TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 25TH APRIL, 2012

Petition No.119 (C) of 2011
(With M.A. No.180 of 2011)

Kansan News Pvt. Ltd.	...	Petitioner
Vs.		
Fastway Transmission Pvt. Ltd. & Ors.	...	Respondents

BEFORE:

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

For Petitioner	:	Mr. Tejveer Singh Bhatia, Advocate Mr. Ravi Sodhi, Advocate
For Respondent Nos. 1,2 & 4	:	Mr. Maninder Singh, Sr. Advocate Mr. Navin Chawla, Advocate Ms. Nidhi Parashar, Advocate
For Respondent No.3	:	Mr. Nasir Husain, Advocate
For respondent No.5	:	Mr. Mukesh Kumar Tiwari, Advocate for Mr. Ruchir Mishra, Advocate
For Respondent No.6	:	Mr. Vivek Goyal, AAG Punjab Mr.Satnarain, Addl. DIPR, Punjab Govt. Mr. Amitesh Gaurav, Advocate
For Respondent No.7	:	Mr. Anasriyas, Research Officer, TRAI

J U D G E M E N T

The Petitioner is a Broadcaster. The First, Second and Third Respondents are Multi Service Operators operating in the State of Punjab. The Fourth Respondent is the Managing Director of the First Respondent; a Director of the Second Respondent and a shareholder of the Third Respondent having 99 percent shares. Respondent No.2, furthermore, is an agent of a big Multi Service Operator, which has a Pan India presence known as Wire & Wireless India Ltd.

2. Petitioner entered into three agreements with the Respondents herein, which are almost identical in terms.

We may notice Clause 8 of the agreement dated 01.8.2010 entered into by the parties with a view to achieving maximum reach to viewers for the channels produced by it namely 'Day & Night News'. The said agreement was valid for a period of one year.

Clause 8 of the said agreement provides for termination. It comprises of five sub clauses. Each sub-clause contained in Clause 8 is independent of each other; each providing for the reason specified therein with regard to termination of the agreement.

3. We are concerned herewith sub-clause (d) of clause 8, which reads as under :-

> *"8(d) Both the parties may terminate this Agreement without cause and without any liability whatsoever by giving the other party thirty (7) days notice. Both the parties shall not have any claim or demand, whatsoever, against each other in this regard."*

The original agreement contemplated 30 days' notice. The correction made therein was, however, not initialed by the parties.

4. According to the Petitioner, in or about October, 2010 a political imbalance in the State of Punjab came into being as the then Finance Minister, Shri Manpreet Singh Badal went out of the Punjab Government and Shiromani Akali Dal. It is the contention of the Petitioner that thereafter the news item related to the said Manpreet Singh Badal for reasons best known to the Respondent Nos. 1 to 3 were being blacked out. Similar blackouts were occasioned with regard to other leaders of the opposition parties. By reason of a notice dated 19.01.2011 purported to have been issued under Clause 4.2 of the Telecommunication (Broadcasting & Cable Services) Interconnection

Regulations, 2004 as amended from time to time, 30 days' notice was issued terminating the said agreement.

> *"3. That though the agreement was for a period of one year commencing from 01.08.2010 to 31.07.2011 clause 8 (d) of the same provided as under :-*
>
> > *"Both the parties may terminate this Agreement without cause and without cause and without any liability whatsoever by giving the other party thirty (7) days notice. Both the parties shall not have any claim or demand, whatsoever, against each other in this regard."*
>
> *4. That in exercise of the power vested in clause 8 (d), we hereby give you the notice of 30 days is being though according to us only 7 days notice was required, however as there was no signature on the correction made on the agreement. We have been advised to give a notice of 30 days as present."*

A public notice to the said effect was also issued on 21.01.2011, which is to the following effect :-

> *"This notice is to be treated as a notice under Clause 4.3 of the Interconnected Regulations as amended from time to time informing the public that the signals of the above channel shall not be available at our network w.e.f. 20.2.2011."*

5. Petitioner contends that the concerned Respondents formed a cartel so as to avoid competition. Petitioner was wholly dependent on the revenue generated from the advertisement as it has been running a digital 'free to air' channel.

Petitioner and various persons similarly placed, made complaints to the Ministry of Broadcasting & Information as also the State of Punjab, but no action was taken. Petitioner is also said to have received a large number of SMSs from the consumers to the effect that they had not been receiving proper audio and video of the Petitioner's channel.

By a legal notice dated 07.01.2011, a sum of Rs.4 crores was demanded by way of damages; in response whereto the Respondent by a letter dated 17.01.2011, with a view to avoid its liability, contended that on two occasions the signals were disturbed due to technical reasons. It now transpires from the evidence of RW-1 that the said technical defects had been addressed to and, thus could not have been a ground for termination of the agreement.

6. It is the contention of the Petitioner that carriage of the channel being governed by the Regulatory regime, the Respondent could not have terminated the agreement relying on or on the basis of Clause 18 (d) thereof as in terms of Clauses 4.2 and 4.3 of Telecommunication (Broadcasting and Cable Services)

Interconnection Regulations, 2004 ('the Regulations'), it was bound to assign reasons for stoppage of retransmission of the channels of the Petitioner.

