

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL  
New Delhi**

**Dated 27<sup>th</sup> July, 2011**

**Petition No. 401(C) of 2010**

Harika Cable : Petitioner

Vs.

Maa TV : Respondent

**BEFORE:**

**HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON  
HON'BLE MR. G.D. GAIHA, MEMBER  
HON'BLE MR. P.K. RASTOGI, MEMBER**

For Petitioner : Mr. Yoginder Handoo,  
Advocate

For Respondent : Mr. Rajagopala Rao, Advocate

**JUDGEMENT**

**S.B. Sinha**

The petitioner herein is a Multi Service Operator. The respondent is a broadcaster.

The parties hereto had entered into an agreement so as to enable petitioner to retransmit signals of the channels of respondent for its operation in the town of Tenali, a sub division in the District of Guntur (A.P.).

The said agreement was entered into on or about 19.11.2009 pursuant where to petitioner became entitled to retransmit signals only in the town of Tenali.

The petitioner, however, contends that it has laid cables in the entire Guntur Mandal as also Chebrah Mandal, the latter being another Sub Division in the District of Guntur.

For the purpose of expanding its area of operation in the said two Mandals, petitioner made a request for supply of signals. It also supplied a Map.

The petitioner contends that, one Tenali Communication had illegally being transmitting signals of the channels of respondent in its areas allegedly without making any payment therefor.

According to the petitioner and as would appear from its letter dated 2.4.2010 addressed to the said Tenali Communication that the latter had been transmitting signals illegally in 10 areas mentioned therein.

By reason of a letter dated 26.4.2010, the petitioner inertia made a complaint to respondent stating that it had not been responding to its request for expansion of its areas.

The respondent in its reply interalia contended that the request of petitioner is not worth consideration as it had not supplied the details as are required in terms of Clause 9.2 of the Telecommunications (Broadcasting and Cable Services) Interconnection Regulation 2004 (The Regulations) as amended from time to time.

In view of the limited controversy raised in this Petition, Mr. Handoo, learned counsel appearing on behalf of petitioner, would contend that Clause 9.2 of the Regulations cannot have any application whatsoever in this case in view of the fact that petitioner neither have any LCO nor have any direct connectivity.

The learned counsel, however, on instructions stated that for the time being, petitioner is ready and willing to enter into an agreement on a subscriber base of 500; subject of course to the condition that as and when other LCOs join its network and/or any other subscriber joins the same, SLR would accordingly be furnished to the respondent. A further offer was made by Mr. Handoo that petitioner is ready and willing to pay three months' advance on the said basis with respondent.

Mr. Rajagopal Rao, learned counsel appearing on behalf of the respondent, on the other hand, urged that Clause 9.2 of the Regulation is mandatory in character and for the purpose of entering into a new agreement or expansion of the area, the requirements laid down therein must be complied with.

The Regulations were made by the Telecom Regulatory Authority of India (TRAI) in exercise of its jurisdiction under Sub Clauses (ii) and (iv) of Clause (b) of Sub section 1 of Section 11 of the TRAI Act, 1997.

In view of the fact that a contract is thrust upon the parties in terms of Regulation 3.2 of the Regulations, the Regulator in its wisdom prescribed fulfillment of certain conditions before a broadcaster is called upon by this Tribunal to enter into such an agreement.

We may for the aforementioned purpose notice Clause 3.2 and the first proviso appended thereto as also Clause 9 of the Regulations.

**“3.2 -** Every broadcaster shall provide on request signals of its TV Channels on non-discriminatory terms to all distributors of TV channels, which may include, but be not limited to a cable operator, direct to home operator, multi system operator, head ends in the sky operator; Multi System Operators shall also on request re-transmit signals received from a broadcaster, on a non-discriminatory basis to cable operators”.

