

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 03rd June 2011

Petition No. 435(C) of 2010
(M.A.No.51 of 2011)

ESPN Software India Pvt. Ltd. Petitioner

vs.

Fastway Transmission Pvt. Ltd. & Ors. Respondents

Petition in No. 25(C) of 2011
(M.A.No.24 of 2011 & M.A.No.52 of 2011)

ESPN Software India Pvt. Ltd. Petitioner

vs.

Fastway Shree Neelkanth Network Pvt. Ltd. Respondent

Petition in No. 26(C) of 2011
(M.A.No.25 of 2011 & M.A.No.53 of 2011)

ESPN Software India Pvt. Ltd. Petitioner

vs.

Fastway Surya Network Pvt. Ltd. Respondent

Petition in No. 27(C) of 2011
(M.A.No.26 of 2011 & M.A.No.54 of 2011)

ESPN Sofware India Pvt. Ltd. Petitioner

vs.

Fastway Shine Star Network Respondent

Petition in No. 29(C) of 2011
(M.A.No.28 of 2011 & M.A.No.55 of 2011)

ESPN Sofware India Pvt. Ltd. ... Petitioner

vs.

Fastway Aerospace Pvt. Ltd. ... Respondent

Petition in No. 30(C) of 2011
(M.A.No.29 of 2011 & M.A.No.56 of 2011)

ESPN Sofware India Pvt. Ltd. ... Petitioner

vs.

Fastway Space Satellite Pvt. Ltd. ... Respondent

Petition in No. 31(C) of 2011
(M.A.No.30 of 2011 & M.A.No.57 of 2011)

ESPN Sofware India Pvt. Ltd. ... Petitioner

vs.

Fastway Citizen Cable Network Pvt. Ltd. ... Respondent

BEFORE:

HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON

For Petitioners : Mr. N. Ganpathy, Advocate
For Respondents : Mr. Navin Chawla and
Mr. Sharath Sampath, Advocates

JUDGMENT

S.B. Sinha

Background Facts

The petitioner is a broadcaster. It is a producer of some channels known as ESPN channels.

Respondent is a Multi Service Operator (MSO) having its area of operation in the entire State of Punjab as also in the Union Territory of Chandigarh.

The parties hereto entered into as many as seven agreements; five on 8.12.2009 and two on 26.3.2010; in terms whereof petitioner was to

transmit signals of the said channels to the network of respondent so as to enable it to retransmit the same to its link operators and subscribers.

There is no dispute with regard to the amount on subscription fees payable in terms of the said agreement.

There is also no dispute that all the seven agreements expired on 30.6.2010. It is furthermore not in controversy that the parties hereto started negotiation for renewal of the said agreements within the period prescribed under Clause 8.1 of the Telecommunications (Broadcasting and Cable Services) Interconnection Regulations, 2004 as amended from time to time. It is furthermore not in controversy in view of the admission made by petitioner itself in the petition that respondent for the purpose of obtaining reduction in its subscriber base was agreeable for renewal of the contracts if petitioner had agreed for a 50% reduction in the subscription fee.

The petitioner contends that respondent took recourse to blackmail tactics having a monopoly and in fact obtained reduction of 15% in the subscriber base from some of the broadcasters.

The petitioner referred to the statement made by the Chief Executive Officer of respondent in his cross-examination to the effect that its total number of subscribers within its area of operation is about 1.526

millions but the subscriber base as agreed to between the parties was only 77,000. The negotiations between the parties continued despite expiry of the period of agreement.

The petitioner, however, did not agree to the offer made by respondent with regard to reduction in the subscriber fee. The parties hereto, however, continued to give and receive signals of the channels of petitioner.

The respondent on or about 7.12.2010 issued a public notice; one of them being in a newspaper known as `Janwani', which is a local newspaper and another published from the State of Himachal Pradesh which are local newspapers but the notices were published in the English language.

It reads as under: -

"

PUBLIC NOTICE

This is to inform the consumer/public that after the expiry of three weeks we shall not re-transmit the channels ESPN, Star Sports and Star Cricket being distributed by ESPN software Private limited on account of refusal of broadcaster to give reduction in subscription fees being claimed due to large scale migration of operators competition of DTH operators and on account of financial unviability of business wit ESPN Software Private Limited for the following networks....."

Proceedings

The petitioner on the premise that at the relevant point of time this Tribunal was on vacation, moved the Delhi High Court by way of a Writ Petition marked as WP (C) No.8724 of 2010.

A learned Judge of the Delhi High Court passed an interim order in favour of petitioner restraining respondent from disconnecting its channels, subject to the condition that on account of continuation of the channels signals, it would not claim any equity in its favour.

It is not in dispute that pursuant to the said interim order, respondent continued to receive signals of petitioner's channels but it had not been making any payment whatsoever in relation thereto to it.

By an order dated 3.1.2011, the said Writ Petition was dismissed taking note of the fact that in the meanwhile petitioner has approached this Tribunal.

A Miscellaneous Application was filed by petitioner which was marked as MA No.30/2011 wherein a contention was raised that continuation of its channels to respondent's network was not commercially viable and having regard to the fact that respondent itself was not inclined to continue to take supply of the said channels, it prayed

for liberty be permitted to discontinue supply of the signals to respondent's network.

This Tribunal by its order dated 8.2.2011, directed as under: -

"...From what has been noticed heretobefore, it is clear that both the parties do not intend to continue with their contractual obligations; respondent for commercial reasons and the petitioner presumably having regard to the interim order passed by the Delhi High Court.

Be that as it may, the parties are ad idem that the supply and/or taking of signal is not in the interest of any of the parties. In that view of the matter, we are of the opinion that these applications may be disposed of with liberty to the to discontinue supply of signals without prejudice to the rights and contentions of the parties.

We may place furthermore notice that according to the respondent the contract has also come to an end."

With the aforementioned observations the said MA was allowed.

In its original application, the petitioner did not pray for recovery of any amount from respondent.

However, an application for amendment was filed. The same was allowed.