7. On the aforementioned premise, this petition has been filed claiming inter-alia the following reliefs :-

> *"i) Declare that the nexus/cartel formed by Respondent No.1 to 4 is illegal and anti-competition and cannot be permitted to operate as such;*
>
> *ii) Hold that the action of the Respondent No.1 to 4 in disrupting TV channels of the Petitioner without any proper notice is illegal and arbitrary;*
>
> *iii) Hold that the public notice dated 21.1.2011 and the notice dated 19.1.2011 issued by the Respondent No.1 to 4 are illegal, arbitrary and are as such void and are thus quashed;*
>
> *iv) Direct the Respondent No.5 and 7 to inquire into the nexus/ cartel formed by Respondent No.1 to 4 and their political nexus;*
>
> *v) Direct the Respondent No.1 to 4 not to disrupt the signals of TV channels of the Petitioner;*
>
> *vi) Award damages to the tune of Rs.4 crores towards loss of revenue/reputation suffered by the Petitioner due to illegal and arbitrary acts of the Respondent Nos. 1 to 4."*

8. It may, however, be placed on record that a Writ Petition was filed by the Petitioner before the High Court of Punjab & Haryana, which was marked as CWP No. 3022 of 2001, inter-alia, praying for a CBI inquiry into the matter, contending that the issues raised therein related to independence of Press and fundamental rights of the Petitioner.

9. The Punjab & Haryana High Court dismissed the Writ Petition on the premise that the Petitioner had an alternative remedy. Pursuant to the observations made therein, this Petition was filed. However, it now appears that the Petitioner had also moved the Supreme Court of India by way of a petition for grant of special leave in terms of Article 136 of the Constitution of India.

The said Special Leave Petition appears to have been dismissed by the Supreme Court of India in the following terms :-

> *"Heard learned senior counsel for the petitioner. We are not inclined to interfere with the impugned order of the High Court. The special leave petition is dismissed. However, the petitioner is free to vindicate his grievance before the TDSAT and it is for the TDSAT to consider and pass appropriate orders."*

Petitioner prayed for grant of an interim relief, but by an order dated 13.4.2011 the same was rejected, inter-alia, opining that it was entitled only to damages.

10. Respondent, in its reply, inter-alia contend :-

(i) Technical sneaks were detected in October, 2010 in respect whereof e-mails had been sent to the Petitioner, but no action had been taken thereupon;

(ii) Having regard to the Clause 18(d), the Respondent was not obligated to assign any reason whatsoever, for termination of contact.

11. During pendency of this Petition however, the Petitioner filed an application before the Competition Commission constituted under Competition Act, 2002. In that view of the matter, it filed an application for amendment of the Petition for withdrawal of prayers 1 and 4 in the present Petition, contending that the Competition Commission alone has jurisdiction in relation

thereto and thus, the Petitioner be permitted to continue to proceed with its application before the said Commission.

Keeping in view the `fact that the said prayer of the Petitioner for withdrawal of the said reliefs was not a simplicitor one under Order XXIII Rule 1 of the Code of Civil Procedure, by reason of an order dated 25.7.2011, the said application was dismissed relying on or on the basis of a judgment of this Tribunal in (See T.V. Network Vs. Star India Pvt. Ltd. & Another- Petition No. 412 (C) of 2005 disposed of on 14.8.2005, opining :-

> *"The law laid down by this Tribunal in the aforementioned case, in our opinion, has to be given effect to. Moreover, this Tribunal having regard to the preamble of the Telecom Regulatory Authority of India Act, 1997 is obligated to protect the interests of the service providers as also to promote and ensure orderly growth in the telecom sector.*
>
> *In that view of the matter, we are of the opinion that liberty sought for by the applicant, cannot be granted at this stage. However, the contentions of the parties shall be considered with the other issues."*

12. By an Order dated 06.9.2011, upon taking notice of the fact that the Respondent No.5 had not filed any Reply, the following issues were framed :-

> *"(i) Whether the notices issued under Clauses 4.2 and 4.3 issued by the Respondent Nos.1 and 2 are invalid?*

(ii) Whether the Respondent Nos. 1 and 4 have formed a cartel and thereby creating a monopoly to restrict the petitioner entry to the cable market of the State of Punjab?

(iii) Whether due to illegal and arbitrary actions of the Respondent Nos.1-4 the petitioner has suffered any damages?

(iv) Whether in view of the facts and circumstances of the present case the petitioner is entitled to specific performance of its carriage agreement entered with the Respondent Nos.1 to 4?

(v) Whether in the facts and circumstances of the case, the Respondent Nos.5 & 6 are necessary or proper parties to this petition?"

13. In support of its case, the Petitioner examined three witnesses. PW-1 Shri Harpal Singh Arora working as a News Room Head in the office of the Petitioner supported the Petitioner's case as contained in the petition.

Shri Rakesh Kumar Sharma, who was examined as PW-2, in its evidence contended that upon taking into consideration the expected revenue, the Petitioner has suffered a loss of Rs.16,51,19,522/-. It was contended that keeping in view interruption between October 2010 to February 2011 and thereafter putting off the Petitioner from its channel, the drop in the revenue

ranged from 40 percent to 67 percent. Along with its evidence, it enclosed a chart to show that fall in the PDT so far as the Petitioner's channel is concerned. The Third witness examined by the Petitioner was Shri Naresh Kumar, Head (Accounts) working in its office.

While contending that the Petitioner had incurred major operational expenditure to the tune of Rs.23,12,48,956/-, the detailed ledger account was not filed, stating that the same would run into hundreds of pages. The said witness contended that the Petitioner is ready and willing to provide the details including the 'Receipts' of each and every payment shown in the calculations.