**9.1 -** In non-addressable systems, while executing an interconnection agreement for the first time between a multi system operator and a cable operator, the parties to the agreement shall take into account the subscriber base of the cable operator on the basis of the Subscriber Line Report (SLR) where such SLR exists. Where such SLR does not exist, this shall be negotiated on the basis of the evidence provided by the two parties on the subscriber base, including the subscriber base of similarly placed cable operators and local survey.

**9.2. -** In non-addressable systems while executing an interconnection agreement for the first time between a multi system

operator and broadcasters, the multi system operator shall furnish a list of the cable operators who will be getting signals from its network along with their subscriber base. The parties to the agreement shall take into account the subscriber base of cable operators connected to the multi system operator while negotiating the subscriber base of the multi system operator. For the consumers proposed to be directly served by the multi system operator the procedure as laid down in sub-clause 9.1 of this regulation shall be followed.”

We may also place on record paragraph 11 of the Explanatory Memorandum issued by the TRAI along with its Third amendment Regulation, 2006, which is as under:

“The primary reason for disputes arising on account of expansion of area is that without addressability, it is impossible to know the actual subscriber base and area is the basis on which a subscriber base is arrived at. Any change in area of operation has direct bearing on the negotiations with respect to subscriber base. However, the expansion of area by a multi system operator on account of giving feed to a cable operator operating outside the existing area of operation of the multi system operator can be taken care of by negotiations based on the Subscriber Line Report (SLR). Similarly, the expansion of area of operation by a cable operation will also get reflected through the Subscriber Line Report (SLR).”

Mr. Handoo, it may be noticed, raised two alternative submissions namely in respect of the new areas for all intent and purport Clause 3.2 would be attracted and in the alternative there is no restriction under the Regulations for expansion of the area in terms of paragraph 11 of the Explanatory Memorandum.

The learned counsel would urge that unless and until an operator starts operating in an area, no existing cable operator would leave the network of the MSO with whom it had entered into a contract nor any subscriber would join a

new network and in that view of the matter it would be difficult to provide names of an LCO and/or the details of the direct connectivities.

In a given case the provisions contained in the proviso appended to Clause 3.2 as also Clause 9.2 of the Regulation may create some hardship but the same, in our opinion, is not sufficient for this Tribunal to make an endeavour to allow a party to wriggle out from the rigors thereof, particularly one the provisions appear to us to be imperative in character.

It is not a case where because of an unreasonable condition, recourse may be taken to the creative interpretation of the statute by a court of law to read an imperative statute to be a directory one, as has been observed by the noted author 'Crawford' in his treatise on Statutory Constructions, as has been noticed by the Apex Court in *Dove Investments Pvt. Ltd. and Ors. v. Gujarat Industrial Inv. Corporation Ltd. and Anr.* (2006)2 SCC 619 in the following terms:

**“13.** Whether a statute would be directory or mandatory will depend upon the scheme thereof. Ordinarily a procedural provision would not be mandatory even if the word “shall” is employed therein unless a prejudice is caused. (See *P.T. Rajan v. T.P.M. Sahir*<sup>3</sup>.)

**14.** In *Chandrakant Uttam Chodankar v. Dayanand Rayu Mandrakar*<sup>4</sup> this Court observed: (SCC p. 212, paras 74-75)

**“74.** In this case it is not necessary for us to go into the question as to whether Section 83 is imperative in character or not inasmuch it is settled law that even where the expression ‘shall’ is used, the same may not be held to be mandatory. Even a mandatory provision having regard to the text and context of the statute may not call for strict construction.

75. In *U.P. SEB v. Shiv Mohan Singh*<sup>5</sup> this Court stated the law in the following terms: (SCC p. 440, paras 96-97)

‘96. Ordinarily, although the word ‘shall’ is considered to be imperative in nature but it has to be interpreted as directory if the context or the intention otherwise demands. (See *Sainik Motors v. State of Rajasthan*<sup>6</sup>, AIR para 12.)