The Reply of Respondent

The respondent in its reply raised a contention that having regard to the conduct of the parties as also the provisions of Clause 8.1 of the Regulations, respondent's liability came to an end on the expiry of three months' from the date of expiry of the original agreements.

The petitioner has not claimed any equitable relief in view of the fact that admittedly respondent had all along been contending that in the event the agreements are sought to be renewed, the same should be on the term that its subscriber base be reduced to the extent of 50%.

It was furthermore contended by respondent that the Delhi High Court in its interim order having not permitted petitioner to adjust equities, in any event it is not entitled to any amount from 28.12.2010 on which date, 21 days expired from the date of publication of the public notice.

The petitioner, however, would contend that as stricto sensu respondent has not complied with the provisions of Clause 4.3 of the Regulations in so far as in one of the newspapers, the public notice was published in the local language which is Gurumukhi, the contractual obligations of the parties continued till the date of disconnection i.e. on 8.2.2011.

Issues

In view of the aforementioned rival contentions of the parties, the following issues arise for consideration: -

- i) "Whether the deactivation notice issued by the Respondent was in accordance with Regulation 4.3 of the TRAI Regulations?
- ii) Whether the petitioner is entitled to claim any amount from the respondent Nos 1 to 7 on the expiry of three months from the respective dates of expiry of the subscription agreements?
- iii) Whether the petitioner is entitled to claim any amount for the period of Jan 2011 and 08.02.2011 in view of the order dated 27.12.2010 passed in Writ Petition No. 8724 of 2010?

Submissions

Mr.Ganpathi, learned counsel appearing on behalf of petitioner urged :-

- (a) From the statement of accounts filed by petitioner which is not in dispute, it would appear that the outstanding amount at the end of December, 2010 was Rs. 2,71,133.376 and as in April, 2011 it was Rs.3,41,78,005/- , but having regard to the fact that supply of signals continued, petitioner would be entitled to the charges till the date of disconnection.

(b) Clause 8.1 of the Regulations read with the provisos appended thereto envisages three situations :-

(i) the parties shall negotiate within the time frame mentioned therein

(ii) all the terms and conditions shall apply till an agreement is reached between the parties or at least for a period of 3 months

(iii) the second proviso appended to the Clause 8.1 envisages a situation that the parties may continue to negotiate and termination of the agreement can be effected only by issuing a public notice and in that view of the matter, petitioner would be entitled to claim the amount of subscription fee till 8.02.2011.

(c) The respondent having a monopoly in Chandigarh and having admittedly a total number of 16 lakhs subscribers with a subscriber base of only 77,000, its offer for reduction therefrom being unreasonable, petitioner must be held to have acted bonafide in not accepting the same.

(d) Keeping in view the fact that respondent did not even respond to the demand letter of the petitioner and having

issued a letter only on 23.11.2010 asking for down gradation wherewith also no service line report was furnished, it cannot be said that the respondent's subscriber base was actually reduced to 50%.

(e) The Delhi High Court having not said that respondent was not to pay anything towards supply of signals in terms of its order of injunction, petitioner was entitled to a decree for subscription charges till the date when the actual disconnection was effected.

(f) The public notice issued by respondent would clearly go to show that although one of the newspapers was in vernacular but the contents of the public notice having been published in English, the requirements thereof must be held to have not been satisfied.

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

(i) On a true, correct and harmonious interpretation of Clause 8.1 of the Regulations, it should be held that the maximum period upto which the commercial terms of the agreement would apply was a period of three months and not beyond the same.

(ii) By reason of the 1st proviso appended to Clause 8.1, a legal fiction having been created, the effect thereof is that the contract would be extended only for a period of three months, and not beyond the same.

(iii) In any event petitioner cannot claim the entire amount of subscription fee from the date of expiry of the agreement i.e 28.2.2010 but only to the extent of 50% thereof.

(iv) The High Court, while passing the interim order must be held to have taken note of the fact that Clause 4.3 being meant for safeguarding the interest of the consumers, the broadcasters were not entitled to take any benefit thereunder.

(v) In any event, equity demands that no payment should be directed to be made after 28.12.2010.

The Statute

The Parliament enacted the Telecom Regulatory Authority of India Act, 1997 (the Act), inter alia to protect the interest of the service providers as also the consumers of the Telecom Sector, to promote and ensure orderly growth of the Telecom Sectors and the matters connected therewith or incidental thereto.

Indisputably, the Central Government in exercise of its power conferred on it by proviso appended to Section 2 (k) of the said Act notified that Broadcasting and Cable services would also be treated to be the 'Telecommunication Services'.

Section 11 of the said Act provides for discharge of the functions of the TRAI inter alia in regard to fixing the terms and conditions of interconnectivity between the service providers.

The Regulator in exercise of the said power made the said Regulations.

It may further be noticed that the Cable TV Networks of the country are also regulated by reason of another Parliamentary Act known as Cable TV Networks (Regulation) Act, 1995.

Indisputably, therefore, the industry of broadcasting and cable services are regulated by the Parliamentary Acts and the aforementioned Regulations framed by the TRAI.

Ordinarily, parties may enter into a contract upon specifying the terms and conditions thereof.

Regulation 3.2 of the Regulations, however, provides for a 'must provide' clause in terms whereof on a request made by a 'Distributor of a TV Channel' a broadcaster is obligated to supply signals of its channels on reasonable terms and on non-discriminatory basis.

Clause 4 of the Regulations provides for disconnection of TV channel signals.

We may notice Clauses 4.2 and 4.3 thereof.

"4.2 No distributor of TV channels shall disconnect the re-transmission of any TV channel without giving three weeks notice to the broadcaster or multi system operator clearly giving the reasons for the proposed action.

4.3 A broadcaster/ multi system operator/ distributor of TV channels shall inform the consumers about such dispute to enable them to protect their interests."

Clause 8 of the said agreement provides for the time period for renewal of the existing agreements.