All the three witnesses have been cross-examined in details. We would refer to the same at an appropriate stage.

Respondent, however, examined only Shri Piyush Mahajan,

14. Mr. Tejveer Singh Bhatia, learned counsel appearing on behalf of the Petitioner, urged :-

(i) Parallel proceeding before this Tribunal as also Competition Commission is not prohibited keeping in view the provisions of Section 62 of the Competition Act, 2002.

Reliance in this behalf has been placed on Fair Air Engineers Pvt. Ltd. Vs. N. K. Modi reported in (1996) 6 SCC 385;

(ii) From the cross-examination of RW-1, it would be clear that he is not a truthful witness and, thus, no reliance can be placed on his deposition as most of its answers were evasive in nature, in so far as from paragraph 5 onwards, he merely denied the case of the Petitioner. The statements made by him revolved round the factual aspects, with which he was neither conversant nor in support whereof any documentary evidence has been produced;

(iii) It is incorrect to contend that the statement made by the Petitioners' counsel at the time of hearing of the interim prayer, would constitute estoppel against the Petitioner from arguing that the contract was governed by the Regulations;

(iv) In any event, even a lawyer cannot make any concession with regard to a legal position which would be binding on his client.

Reliance in this behalf has been placed on "P. Nallammal v. State, (1999) 6 SCC 559". "Fair Air Engineers (P) Ltd. v. N.K. Modi, (1996) 6 SCC 38" and "National Seeds Corporation Ltd. v. M. Madhusudhan Reddy, (2012) 2 SCC 506";

(v) As the Regulations govern the industry as a whole and the Regulator in its wisdom having directed that reasons must be assigned for termination of the agreement keeping in view

the growth of the industry, it is idle to contend that no reason was required to be assigned;

(vi) The players in the field in view of the regulatory provisions cannot be permitted to terminate an agreement which is otherwise valid, at its whims or fancy;

(vii) Rights conferred on a broadcaster in terms of Clauses 4.2 and 4.3 have nothing to do with Clause 3.2 thereof;

(viii) If the contention of the Respondent that no reason was necessary to be assigned in view of the Clause 18(d) of the Contract is accepted, Clause 4.2 would be rendered otiose;

(ix) For all intent and purport, the Respondents have put off the signals of the Petitioner from its network and, thus, it was obligatory on their part to issue the said notices. The very fact that they did so, is a clear indicator that they also understood that the contract between the parties is subject to Regulations.

15. Mr. Maninder Singh, learned senior counsel appearing on behalf of the Respondent, on the other hand, urged :-

(i) Having regard to the well settled principle that whereas the Regulations contained a 'must provide clause' but does not

deal with a 'must carry clause', no notice under Clauses 4.2 and 4.3 were required to be issued;

(ii) The Petitioner, being a Broadcaster, having entered into the contract with its eyes wide open and the contract having been worked out by both the parties, is estopped and precluded from raising the question of validity and/or legality thereof;

(iii) If the Petitioner was aggrieved, it could have refused to enter into the contract or could have approached this Tribunal immediately thereafter;

(iv) The Regulator having not framed any regulation governing carriage and placement and having emphasized on complete commercial freedom, Clause 18(d) providing for :-

(a) termination without notice, without cause; and

(b) no liability on either of the parties, whatsoever,

This Petition must be held to be not maintainable;

(v) The Interim Order dated 13.4.2011, so far as the contentions of the Petitioner are concerned, having attained finality, it cannot be permitted to raise fresh contentions;

(vi) Clauses 4.2 and 4.3 of the Regulations read with the Explanatory Memorandum of the TRAI, do not provide for any protection to the broadcasters nor confer any right on them but merely on the consumers;

(vii) Respondent having clearly mentioned Clause 18(d) in both of its notices under Clause 4.2 as also the Public Notice under Clause 4.3 of the Regulations, the same must itself be held to be the reasons in support of the termination of the agreement;

(viii) A clause, whereby both the parties having been given freedom to terminate the contract on serving on the other side 30 days' notice, is legal and valid as would appear from the decisions of the Supreme Court of India in Her Highness Maharani Shantidevi Vs. Savjibhai Haribhai Patel and Ors. reported in AIR 2001 SC 1462, The Central Bank of India Ltd. Vs. The Hartford Fire Insurance Co. Ltd. reported in AIR 1965 SC 1288, General Assurance Society Ltd. vs. Chandmull Jain and Anr. reported in AIR 1966 SC 1644 and Classic Motors Ltd. vs. Maruti Udyog Ltd. reported in 65 (1997) DLT 166 as also the decision of this Tribunal in Petition No. 113 (C) of 2007 – Total Telefilms Pvt. Ltd. Vs. Tata Sky Ltd.

The only exception, which can be curved out for the purpose of awarding damages would be a case where the liability is excluded or limited, is one where the fundamental breach of contract has been committed and no such case having been made out, the Petitioner is not entitled to any

decree. Reliance in this behalf has been placed on Photo Production Ltd. vs. Securicor Transport Ltd. reported in (1980) 1 All ER 556;

(ix) In the light of the recent decision of the Supreme Court of India in Union of India & Anr. Vs. Association of Unified Telecom Service Providers of India and Ors. reported in (2011) 10 SCC 543, the Petitioner cannot be permitted to approbate or reprobate at the same time;

(x) From the evidence adduced on behalf of the Petitioner it would appear that the factual aspects of the matter are sought to be proved relying on or on the basis of the newspaper reports and/or tables and drafts as the same being inadmissible in evidence, it must be held to have filed its case for damage.