97. It is important to note that in *Crawford on Statutory Construction* at p. 539, it is stated:

“271. *Miscellaneous implied exceptions from the requirements of mandatory statutes, in general.*—Even where a statute is clearly mandatory or prohibitory, yet, in many instances, the courts will regard certain conduct beyond the prohibition of the statute through the use of various devices or principles. Most, if not all of these devices find their jurisdiction in considerations of justice. It is a well-known fact that often to enforce the law to its letter produces manifest injustice, for frequently equitable and humane considerations, and other considerations of a closely related nature, would seem to be of a sufficient calibre to excuse or justify a technical violation of the law.”

In *Escotel Mobile Communication Ltd. Vs. DoT*, by Judgement dated 11<sup>th</sup> February, 2010, Petition No. 3 of 2004, the said principle was reiterated, stating

32. In a given situation, the term “immediately” may mean “within reasonable time, it must be done immediately. [See *Gangavishan Heeralala v. Gopal Digambar Jain and Ors.* AIR1980MP119; *Keshava S. Jamkhandi v. Ramachandra S. Jamkhandi*, AIR1981 Kar 97 at 101; *Ramnarayan v. State of M.P.*, AIR 1962MP93; *R. v. Inspector of Taxes (1971)* 3 ALL ER394 and *R. v. HU Inspector of Taxes (1972)* 1 ALL ER 545 In *Bombay Dyeing (Supra)*, this Court observed:

In ‘*The Interpretation and Application of Statutes*’, Reed Dickerson, at p. 135 discussed the subject while dealing with the importance of context of the statute in the following terms:

.....The essence of the language is to reflect, express, and perhaps even effect the conceptual matrix of established ideas and values that identifies the culture to which it belongs. For this reason, language has been called “conceptual map of human experience.

33. In K.S. Muthu v. T. Govindarajulu and Anr. 2000(4) SCALE 175, this Court opined:

“.....In the circumstances when the appellant was not in a position to perform the direction given by the Court in view of the holiday, the Court cannot expect the Appellant to perform what is impossible.....

“In Pandiyan Roadways Corpn. Ltd. v. N. Balakrishnan, (2007) 9 SCC 755, the law is stated to the following terms:

On a plain reading of the said provision and particularly in view of the fact imperative in character. It may, however, be held to be directory in certain situations, while construing a statute of this nature, the context plays an important role. Interpretation of a statute would also depend upon the fact situation obtaining in the case. Therefore, however, certain exceptions to the said rule.”

The effect of this Regulation has been considered by this Tribunal recently in M/s. Digicable Network (India) Pvt. Ltd. Vs. Star Den Media Services Pvt. Ltd. disposed on 2<sup>nd</sup> February, 2011 where the law has been laid down in the following terms.

“There is no such requirement under the Regulations, in our opinion. It is one thing to say that a broadcaster keeping in view the SLRs and/or the subscriber base is to start with a figure, so that the parties can enter into a negotiation, but in a situation of this nature, it would be wholly inequitable as also unreasonable to ask the petitioner to enter into an agreement with a minimum guarantee of Rs.31 lacs. It goes to show that the respondent intends to deny the request of the petitioner unjustly. The proposed term being wholly unreasonable, the same would amount to a refusal.”

On interpretation of the said Regulation, this Tribunal opined:

“Clause 9.2 indisputably is one of the conditions precedent for invoking Clause 3.2. On a plain reading of the said provision, it would be evident that even for entering into an interconnection agreement for the first time, the Multi System Operator is required

to furnish a list of cable operators “who will be getting signals from its network along with their subscriber base”. So far as the proposal of the ‘Distributor of TV channel’ to make available the signals by way of retransmission is concerned, we are of the opinion that SLR, as laid down in sub-clause 9.1 of the Regulations are required to be furnished. As at present advised, no case has been made out for reading down the said provision. It has not been stated that for a new comer to the field, it is impossible to comply with the said provision.