It reads as under: -

"8. Time Period for Renewal of existing agreements

8.1 Parties to an interconnection agreement for supply of TV channel signals shall begin the process of negotiations for renewal of existing agreement at least two months before the due date of expiry of the existing agreement.

Provided that if the negotiations for renewal of the interconnection agreement continue beyond the due date of expiry of the existing agreement then the terms and conditions of the existing agreement shall continue to apply till a new agreement is reached or for the next three months from the date of expiry of the original agreement, whichever is earlier. However, once the parties reach an agreement, the new commercial terms shall become applicable from the date of expiry of the original agreement.

Provided further that if the parties are not able to arrive at a mutually acceptable new agreement, then any party may disconnect the retransmission of TV channel signals at any time after the expiry of the original agreement after giving a three weeks notice in the manner specified in clause 4.3. The commercial terms of the original agreement shall apply till the date of disconnection of signals."

With a view to construe the said provisions, we may also notice Paragraph 13 of the Explanatory Memorandum issued by the TRAI with the Telecommunication (Broadcasting and Cable Services) Interconnection (3rd) Amendment Regulations, 2006 :-

Renewal of agreements

"13. Renewal of agreements is smooth in most of the cases, but the problems arise when the negotiations for renewal extend beyond the date of expiry of the original

agreement. To govern the terms and conditions for continuation of signals beyond the expiry date of the original agreement, the original agreement can be extended till an agreement is reached regarding the terms and conditions for renewal. However, it must be recognized that the new commercial terms will apply retrospectively from the date of expiry of the original agreement. If however, no agreement is reached, then either party can disconnect the signals after giving the statutory notice as provided in Regulation 4 of these regulations. The terms and conditions of original agreement would govern the relationship between the two parties till the date of disconnection of signals. It is believed that the parties should be able to reach a new agreement within three months of expiry of the old agreement (after five months of negotiations). However, in case negotiations carry on beyond this period, then some new interim arrangement regarding terms and conditions should be worked out between the parties and terms and conditions of the old agreement would not get automatically extended beyond this period."

Before, however, construing the provisions relating to termination of the agreement we may also notice one of the other provisions, namely, Clause 11.1 of the Regulation to which reference has been made by Mr. Navin Chawla.

It reads as under: -

"Between Multi System Operator and Cable Operator

11.1 In non-addressable systems, negotiations on revision of subscriber base at the time of renewal of interconnection agreement between a multi system operator and a cable operator shall take into account the changes in subscriber base of the cable operator over the past three years, as well as the changes in which the cable operator is operating and its adjoining areas for the current period."

Interpretation Issue

Clause 8.1 is in three parts.

By reason of the said provision the parties are obligated to begin the process of negotiations for renewal of existing agreement at least two months before the due date of expiry of the existing agreement. The first proviso, however, envisages continuance of the agreement, in terms whereof the terms and conditions of the existing agreement would continue for next three months from the date of expiry of the original agreement. By reason thereof the maximum period is not fixed as has been urged by learned counsel.

The said proviso envisages that if an agreement is arrived at, the new commercial terms would be given a retrospective effect from the date of the expiry of the original agreement.

The second proviso, however, envisages a situation where the parties are unable to arrive at mutually accepted terms of new agreement, in which event any party thereto would become entitled to disconnect transmission of TV channel signals at any time after the expiry of the original agreement but therefor a three weeks' notice is required to be issued in the manner specified under Clause 4.3 of the Regulations.

It furthermore provides that the commercial terms of the agreement shall apply till the date of disconnection of signals.

Respondent contends that the period of three months is the maximum period whereafter the entire arrangement comes to an end. What, however, would be the effect of such a situation is the question? Once it is held that the parties are bound by the provisions of the Regulations not only from a stage prior to entering into the agreement but also during its tenure and till termination is effected in the manner as provided by the Statute the logical consequences thereof shall ensue.

Ordinarily, a Statute should be given a literal meaning. In the event, however, there exists some ambiguity, a purposive meaning may be assigned so as to give effect to the object thereof.

The Regulations constitute 'law' within the meaning of Article 13 of the Constitution of India. Assuming that it is a subordinate legislation (however such Regulations have been held to be only 'Direction of the Regulator'), it must be read in conformity with not only with the Principal Act but also the other Parliamentary Acts, like Indian Contract Act, in the event it is found to be ambiguous. A Statute must also be read reasonably. It has to be construed keeping in view not only the other statutory provisions but also the common law principles.

It is now well-settled that a 'Proviso' and 'Explanation' appended to a principal provision can be construed in four different manner.

It was so held in *S Sundaram Pallai and Ors. vs. R. Pattabiraman and Ors.* AIR 1985 SC 582 in following terms: -

"42. We need not multiply authorities after authorities on this point because the legal position seems to be clearly and manifestly well established. To sum up, a proviso may serve four different purposes:

- 1) qualifying or excepting certain provisions from the main enactment;
- 2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;
- 3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and
- 4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision.

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45. We have now to consider as to what is the impact of the Explanation on the proviso which deals with the question of willful default. Before, however, we embark on an enquiry into this difficult and delicate question, we must appreciate the intent, purpose and legal effect of an Explanation. It is now well settled that an Explanation added to a statutory provision is not a substantive provision in any sense of the term but as the plain meaning of the word itself shows it is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision. Sarathi in 'Interpretation of Statutes' while dwelling on the various aspects of an Explanation observes as follows:

- (a) The object of an explanation is to understand the Act in the light of the explanation.
- (b) It does not ordinarily enlarge the scope of the original section which it explains, but only makes the meaning clear beyond dispute."