16. Submission of Mr. Maninder Singh that the counsel for the Petitioner at the time of argument for obtaining the interim prayer having confined its argument to breach of contract qua contract, it is now estopped and precluded from raising any other contention including Clauses 4.2 and 4.3 of the Regulations cannot be accepted.

The contentions raised in an interim matter cannot be treated to be final. An interim order passed in a proceeding never constitutes a precedent. An interim order even at interim stage can be varied, modified or altered.

17. Any concession on the legal issue, in any event, by a counsel is not binding on a party.

(See P. Nallammal v. State, (1999) 6 SCC 559)

18. Petitioner admittedly has moved the Competition Commission so far as prayer (i) and (iv) are concerned. Whether it was entitled to do so, is not a matter of concern for this Tribunal. Section 62 of the Competition Act, 2000 provides that the provisions thereof are in addition to and not in deliberation of any other law for the time being in force.

19. While construing a par-materia provision contained in Section 37 of the Consumer Protection Act, the Supreme Court opined that filing an application

before the Competition Commission will not bar the Applicant to avail any other remedy.

(See Fair Air Engineers Pvt. Ltd. and Another Vs. N. K. Modi reported in (1996) 6 SCC 385 and National Seeds Corporation Vs. M. Madhusudan Reddy reported in (2012) 2 SCC 506).

20. The Parliament enacted the Telecom Regulatory authority of India Act, 1997 ('The 1997 Act'), wherein 'telecommunication service' has been defined in Section 2 (k) to mean :-

> *'telecommunication service' means service of any description (including electronic mail, voice mail, data services, audio tex services, video tex services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electro-magnetic mean but shall not include broadcasting services."*

21. By reason of a notification dated 09.01.2004, 'broadcasting service' was brought within the purview of the 'telecommunication service' by employing a legal fiction.

22. The TRAI in exercise of its jurisdiction under Section 11 (1) (b) of the Act made 'the Regulations'.

We may notice some of the provisions thereof :-

> *"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; [HITS operators and multi system operators shall also, on request, re-transmit signals received from a broadcaster, on a non-discriminatory basis to cable operators.]*
>
> . *Provided that this provision shall not apply in the case of a distributor of TV channels having defaulted in payment.*
>
> *Provided further that any imposition of terms which are unreasonable shall be deemed to constitute a denial of request*
>
> *[Provided also that the provisions of this sub-regulation shall not apply in the case of a distributor of TV channels, who seeks signals of a particular TV channel from a broadcaster, while at the same time demanding carriage fee for carrying that channel on its distribution platform.]17*
>
> *4.2 No distributor of TV channels shall disconnect the re-transmission of any TV channel without giving three weeks notice to the [broadcaster, multi system operator or HITS operator, as the case may be 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. Accordingly, the notice to disconnect*

signals shall also be given in two local newspapers out of which at least one notice shall be given in local language in a newspaper which is published in the local language, in case the distributor of TV channels is operating in one district and in two national newspapers in case the distributor of TV channels is providing services in more than one district. The period of three weeks mentioned in sub-clauses 4.1 and 4.2 of this regulation shall start from the date of publication of the notice in the newspapers or the date of service of the notice on the service provider, whichever is later."

23. What would be the effect of the said provisions vis-à-vis paragraph 8 (d) of the Agreement dated 01.8.2010 is the core question?

24. It is not in controversy that whereas clause 3.2 applies in the case of a 'must provide' situation, it would have no application in the case of a 'must carry' situation.

There cannot, moreover, be any doubt or dispute that in a case governed by contract qua contract, the parties would have the freedom to terminate a contact by issuance of notice. They would also be at liberty to exclude or limit their liabilities in the event of failure to comply with the terms of the contract.

25. As indicated heretobefore, Mr. Maninder Singh has relied upon a large number of decisions, to which I shall refer to a little later.

26. The 1997 Act, however, provides for a regulatory regime. The TRAI, in its wisdom, may regulate the trade. It has done so. The applicability thereof is in question in a case of carriage of channel.

It is now a trite law that where freedom of contract is curtailed by Regulations, the conditions precedents therefor must be fulfilled.

There cannot furthermore be any doubt or dispute that once the statute is found to be governing the field; a contract between a contractor and a distributor of T.V. channel shall be subject thereto. It is not in dispute that the Petitioner being a 'broadcaster' and the Respondents concerned being 'Multi Service Operators', they would be 'service providers' within the meaning of the provisions of the said Regulations.

27. The Regulations, unlike Parliamentary or Legislative Acts do not contain 'Chapters'. They do not have different 'Parts' dealing with different subjects.

28. Clause 3.1 prohibits the 'Broadcaster' to engage in any practice or activity to enter into any understanding or arrangement, including exclusive contracts with any other distributor of TV channels that prevents any other distributor of TV channels from obtaining such TV channels from distributor.

Clause 3.2 must be read in the said context.

Explanation appended to Clause 3.2 prohibits the broadcaster, from whom the signals have been sought for the distribution of TV channels, the stipulation of placement frequency or package/tier, as a pre-condition for making available signals of the requested channels and in the event the same is insisted upon, it would amount to imposition of unreasonable terms.

