It is also not the case of the petitioner that by reason of any act of omission or commission, the respondent no.2 has caused any loss or damage to the petitioner.

The petitioner having not prayed for any damages against the respondent no.2, we need not go into the aforementioned question. Moreover, as it appears from two emails issued by the petitioner being dated 19.2.2008 and 10.3.2008 it is evident that the petitioner had been keeping itself abreast with the position that the construction starts as also the power supply is given. Even Mr.

Ram Singh, the witness examined on behalf of respondent no.2 has in his deposition stated :-

> "Q: is it correct to say that BECIL was appointed as agent of clear media for CTI?
>
> A: Yes
>
> Q: is it correct to say that BECIL and accepted the hand over of the licensed infrastructure from Prasar Bharti on 2nd July, 2007?
>
> A: yes
>
> Q: does the handing over/taking over certificate bears the signature?
>
> A: yes
>
> Q: is it correct to say that on taking over of space for setting up infrastructure for CTI the petitioner was intimated immediately?
>
> A: yes
>
> Q: was such intimation given in writing?
>
> A: no
>
> volunteer: it was given orally

Q: is it correct to say that whenever BECIL for starting project takes possession of land proper records would be maintained?

A: yes”

We may further notice:-

“The attention of the witness is drawn to agreement dated 07.02.2006 on page number 119 (clause 3.3)

Q: is it correct that in terms of clause 3.3, land and building was to be made available by Prasar Bharti to the petitioner or to BECIL on behalf of the petitioner?

A: yes

Q: did clear media ever writing a letter to BECIL object into setting up of CTI on land and building owned by Prasar Bharati?

A: no”

In view of the suggestions given to the said witnesses as also the materials brought on record by the parties, we are of the opinion that no case has been made out for passing any order against the respondent no.2.

We, therefore, are of the opinion that the petition should be allowed only against the respondent no.1. It is directed

accordingly. However, in the facts and circumstances of the case, there shall be no order as to costs.

(S.B. Sinha)

Chairperson

(G.D. Gaiha)

Member

(P.K. Rastogi)

Member

April 21, 2011

`ns’/anu