See Also

Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO,
(2007) 5 SCC 447

Nirman & Associates Private Ltd. v. ESPN Software India Pvt. Ltd. & Ors.,
Petition No. 187(C) of 2010 dated 16th December, 2010

Harika Cable Vision v. E TV Network & Anr., Petition No.227 (C) of 2008
Dated 5th November, 2009

In *Motiram Ghelabhai (dead) through LR Maniram Motiram vs. Jagan Nagar (dead) through LRs & Ors.* reported in 1985 (2) SCC 279, the Apex Court observed :-

"...Is it introduced merely with a view to qualify or create exceptions to what is contained in the main provision of s.50 or does it go beyond that purpose and enact a substantive law of its own by way of providing for special savings following upon the repeal of the two earlier enactments, the 1939 Act and the 1944 Act ? That a proviso could be of either type was not disputed before us by counsel for the appellant-defendant. In fact in *Shah Bhojraj's* case (supra) this Court after referring to two English decisions and a passage in *Caries on Statute Law* (5th edition) at page 166 of the Report has observed thus:

"The law with regard to provisos is well-settled and well-understood. As a general rule, a proviso is added to enactment to qualify or create an exception to what is in the enactment and ordinarily a proviso is not interpreted as stating a general rule. But provisos are often added not as exceptions or qualifications to the main enactment but as savings clauses, in which cases they will not be considered as controlled by the section."

It is also a well-settled principle of law that the Court shall not interpret a statute in such a manner so as to make another provision contained therein redundant or otiose.

Each word has to be given its meaning. A vacuum shall not be presumed.

Application of Provisos to Clause 8.1 of the Regulation

Bearing in mind the aforementioned well-settled principles, I am of the opinion that the first proviso contemplates a situation which would take the parties either to enter into an agreement on renewal thereof, in which event the other terms of the contract, subject of course to the settlement of differences between the parties, the commercial terms be given a retrospective effect. The commercial terms between the parties in absence of any agreement to the contrary would not change. They may change in favour of the broadcaster or in favour of the service providers.

If, however, the parties do not agree for renewal of agreement or the terms thereof but continue to hold negotiations, the agreement would continue to operated for a period of three months.

It may be noticed that whereas other terms of the contract were given only a prospective effect to, as for example the technical terms or

other general terms of a contract; the commercial terms. By reason of the first proviso appended to Clause 8.1 of the Regulations are required to be given a retrospective effect.

The second proviso, however, contemplates a situation where the parties despite expiry of the terms of the agreement either expressly or by necessary implication which would include their conduct, may continue to supply signals of the channels and which is received by the service provider.

If the Regulator did not contemplate any vacuum and intended to consider all aspects of the matter, it must be held that supply of signal was not contemplated to be on a gratuitous basis.

A party to an agreement may terminate it either during pendency thereof or on the expiry thereof or during the extended period of negotiations or at the end of the three months from the date of expiry of the original agreement; but before recourse thereto is taken, the statutory obligations on his part must be complied with, namely, issuance of a public notice in the manner laid down under Clause 4.3 of the Regulations.

It has been noticed heretobefore that the two provisos used different terms. Firstly the first part of the first proviso contemplates

continuation of all terms and conditions but the second part contemplates only commercial terms which only can be given a retrospective effect.

Termination of an agreement by a service provider is governed by a Statute. There may be a formal agreement and there may not be one.

But once the parties resort to transmission and retransmission of signals of the channels of the broadcasters, the other players in the field, namely, the link operators, sub-link operators and ultimately the public acquire some right in regard thereto.

The Act contemplates protection of the interest of the public as is evident from the preamble of this Act. It also envisages protection of the rights of the service providers. When construing a Statute, the Interpreter should give effect to the purpose and object for which it was enacted.

While construing the second proviso, the Court has to bear in mind that the Regulator has used the words "at any time" and, thus, the period is not restricted to three months. It is not restricted to a situation where the negotiations have failed. It envisages a situation where transmission of signals continued for the benefit of the viewer. By way of example it may be said that public of a particular area may be interested in the Sports Channel. If they come to know that the agreement between a Broadcaster and a Multi Service Operator would come to an end, it may either move this Tribunal or shift to other MSOs/LCOs. They may take

such steps as they think would be to their benefit i.e. to continue to view the channel for which several modes are available to him.

Can it be held that the second proviso appended to Clause 8.1 contemplates such a situation and that supply of signal is presumed to have gratuitously made? The answer to the aforementioned question must be rendered in the negative.

The doctrine of quasi contract as envisaged under Section 70 of the Indian Contract Act shall come to the aid of the supplier of signals. In such an event, in a given case, even the common law principles of restitution may be invoked. Submissions of Mr.Chawla that the commercial terms envisage only the subscriber base is not correct. Subscriber base may be one of the factors for determining the commercial terms of the contract. It is not and cannot be the only determining factor for all the commercial terms.

The commercial terms may envisage payment of the subscription fee in advance or on the 7th day of the month or at the end of the month. The commercial terms may also envisage that the arrears are to be paid in instalment. It may moreover envisage a change in the mode of payment. The broadcaster may insist on payment through bank drafts only and not in cash or even by cheque.

The interpretation of Clause 8.1 came up for consideration before this Tribunal inter alia in Den Networks Ltd. vs. Multi Vision Network Petition No.27 (C)/2010 disposed of on 17.1.2011, wherein it was held :-

“...We would, however, assume that the agreement between the parties came to an end and clause 8 of the regulation will have no application.

The matter relating to supply of signals for the purpose of retransmission thereof of the channels of broadcasters stand on a different footing.

The statutory scheme in terms of the Act as also the Regulations undoubtedly provide that the same must sub serve the public purpose.

The regulator as also this Tribunal are enjoined with a duty to uphold the right of the public in this behalf.

It is in that view of the matter, the regulator had provided different kinds of notices viz: -

1. Notices under clause 4.1 by a broadcaster to the distributor;
2. Notices by distributor to a broadcaster in terms of clause 4.2, and
3. Requirement of public notices to be issued for consumption of public both by the broadcaster as also the distributor of cable services as envisaged under Clause 4.3.

Whereas the notices in terms of Clauses 4.1 and 4.2 are for the benefit of the broadcaster and the distributors respectively, the one under Clause 4.3 is for the benefit of the public.

The public keeping in view the said provisions as also the Explanatory Memorandum attached to the regulations would be entitled to bring an action before a court of law or migrate to another MSO within the aforementioned period.