Clause 4 is under the heading 'disconnection of TV channel signals'

Clause 4.1 prohibits the Broadcaster, Multi Service Operator and a HITS operator from disconnecting the TV channel signals to a distributor of TV channels without giving three weeks' notice clearly giving the reasons for the proposed action.

Clause 4.2 prohibits 'a distributor of TV channels' from retransmission of any TV channel without giving three weeks' notice inter-alia to the broadcaster, clearly giving the reasons for the proposed action.

Clause 4.3 deals with issuance of a public notice, postulating giving of reasons in brief.

29. The TRAI in paragraph 6 of its Explanatory Memorandum, stated as under :-

> *"6. The notice to the service provider concerned should clearly inform the service provider about the reasons for proposed disconnection. The notice should specify the terms & conditions of the agreement which have been allegedly violated and the details of such violation rather than cryptically mentioning violation of the agreement as the reason for issue of the notice. This is necessary so as to pin point the issues of dispute, so that the affected service provider can take steps either for rectifying the violation or to approach appropriate forum for redressal. Similarly, the public notice should also have the reasons for proposed disconnection in brief."*

30. Where the parties have the freedom of contract, they would be at liberty to fix the terms and conditions. However, if Regulations govern the field, it shall prevail over the contract.

Clause 8 (d) is a composite term providing for termination without any notice or without any liability. If cause is required to be assigned for retransmitting the channels of a broadcaster, non-compliance thereof shall lead to its own consequences.

Re-transmission of signals and/or carriage thereof is for the benefit of the viewers. The TRAI not only intended to protect the rights of the ultimate consumers, but also the service providers. Termination of a contract without

service of notice containing reasons having been prohibited, the same must be held to be imperative in character.

31. The parties are free to choose their terms. Unlike a 'must provide clause', the 'must carry clause' may contain any general, technical, financial and other terms. The Regulations do not come on the way of the parties with regard thereto. What, however, is said to be regulated, is the termination of the agreement.

32. The Preamble of the 1997 Act postulates protection of the rights of the service providers and customers. It envisages growth of industry which would mean an orderly growth.

If, for the said purpose, the minimal requirement with regard to termination of an agreement is provided for, the same in the opinion of this Tribunal shall also apply to a case where the parties of their own entered into an agreement i.e. without the intervention of this Tribunal as envisaged under Clause 3.2 of the Regulations. The safeguards contemplated in terms of Clauses 4.2 and 4.3 presumably were to let the other side as also the public know as to why the contract was being terminated.

A contract may not require assignment of any reason, any notice or any liability at all. In a case, which is within the realm of private law, the parties will be bound by the terms of the contract, but not in a case where the field is regulated.

In Dish TV India Ltd. Vs. ESPN Software India Pvt. Ltd. disposed of on 10.4.2012, the broadcaster, despite having entered into a non-RIO contract with a DTH operator was held to be bound to provide for an option to the later to elect to a RIO based contract. The DTH operators merely carry the signals of the broadcasters.

33. Mr. Maninder Singh would contend that Clauses 4.2 and 4.3 would apply only in cases where clause 3.2 applies.

It is not possible to agree to the said contention.

Clause 3.2 merely provides for additional rights to a distributor of a TV channel to obtain supply of signals of its channels from the concerned broadcaster. It would apply to a case where despite request the Broadcaster does not do so.

Would it mean that where such a right was not required to be exercised and the parties entered into a contract voluntarily, Clauses 4.2 and 4.3 would not apply?

In my considered opinion, before supply of signals is taken off from the network of any service provider Clauses 4.2 and 4.3 of the Regulations shall apply both in a case where a contract has been entered into by reason of an order of this Tribunal and on a voluntary basis.

34. Applicability of Clauses 4.2 and 4.3 of the Regulations in a case of carriage contract has been raised before this Tribunal in a number of decisions. The said cases arose as Prasar Bharti had refused and/or did not renew the contract of carriage entered into by and between it and several broadcasters.

Prasar Bharti questioned the jurisdiction of this Tribunal contending that it having been created under a Parliamentary Act is not a licensee within the meaning of the provisions of the 1997 Act.

In Total Telefilms Vs. Prasar Bharti, the said contention was negatived. Directions were issued to Prasar Bharti as a DTH Operator and, thus, a service provider.

In Petition No. 195 (C) of 2008, Zee Turner Ltd. Vs. Prasar Bharti, a three member Bench presided over by Arun Kumar, J., opined :-

> *"73. There is another dimension to this case. This issue cannot be and should not be viewed only in terms of offer and acceptance as*

per the Indian Contract Act, 1872. Prasar Bharati is a DTH operator and it is bound by the Regulations issued by the TRAI. In this regard, Prasar Bharati is guilty of violating clauses 4.2 and 4.3 of the interconnection regulations mandating notice to the Petitioner as also a public notice in two newspapers and giving 21 days notice before disconnection.

Noticing Clauses 4.2 and 4.3 of the Regulations, it was furthermore opined :-

"Admittedly, Prasar Bharati discontinued the carriage of the Petitioners two channels -- Zee smile and Zee Jagran- without any notice on the ground that the Agreement had expired and that Prasar Bharati is not covered under the provisions of the TRAI Act. We have already announced on the latter issue. And since Prasar Bharati is covered under the Regulations, it is clear that in discontinuing the channels, it is in violation of the Regulations.