It is, therefore, difficult for us to accept the contention raised on behalf of the petitioner that in a case, where the seeker of the channels is a first time operator, the Subscriber Line Report is not required to be furnished.

Clause 9.2 indisputably is one of the conditions precedent for invoking Clause 3.2. On a plain reading of the said provision, it would be evident that even for entering into an interconnection agreement for the first time; the Multi System Operator is required to furnish a list of cable operators who will be getting signals from its network along with their subscriber base”.

Upon considering some of the decisions rendered by this Tribunal, it was opined:

“It is now a well settled principle of law that a statute should, unless there exists any anomaly and/or leads to any absurdity, should be given a plain and literal meaning. A statute should be construed also in the text and context thereof. If an exception has been created to main provision, there is absolutely no reason as to why it should not be given its full effect.

Each case, therefore, must be decided on its own facts but the basic principle of law is required to be followed”.

Similarly in *Shiristi Cable Vs. Zee Turner Ltd. Noida*, Petition No. 344 (C) of 2010 disposed on 3<sup>rd</sup> February, 2011, this Tribunal held as under: -

“It is, therefore, not correct to contend that it is not possible for an operator to furnish any data whatsoever to the broadcaster so as to meet the requirements of Clause 9.2.”

Considering the decision of this Tribunal in *Digicable (Supra)*, it was held:

“Following the aforementioned decision of this Tribunal, I am of the view that the interest of justice shall be sub-served if the petitioner is directed to supply the names of the proposed operators with their subscriber base at an early date on receipt whereof the parties may negotiate and enter into a subscription agreement on such subscriber base as may be agreed upon as expeditiously as possible and not later than three weeks from date of furnishing of the said informations by the petitioner.

I have issued the aforementioned direction as minimum guarantee of the number of connectivity by itself is not a substitute of clause 9.2 of the regulations nor the list of operators working with the petitioner in the CAS area will be indicative of the proposed LCOs with whom the petitioner intends to enter into an agreement.”

Area of operation, as would appear from the paragraph 11 of the Explanatory Memorandum has a vital role to play in the matter of agreement providing for supply of signals entered into by and between a Broadcaster and a Multi Service Operator.

Paragraph 11 of the Explanatory Memorandum dealing with expansion of operation area is one of the principal reasons resulting in disputes between a Broadcaster and a Multi Service Operator, so far as ascertainment of actual subscriber base in relation to the area for which the subscriber base is to be arrived at.

Paragraph 11 Explanatory Memorandum does not state that the Multi Service Operator has a right to expand its area of operation whenever he desires. No legal right can be created by reason of an Explanatory Memorandum. Had the intention of the TRAI been to create a right in the Multi

Service Operator or a Local Cable Operator to expand its area of operation whenever it desires, it could have said so without any reservation and/or in explicit terms.

The said paragraph speaks about entering into negotiations by the parties so as to enable them to know the subscriber base in the expanded area. If the regulator intended to create such a right, it could have also thought of the ground realities which is projected by Mr. Handoo that such SLRs will not be available being dependant upon the manner in which the MSO retransmits the signals and other relevant factors.

We, therefore, are of the opinion that interest of justice would be subserved, if this petition is disposed of with a direction upon respondent to enter into a negotiation with petitioner on the basis of the offer made by the former as also on the basis of the evidence which it may produce at a meeting with respondent with regard to the subscriber base in the light of Clause 9.2 of the Regulations.

The respondent may also consider the question keeping in mind the areas in which petitioner is said to have laid the cable but has not started any operation as yet which of course is a large one. There cannot be any doubt or dispute that petitioner must also place before respondent all evidences that it is otherwise entitled to operate in the expanded area in accordance with law and the

broadcaster would be in a position to transmit signals of its channels on reasonable terms and on a non- discriminatory basis.

This petition is disposed of on the above terms but in the facts and circumstances of this case without any order as to costs.

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

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

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

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