This statutory remedies provided by reason of Clause 4.3 of the Regulations, in our opinion, having regard to the interest of the consumers, ordinarily, cannot be waived by any of the parties to the contract.

If, thus, in the event a finding of fact can be arrived at that the supply of signal continued which would appear from the conduct of the parties, the respondent would be bound to pay the charges arising out of the same, the signals having not been supplied gratuitously.

The relationship between the parties, therefore, did not come to an end only on mere expiry of the contract but the same would come to an end only the on expiry of 21 days from the date of publication of the public notice in two newspapers in the manner as contemplated thereby.

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Strong reliance has been placed by Mr. Chawla on a passage from 27th Edition of Anson's Law of Contract. We may however notice the relevant passage from its 28th Edition.

"The need for acceptance of a repudiation for the contract to be discharged led to Asquith L.J.'s famous and influential aphorism that 'an unaccepted repudiation is a thing writ in water'. (Howard v. Pickford Tool Company Ltd. [1951] 1 K.B. 417 at p. 421; See Also: Fercometal S.A.R.L v. Mediterranean Shipping Co. S.A [1989] AC 788 at p. 800, State Trading Corporation of India Ltd. Vs. M. Goldodetz Ltd. [1989] 2 Lloyd's Rep. Page 277 at p. 285.) But an unaccepted repudiation is not altogether without effect. An innocent party who remains ready and willing to perform can rely on the unaccepted repudiation as a defense in an action brought by the guilty party. (Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd. (1954) 90 CLR 235 at pp. 245, 251; Foran v Wight (1989) 168 CLR 385 at p. 438 (Australia). See Further Carter, Breach of Contract, 2nd Edn. (1991) p. 242 ff.)"

This Tribunal noticed that Chitti in his authoritative work on Contracts stated the legal position thus :-

“Unless and until the repudiation is accepted the contract continues in existence for “an unaccepted repudiation is a thing writ in water.” Acceptance of a repudiation must be clear and unequivocal and mere inactivity or acquiescence will generally not be regarded as acceptance for this purpose. But there may be circumstances in which a continuing failure to perform will be sufficiently unequivocal to constitute acceptance of repudiation. It all depends on “the particular circumstances of the case.” An example of a failure to perform which has been suggested as sufficient to constitute an acceptance is the following:

“Postulate the case where an employer at the end of a day tells a contractor that he, the employer, is repudiating the contract and that the contractor need not return the next day. The contractor does not return the next day or at all. It seems to me that the contractor's failure to return may, in the absence of any other explanation, convey a decision to treat the contract as at an end.”

The requirement that the acceptance be communicated “clearly and unequivocally” is likely to mean that it is only where there has been a failure to carry out an act in relation to a party in breach that silence or inactivity will be sufficiently unequivocal for this purpose. Where the silence or inactivity relates to the performance of a contract to which the party in breach is not privy then it is unlikely that silence will be sufficiently unequivocal....”

In *Asianet Satellite Communication Ltd. vs. ESPN Software India Pvt. Ltd.* Petition No.153(C) /2009 disposed of on 28.5.2010, this Tribunal referred to the decisions of the Supreme Court of India including *RBI vs. Peerless General Finance & Investment Co. Ltd.*

Ors, AIR 1987 SC 1023 wherein law has been laid down in the following terms :-

"33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. It is by looking at the definition as a whole in the setting of the entire Act and by reference to what preceded the enactment and the reasons for it that the Court construed the expression "Prize Chit" in *Srinivasa* and we find no reason to depart from the Court's construction."

Recently the Delhi High Court in *Star India P. Ltd. vs. Life Style Communication Pvt. Ltd* WP (C) No.9185/2007 noticed as under:-

"In this case, the agreement between the parties ended in December, 2006. The petitioner no doubt gave benefit of the grace period to the respondent before disconnecting the supply in April 2007. Yet, that fact and the arrears said to have been payable by the respondents could not have been the only criteria, to the exclusion of the arrears

of other factors, for the TDSAT to decide whether a mandatory order should have been granted. The respondents had adverted, in their application to it, about continued correspondence with the petitioner, about other operators encroaching its area; it also mentioned about the petitioner demanding Rs.11,50,000/- as the arrears payable, which was paid on 20.7.2007. It had apparently written repeated letters to the petitioners, on 20.7.2007; 24.8.2007 and 7.9.2007, seeking restoration of connection. Yet the petitioner did not take any action therefore, it approached TDSAT, which after considering all materials, and the circumstances concluded that the claim made by the petitioner about the outstanding amount being Rs.24 lakhs, was prima facie exaggerated. On all overall conspectus of these facts, the TDSAT directed restoration of supply subject to certain conditions."

(See also Shree Devi Master Media Systems vs. ESPN Software India Pvt. Ltd. decided on 14.11.2008)

In this view of the matter and keeping in view the fact that last sentence of the second Proviso appended to Clause 8.1 provides for application of the commercial terms till the agreement is terminated in the manner laid down therein, petitioner would be entitled to the subscription fees upto 28.12.2010.

Reasonableness of Rates

Submissions of Mr.Chawla in this regard is that in the event if it be held that the provision of Section 70 of the Indian Contract Act (the `Act') is attracted for the period 30.9.2010 to 28.12.2010, keeping in view the factual matrix involved herein and in particular the statements made by

the CEO of the petitioner (PW-1), 50% of the agreed subscription fee should be held to be a reasonable amount.

For the purpose of claiming compensation under Section 70 of the Contract Act as also the doctrine of 'Restitution', Mr.Chawla urged what is necessary to be found out is the extent of benefit derived by a party by reason of supply of some goods which was not intended to be done gratuitously.

In support of the said contention, strong reliance has been placed on the testimony of PW-1 which is in the following terms: -

"Q.2: When was the first meeting regarding renewal of agreements with Fastway held between the parties?

A: It was in the month of July 2010, when I went to meet Mr. Gurdeep Singh at his Ludhiana Office.