74. We therefore hold that there was a consensus ad idem before the date of expiry of the earlier Agreement, that the Respondent Prasar Bharati had, in disregard of the Regulations, illegally discontinued the carriage of the petitioner's channels. We accordingly direct the Respondent Prasar Bharati to restore the two channels on payment, by the Petitioner, of the carriage fee of Rs. 60 lakh for each of these channels. It shall do so within two days of the receipt of payment. Similarly, on payment of another Rs. 60 lakh, it will continue to air their third channel -- ETC Music."

35. In arriving at the said decision, it was clearly held that Prasar Bharti was guilty of violating Clauses 4.2 and 4.3 of the Interconnection Regulations mandating notice to the Petitioner therein as also a Public Notice in two newspapers and giving 21 days' notice before disconnection.

36. Similar question arose in Petition No. 407 of 2010 – Zee Turner Ltd. Vs. Prasar Bharti. The counsel appearing on behalf of the Respondent therein contended that Clause 8.1 of the Regulations shall apply.

It was opined :-

> *"We are not in a position to agree with the submission of Mr. Naveen Chawla that despite the expiry of the agreement, the broadcasters will be entitled to a notice under Clause 4.2. The second part of Clause 4.3 provide for a procedure only and not of a right."*

It was, however, observed :-

> *"We were asked that Clause 3.2 of the Regulations may not provide for 'must carry' clause. But, as noticed heretobefore, Mr. Dhingra himself suggested that Clause 8.1 of the Regulations shall apply. If that be so, the said clause will apply on its own force and not in all situations. It must be read with Clause 3.2."*

37. However, in Media Worldwide Pvt. Ltd. Vs. Prasar Bharti – Petition No. 17 (C) of 2011, differing opinions were expressed.

A controversy arose therein as to whether notice under Clause 4.3 was imperative in character.

The majority of the Members opined :-

> *"36. In this particular case, when the process on negotiations itself has not started, the proviso to the clause 8.1 is not applicable. Even if we consider that disconnection has taken place without giving three weeks notice in the manner specified under clause 4.3. Further, we are of the view that Clause 4.3 is for the purpose of informing the consumers and not the petitioner. Clause 4.2 relating to disconnection of TV signals by the distributors is not applicable in this case. <u>This notice is necessary during the currency of the agreement and not after the completion of the period of the agreement.</u> At the most consumers may approach this Tribunal and agitate about their rights and obligations but the petitioner cannot claim right of renewal when he has not shown any interest or willingness to continue their relationship by executing a fresh agreement with the respondent."*
>
> ***(Emphasis supplied)***

38. However, the minority opinion followed the decisions in Zee Turner Ltd. (Supra), stating :-

"14. Regulation 3 provides for general provisions relating to nondiscrimination in interconnect agreements. Contrary to the Common Law principles of contract, Clause 3.2 of the Regulations provides for a 'must provide' clause in terms whereof every broadcasters are obligated to provide signals of its TV channels on non-discriminatory terms to all distributors of TV channels.

15. It is, however, not in controversy that the said 'must provide' clause would not mean that the DTH operators like respondent herein would be bound to carry the channels of the broadcaster on a request made by it or otherwise.

We have noticed heretobefore Clauses 4.2 and 4.3 of the Regulations."

It was also observed :-

"Application of Regulations

18. Having noticed the provisions of the Regulations, it is necessary to place on record that this Tribunal in Total TV Vs. Prasar Bharati has clearly held that the provisions of the Regulations and in particular, Clauses 4.2 and 4.3 would be applicable so far as carriage of channels by Prasar Bharati is concerned. The said decision of this Tribunal, for all intent and purport, has been followed by us in our judgment dated 16.12.2010 in Petition No. 407 (C) of 2010 (Zee Turner Ltd. & Anr. Vs. Prasar Bharati), Petition No. 410 (C) of 2010 (Seven Star Satellite Pvt. Ltd. Vs. Prasar Bharati) and Petition No. 416 (C) of 2010 (Enter 10 Television Pvt. Ltd. Vs. Prasar Bharati). It is otherwise binding on us. In fact no contention has been raised to take another view thereof."

39. The said decision, therefore, was rendered in a case where the process for renewal had not been started and the agreement entered into by and between the parties had also expired.

It was, moreover, clearly held that notices would be required during currency of the agreement.

40. A similar question arose in a case where the agreement was still in force when the petition was filed being Petition No. 132 (C) of 2010 – M/s Polimer Channels Vs. Samangali Cable Vision.

In the interim order passed in the said case, this Tribunal opined that prima facie Clauses 4.2 and 4.3 are imperative in character having used a negative word and, furthermore, the word 'shall' has been used, stating :-

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

41. In its final judgment, the said principle was reiterated and a nominal amount of damages was directed to be paid to the Petitioner therein.

It was opined :-

> ***"Notice – Requirements of***
>
> *There cannot be any doubt or dispute that keeping in view the provisions of Regulations 4.2 and 4.3 of the 2004 Regulations, the petitioner, being a broadcaster, was entitled to three weeks notice. Thus, even a public notice was required to be issued.*
>
> *The proviso appended to Regulation 4.1 also provides for written agreement but such a proviso has not been appended to Regulation 4.2.*
>
> *The termination of the arrangement was, therefore, wrongful."*

The effect of such unlawful termination, however, it was held, need not result into a direction upon the Respondent to restore supply of signals.