Q.3: What was discussed in this meeting?

A: Renewal of the subscription agreements.

Q.4: Is it correct that Mr. Gurdeep Singh had stated that Fastway will be interested in renewal of the agreements only on down gradation of subscription fee by 50 % of the existing?

A: Initially he said that he wanted a down gradation, without specifying any percentage but subsequently in the month of September 2010 he did ask for 50 % deduction in the subscription fees.

(Attention of the witness is drawn to para 5 of his affidavit by way of evidence)

Q.5: What was discussed during this meeting?

A: We were telling him that these discounts are not possible as these are without any basis. However, we requested him to renew the service agreements with a nominal growth.

(The witness is shown answer to question no. 2 above where he has deposed that the first meeting was held in July 2010, whereas in para 5 of his affidavit he has stated about the meeting prior to June 2010.)

Q.6: Which of the above two statements are correct?

A: Renewal of the subscription agreements was discussed in the month of July 2010.

Q.7: Would it therefore be correct that even in the meeting referred by you in para 5 of your affidavit, the negotiations between the parties related to the renewal of the subscription agreement and according to you the same had failed?

A: Yes. No conclusive understanding could be reached between us and we requested that we meet again.

Q.8: Is it correct that you had been categorically informed that Fastway will not be interested in renewal without a reduction in the subscription fees?

A: Yes.

Vol. Only in the month of September 2010."

Our attention was also drawn to the following portion of his deposition: -

"Q.19: Is it correct that part payment was requested by the petitioner from the respondent so that respondent's request for down gradation can be accepted?

A: No.

Q.20: Is it correct that according to the petitioner the respondent was in arrears of subscription fee even on the date when the petition was filed by it before the Hon'ble High Court of Delhi?

A: Yes.

Q.21: Is it correct that according to the petitioner the respondent was in arrears of subscription fee even on the date when the petition was filed by it before this Hon'ble Tribunal?

A: Yes.

Q.22: In view of your answers to questions no. 20 and 21, why did the petitioner not let the respondent disconnect the retransmission of signals?

A: Because we had to keep the signals on as per the directions of the Hon'ble High Court of Delhi and this Hon'ble Tribunal.

Q.23: Why did the petitioner decide to disconnect the signals of the respondent in February 2011?

A: We were directed by this Hon'ble Tribunal to deactivate the signals on 8.2.2011.

xxx

Q.25: Why did you not take such so called directions earlier than February 2011?

A: Because the negotiations were on and Fastway was making part payments and we were hopeful of a solution but on 7.12.2010 Fastway came out with a public notice and also sent us a letter asking that they will not be interested in the services 21 days from the date of these publications."

Effect of Clause A of the Regulations

Mr.Chawla would urge that at least since 17.3.2009, the Regulator having inserted Clause 4 A to reduce the terms and conditions of all interconnection agreements to writing it must be held to be an Act of illegality if the parties in the garb of Clause 8.1 continue to give and take supply of signals from the broadcasters to the network of the MSOs.

The respondent has not pleaded the effect of the oral arrangement, if any.

It is not, in our opinion, a case where the parties deliberately took recourse to evasion of an imperative statutory provision.

Such contingency is contemplated under the Statute. Clause 4A of the Regulations has to be read in the light of the second proviso appended to Clause 8.1.

What is meant by an agreement is a full fledged agreement but what is contemplated in terms of Clause 8.1 is renewal of terms. Variations in the commercial terms may be done even by way of a short agreement. It may even be by way of exchange of letters.

It is difficult to accept the submissions of Mr.Chawla that in the event Clause 8.1 is construed to convey a meaning that the parties may

continue to give and take supply of signals for an indefinite period, the same would be wholly illegal.

Regulation did not contemplate such a situation. It is wholly unlikely that both the parties to a contract and in particular, the Broadcasters, would not like to implement the terms of the contract other than the commercial terms ad infinitum.

Section 23 of the Contract Act and/or the doctrine of *Ex Turpi Causa Non Oritur Actio* would apply when an illegality affects public policy.

The Regulations speak of another public policy i.e. the public should not be deprived of viewing a channel without a reasonable notice; the period of such notice being at least 21 days.

The second proviso appended to Clause 8.1 must, therefore, be read having been made keeping in view the public interest and not in derogation thereof. The said provision must be construed in the light of the 'Preamble' of the Act.

Supply of a signal by a Broadcaster itself is a Fundamental Right as contemplated under Article 19 (1) (a) of the Constitution of India.

So far as Clause 4A of the Regulations is concerned, as at present advised, I am of the opinion the same may be construed for the purpose of enforcement of the provisions of the Regulation and for the

enforcement of the terms of the contract which in law can also be an oral one.

Regulations having been made by a Statutory Authority cannot otherwise supersede a Parliamentary Act, namely, the Indian Contract Act.

The Regulations must be subservient to a Parliamentary Act.

Clause 4 A of the Regulations, therefore, does not render all contracts void and illegal.

A contract may be void but may be legal. Such a void contract would not attract the principles of Section 23 of the Contract Act or the general principles of *Ex Turpi Causa Non-Oritur Actio* vis-à-vis Section 23 of the Contract Act.

It has been noticed heretobefore that the Calcutta High Court in the case of British and Shipping Co. (supra) has held that even in such a situation Section 70 of the Contract Act shall be applicable.

Even otherwise, the submission of Mr. Chawla, as noticed heretobefore, is that for the period September, 2010 to December, 2010, the petitioner should be charged @ 50% of the subscription fee. If that be so, the last sentence of the Second Proviso appended to Clause 8.1 of the Regulations would not be Unconstitutional.

If Mr.Chawla is correct that even no amount would be payable, the respondent in a case of this nature would be a party to the so called illegality.

It had been, without any demur whatsoever receiving signals.

It had also a legal duty to stop taking supply of signals if it thought that supply of signal would be illegal.