42. In M/s. Shreya Broadcasting Pvt. Ltd. Vs. Helapuri Cable Vision Pvt. Ltd. – Petition No. 236 (C) of 2009 disposed of on 01.12.2009, it was held :-

> *"In this case, in our opinion, Regulations 4.2 and 4.3 are attracted. It has not been denied or disputed before us by the learned counsel for the respondents that the statutory requirements contained in*

clauses 4.2 and 4.3 have not been complied with. The learned counsel however submits that the petitioner was communicated of the decision to disrupt retransmission of signals orally, which according to us does not meet the requirements of law. The contentions raised on behalf of the respondents, therefore, in our opinion, are liable to be rejected.

As action on the part of the respondent in disconnecting or disrupting retransmission of signals of the aforementioned TV-5 channel is illegal, the petitioner is entitled to the reliefs prayed for herein."

43. It should, however, also be placed on record that in M/s. Jeevan Telecasting Corporation Ltd. Vs. Asianet Satellite Communications Ltd. - Petition No.210 (C) of 2010, it was held :-

"*Mr. Maninder Singh, the learned counsel appearing on behalf of the petitioner, on the other hand, urged that although there exists a distinction between `a must carry' clause and a `must provide' clause, this Tribunal even in a situation of this nature would be entitled to determine as to what should be the reasonable amount for carrying of a broadcaster's channel on the analogue and digital platform by a Multi Service Operator.*

Drawing our attention to clause 8 and 8.1 of the Memorandum for understanding, the learned counsel would submit that this Tribunal has jurisdiction, in a situation of this nature even to direct specific performance of contract.

There is no doubt or dispute that having regard to the recommendations of TRAI, the matter relating to carriage or placement is governed by the agreement between the parties and not by any Act or Regulation.

It has not been shown before us as to how and in what manner the matter relating to carriage and placement is regulated. If it is not, prima facie we are of the opinion that the petitioner would be entitled to only damages, in the event, the parties fail to arrive at a negotiated price for the purpose of carriage of the channel of the broadcaster by the MSOs on either Analogue platform or Digital platform or both."

It was, therefore, not a case where the supply of signals was sought to be disturbed.

In that case, the question which arose for consideration was Specific Performance of Contract. The counsel for the parties therein were remiss in pointing out to us as to how a carriage of placement agreement was governed by any Regulation.

It is one thing to say that the other terms and conditions of a contract would not be governed by the Regulations, but it is another thing to say that keeping in view the purpose and object for which the Regulations have been issued namely, protection of interest of the service providers and the consumers, even provision for service of notice would be beyond the purview of the Regulations.

44. In a situation of this nature, the doctrine of 'Purposive Construction' may be put into service.

In Reliance Infratel Ltd. v. Etisalat DB Telecom – Petition No. 75 of 2012, the doctrine of 'purposive construction' was applied, stating as under :-

> ***"Purposive Construction – Rules of***
> *72. Keeping in view the recent decision of the Supreme Court of India in the case of Centre for Public Interest Litigation (supra), it may not be necessary for us to notice the history as also the developments in the field.*
>
> *The Doctrine of Purposive Interpretation may be resorted to for the purpose of ascertaining the purpose and object for which said acts were enacted.*
>
> *73. Francis Bennion in his book on Statutory Interpretation 5th Edition at page 945, states the law thus:-*
>
> > *" ….Legislation is still about remedying what is thought to be a defect in the law. Even the most „progressive" legislator, concerned to implement some wholly novel concept of social justice, would be constrained to admit that if the existing law accommodated the notion there be no need to change it. No legal need that is. Legislation possesses a propaganda value also.*
>
> *Contrast with literal construction - Although the term `purposive construction" is not new, its entry into fashion betokens a swing by the appellate courts away from literal construction. Lord Diplock said in 1975 :*

`If one looks back to the actual decisions of [the House of Lords] on questions of statutory construction over the last 30 years one cannot fail to be struck by the evidence of a trend away from the purely literal towards the purpose construction of statutory provisions. "

The matter was summed up by Lord Diplock in this way:

"…I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language use would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains one of construction, even where this involves reading into the Act words which are not expressly included in it. Kammins Ballrooms Co Ltd V Zenith Investments (Torquay) Ltd [1971] AC 850 provides an instance of this; but in that case the three conditions that must be fulfilled in order to justify this course were satisfied. First, it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; secondly, it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the purpose of the Act was to be achieved; and thirdly, it was possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by parliament had their attention been drawn to the omission before the Bill passed into law. Unless this third condition is fulfilled any attempt by a court of justice to repair the omission

in the Act cannot be justified as an exercise of its jurisdiction to determine what is the meaning of a written law which parliament has passed."

"Lord Diplock"s third point is, with respect, erroneous. In an earlier case the House of Lords had adopted a purposive-and-strained construction while expressly ruling out any need to formulate the missing words. The truth is that it is almost invariably possible to formulate the same legislative proposition in numerous different ways. All drafters know that no two of them, given a set of instructions will produce a Bill in identical wording, or anything like it."