Moreover, it is one thing to say that reasonableness of damages in terms of Section 70 of the Contract Act should be determined on the basis of materials brought on record but it is another thing to say that where the rate itself has been provided for in the statute, no further evidence is necessary. In this case the Regulator itself has directed that the earlier commercial terms shall apply.

Mr.Chawla has placed reliance upon a decision of this Tribunal in Shri Ram Den Network Pvt. Ltd. vs. Zee Turner being Petition No.216 (C)/2010.

In that case itself it has been held :-

“The terms of the regulation having laid down conditions of renewal of the agreement and/or having raised a legal fiction, an attempt should be made to construe the same literally. The process of negotiation must start two months before the due date of expiry of the existing agreement. However in the event the negotiations continue despite expiry of Interconnection Agreement, the terms and conditions thereof would continue to apply till a new agreement is arrived at or for the next three months of the expiry of the original agreement, whichever is earlier. There cannot, thus, be any doubt or dispute that the

maximum period during which the agreement shall remain valid is for three months after the expiry of the agreement.

The second proviso appended to clause 8.1 of the Regulations must be construed in the light of the main provisions as also the first proviso appended thereto. The second proviso merely provides for the consequences if the parties were not able to arrive at a mutually acceptable arrangement. It enables both the parties to disconnect the transmission of TV signals after giving a notice in the manner specified in clause 4.3 i.e a notice for a period of three weeks. The commercial terms, however, would apply till the expiry of the original agreement."
(emphasis added)

The said decision in stead of assisting respondent runs counter to its contention.

Reliance has also been placed by Mr.Chawla on a decision of this Tribunal in the case of M/s Total Tele films Pvt. Ltd. vs. Tata Sky Ltd. (DTH Licensee) Petition No.113 (C)/2007 disposed of on 25.7.2008 to contend that there is no must carry clause.

It is so. However, we must notice that a three Member Bench of this Tribunal in Total TV vs. Prasar Bharti being Petition No.103 (C)/2008 disposed of on 15.12.2008 as also in 7 Star vs Prasar Bharti has clearly held that even in the matter of carriage of channels, both Clauses 4.3 and 8.1 would be applicable.

In that view of the matter there cannot be any doubt or dispute that the carriage of channel would also be governed by the regulatory regime.

Re : Claim of the Petitioner for Payment of Subscription Charges till the Date of Disconnection

The only question which survives for consideration as to whether the petitioner is entitled to charges upto February, 2011.

This requires construction of the order of the Delhi High Court as also the effect of the order of injunction.

For the aforementioned purpose even the equitable principles are required to be applied.

Mr.Chawla would contend that petitioner cannot claim the subscription fee from 28.12.2010 till 8.2.2011, in view of the interim order issued by the Delhi High Court as also this Tribunal. The interim order according to the learned counsel having been issued at the asking of petitioner, it would be wholly unjust to say that signals were supplied on the basis of the order of the Delhi High Court as also this Tribunal. We intend to take up the question of the impact or the effect of the order of the Delhi High Court as also this Tribunal separately.

Although, the statements made by the PW-1 has been extracted in extenso. I am of the opinion that the same may not be of much relevance.

It is one thing to say that the provisions of Section 70 of the Contract Act as also the doctrine of 'Restitution' were required to be considered for the purpose of applying the correct principles of interpretation of statute, but it is another thing to say that the provisions of Section 70 or the doctrine of restitution has to be considered not in terms of the second proviso appended to Clause 8.1 of the Regulations but on the basis of the materials brought on record for the purpose of calculating the amount of reasonable damages.

Mr.Chawla himself has relied upon a decision of the Supreme Court of India in Panna Lal vs. Deputy Commissioner, Bhandara and Anr. (1973) 1 SCC 639 wherein it was held: -

"5. But even apart from contract we have no hesitation in holding that in all the three cases liability under Section 70 of the Contract Act clearly arises. We do not understand why the High Court thinks that the Dispensary Fund Committees cannot be regarded as the owners or beneficiaries of the buildings of the hospitals. And more curiously the High Court has said that it is the public that are the beneficiaries. The buildings on construction belong to the Dispensary Fund Committee and the Municipal Committee and they have received benefit in so far as they are the owners.

7. It is true, as the learned Judges of the High Court pointed out that real basis for a claim under Section 70 is not the terms of the contract but the quantum of the benefit actually derived. In the absence of any other material the contract between the parties provides a useful basis for calculating that benefit. It has not been alleged on behalf of the defendants that the rates agreed upon and later enhanced were not fair rates or that anybody else would have undertaken the work cheaper. The only reasonable way of arriving at the value of the benefit derived by the Government is on the basis of the rates agreed upon (including future increases in rates by PWD) and that would be a fair indication of the value of the work. We may in this connection refer to the decision of this Court in *Piloo Sidhwa v. Municipal Corp.* where the market price was taken as a proper indication of compensation under Section 70 and interest also was awarded."

(Underlining is mine for emphasis)

Applying the aforementioned principles laid down by the Supreme Court of India, in the opinion of this Tribunal, there cannot be any doubt or dispute whatsoever that the rate which has been agreed upon as also the enhancement contemplated under the agreement would be the fair rates in absence of any evidence to show that any other supplier would have supplied the same cheaper.

We may also in this connection notice a decision of the Calcutta High Court in *Great Easter Shipping Co. Ltd. vs. UOI* reported in AIR 1971 Calcutta 150, wherein Section 70 of the Contract Act was invoked despite a finding that the contract between the parties thereto was void being hit by the Article 299 of the Constitution of India.

The learned Judge construed Section 70 in the light of the third para of Section 73 of the Contract Act which is based on the doctrine of restitution to opine that nobody can unjustly enrich itself.

If that is the legal position, I am of the view of the last sentence of the second proviso appended to Clause 8.1 of the Resolution must be given its literal meaning in a situation of this nature having been contemplated by the Regulator itself.

Submissions of Mr. Chawla must, therefore, be rejected inasmuch as the Statute itself contemplates the rate to be applied would be as per commercial terms.

It is also to be noticed that even ordinarily during currency of an agreement irrespective of the change in the subscriber base, the amount of the subscription fee fixed under an agreement is not to be varied except in exceptional situations.

The question which survives is as to whether the respondent has made out such an exceptional case.

The parties hereto had several meetings.

If PW-1 is to be believed, down gradation although asked for by respondent but the percentage thereof being 50% had not been indicated by it from the very beginning.

Negotiations were to be held for a large number of agreements; down gradation if required to be granted might not have been 50% in each case.

The petitioner admittedly did not agree thereto. It, on the other hand, wanted some growth however small it may be in the subscriber base.

Mr.Piyush Mahajan in his evidence stated that after he joined in August 2010, he was a party in some of the negotiations. He has also not made any statement that the parties had arrived at some agreement in those meetings. Only because in the course of negotiation some offer is made unless accepted, the same cannot form the basis of a contract.

No evidence has also been brought on record to show as to how many meetings were held between the parties as regards renewal of the agreements.

No minutes of meeting were prepared; no correspondence passed between the parties to show as to what had transpired in the said meetings.

The petitioner had all along been contending that keeping in view the connectivity of respondent being 15 to 16 lakhs and the subscriber

base being 77,000, the demand of growth made by it was not unreasonable. In that view of the matter and having regard to the Second Proviso appended to Clause 8.1 of the Regulations.

The respondent apart from the statements made in its reply and as explained by RW-1 had not brought on record any material to show as to what was its positive stand.

Clause 4.3 of the Regulation Issue

The petitioner's only contention is that although public notice has been published in two newspapers, one of them having not been published in the local language, the same was illegal and, thus, not from the point of view of the broadcaster but from the point of view of the public, the contract shall continue.

In this case keeping in view the factual matrix involved, the said question need not be finally decided.

The publication of notice was for the viewers of two different States meaning thereby the State of Punjab and the Union Territory of Chandigarh.

I have not been informed as to what is the local language for the Union Territory of Chandigarh. If the local language of Union Territory of Chandigarh is not *Gurumukhi*, the question of publication of notice in *Gurumukhi* does not arise.

Mr.Ganpathy has, however, referred to two decisions of this Tribunal; one in Neo Sports Broadcast Pvt. Ltd vs. Sun Direct TV 138 (C)/2010 decided on 3.3.2011; and the other Den Network (supra) decided on 17.1.2011.

In New Sports (supra) this Tribunal has held as under :-

“...Furthermore, the notice of three weeks, as mentioned in Clause 4.3 of the Regulations, was required to be published in two newspapers.....”

In that case the publication was carried out only in one newspaper.

The only submission made therein was that petitioner therein had a constructive notice which was negated and in that view of the matter it was held :-

“Even in terms of the said provision, the petitioner is entitled to damages.”

In Den Networks (supra) it was held :-

“There cannot be any doubt or dispute that the liability of a party during subsistence of an agreement and on the expiry thereof would differ but the same would depend on the fact situation involved in each case. Indisputably, the parties are governed by the Regulations. None of the parties having regard to clause 4 of the Regulations can terminate the contract without following the procedure prescribed therein. The respondent admittedly had not issued a public notice as is required in terms of clause 4.3 of the Regulations. It may not be a case where clause 8.2, as indicated hereinbefore, would apply. But even in a case where the agreement does not subsist on the same terms and conditions, the mutual contractual obligations on the part of the parties automatically do not come to an end. It comes to an end only on the publication of a notice in terms of clause 4.3 of the regulations, unless the parties ceased to perform their respective parts of the contract.”

Moreover, I am of the opinion that in this case it is not necessary to go into the aforementioned position keeping in view the factual matrix involved.

The order passed by the Hon'ble Delhi High Court dated 27.12.2010 has been noticed heretobefore. The Delhi High Court in its order clearly stated that the petitioner would not claim any equity as it was espousing the cause of the public and not its own.

Mr.Ganpathi would urge that the Delhi High Court did not say that supply of signals would not be gratuitous. Ordinarily, it would be so, but in this case petitioner was only entitled to a reasonable notice when the contract provided for termination of the agreement on service of a notice.

The law contemplates that such notice, in absence of any contract, would provide for a reasonable time.

In this case, having regard to the provisions contained in Clauses 4.1, 4.2 and 4.3 of the Regulations, there cannot be any doubt that the period of 21 days and that too a separate notice to the service provider and public at large, should be considered to be a reasonable one.

If that be so, petitioner was entitled to damages only for the said period.

It could not have, despite receipt of the notice, raised a contention so as to pray before this Tribunal to direct a multi service operator (MSO) to carry its channels beyond the said period.

It has heretofore been held that the public notice cannot be said to be illegal.

If despite the same the petitioner has approached the High Court and obtained an order of injunction, it did so at its own risk.

The law does not contemplate that even in a situation of this nature petitioner would be entitled to damages from the MSO asking it to

continue to take supply of signals and pay for it, although, it was not ready and willing therefor.

One aspect of the matter cannot also be lost sight of.

The petitioner itself understood the implication of the order of the Delhi High Court. It itself sought leave of this Tribunal to stop supply of signals to respondent's network. Such leave having been granted; supply of signals was stopped from 8.2.2011.

Such a step has been taken by petitioner on the premise that the respondent itself has terminated the contract; presumably on the premise that the same was legal.

It, in the aforementioned situation, cannot now be permitted to say that only for the purpose of claiming damages the notice must be to be illegal and at the same time it itself has acted thereupon proceeding on the premise that the notice was a valid one.

For the reasons aforementioned, I am of the opinion that the petitioners are entitled to a decree for a sum of Rs 27,321,376/- i.e. till December 2010 and not upto 8.2.2011.

In the facts and circumstances of the cases, petitioner is also entitled to interest @ 12% p.a throughout.

The respondent shall pay and bear the costs of the petitioners.
Advocate's fees assessed @ Rs.50,000/- in each case.

.....

(S.B. Sinha)
Chairperson

May _____, 2011
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