74. In Grid Corporation of Orissa Limited v. Eastern Metals and Ferro Alloys, (2011) 11 SCC 334 at page 342 it is stated as under:

"25. This takes us to the correct interpretation of Clause 9.1. The golden rule of interpretation is that the words of a statute have to be read and understood in their natural, ordinary and popular sense. Where however the words used are capable of bearing two or more constructions, it is necessary to adopt purposive construction, to identify the construction to be preferred, by posing the following questions: (i) What is the purpose for which the provision is made? (ii) What was the position before making the provision? (iii) Whether any of the constructions proposed would lead to an absurd result or would render any part of the provision redundant? (iv) Which of the interpretations will advance the object of the provision? The answers to these questions will enable the court to identify the purposive interpretation to be preferred while excluding others. Such an exercise involving ascertainment of the object of the provision and choosing the interpretation that will advance the object of the provision can be undertaken,

only where the language of the provision is capable of more than one construction. (See Bengal Immunity Co. Ltd. v. State of Bihar [AIR 1955 SC 661 : (1995) 2 SCR 603] and Kanai Lal Sur v. Paramnidhi Sadhukhan [AIR 1957 SC 907 : 1958 SCR 360] and generally Justice G.P. Singh's Principles of Statutory Interpretation, 12th Edn., published by Lexis Nexis, pp. 124 to 131, dealing with the rule in Heydon case [(1584) 3 Co Rep 7a : 76 ER 637] .)"

75. In DLF Universal Limited v. Director, Town and Country Planning Department, Haryana, (2010) 14 SCC 1 it was stated:

> *"13. It is a settled principle in law that a contract is interpreted according to its purpose. The purpose of a contract is the interests, objectives, values, policy that the contract is designed to actualise. It comprises the joint intent of the parties. Every such contract expresses the autonomy of the contractual parties' private will. It creates reasonable, legally protected expectations between the parties and reliance on its results. Consistent with the character of purposive interpretation, the court is required to determine the ultimate purpose of a contract primarily by the joint intent of the parties at the time the contract so formed. It is not the intent of a single party; it is the joint intent of both the parties and the joint intent of the parties is to be discovered from the entirety of the contract and the circumstances surrounding its formation."*

{See Regional Provident Fund Commissioner Vs The Hooghly Mills Co. Ltd. [(2012) 2 SCC 489]}.

It is on the said premise only the purpose and object for which the Act has been enacted has to be considered.

What was the underlying object of the 1997 Act?"

Applying the said principle, this Tribunal is of the opinion that it was obligatory on the part of the Respondent to assign reasons as is envisaged under Clauses 4.2 and 4.3 of the Regulations.

45. Keeping in view the aforementioned backdrop of events, we may notice some of the decisions cited by Mr. Maninder Singh.

In Maharani Shanti Devi (Supra), a suit for specific performance was filed. A decree was passed therein. The said decree was modified to the extent that the same shall be subject to issue of final declaration under Section 21 of the Urban Land (Ceiling & Regulation) Act, 1976. An appeal was preferred thereagainst. There existed a clause in the agreement for sale that the contract could be unilaterally terminated before the delivery of possession was effected.

It was opined :-

*"**50.** There is no merit in the contention of Mr Dhanuka. The decision relied upon by Mr Dhanuka is not applicable to unambiguous documents. That is clear from the decision itself. In respect of unambiguous documents, Odgers' Construction of Deeds and*

Statutes, 5th Edn., by G. Dworkin at pp. 118-19, has been quoted in the aforesaid decision as under:

> *"The question involved is this: Is the fact that the parties to a document, and particularly to a contract, have interpreted its terms in a particular way and have been in the habit of acting on the document in accordance with that interpretation, any admissible guide to the construction of the document? In the case of an unambiguous document, the answer is 'No'."*

When there is no ambiguity in the clause, the question of intendment is immaterial.

As regards validity of such a clause, the Supreme Court of India held that such a power of termination need not be exercised for good and reasonable cause as otherwise unilateral power to determine a contract would have to be treated to be void and ineffective in law.

The Apex Court applied the principles of Raja Ramannar, C.J. in Maddala Thathiah Vs. Union of India AIR 1957 Madras page 82 to opine that it is unable to agree with the draft proposition that the absolute power of termination would be void.

In arriving at the said finding, it was held :-

> *"57. Under general law of contracts any clause giving absolute power to one party to cancel the contract does not amount to interfering with the integrity of the contract. The acceptance of the argument regarding invalidity of contract on the ground that it gives*

absolute power to the parties to terminate the agreement would also amount to interfering with the rights of the parties to freely enter into the contracts. A contract cannot be held to be void only on this ground."

46. There cannot be any quarrel on the said proposition of law.

The question, however, would be as to whether the same shall apply in a case where the termination clause is governed by a statute.

In Shanti Devi (Supra), the Apex Court also relied upon the Central Bank of India, Amritsar Vs. Hard Core Fire Insurance Co. AIR 1965 SC 1288 and General Assurance Society vs. Chandmull Jain & Anr. AIR 1966 SC 1644.

In Central Bank of India (supra), an insurance agreement containing a power of termination as contained in Clause 10, was found to be not capricious or unreasonable.

In General Assurance Society Ltd. (Supra), it was stated :-

"17. This condition gives mutual rights to the parties to cancel the policy at any time. To the assurer it gives a right to cancel the policy at will. It was contended that such a condition was so unreasonable that it could not be allowed to stand. It was argued on the authority of Sze Hal Tong Bank Ltd. v. Rambler Cycle Co. Ltd. (1959) AC 576 that the extreme width of the condition must be cut down by an implied limitation which was that the main object and intent of the contract should not be allowed to be defeated and that object and

intent was the insuring of the property against floods and cancellation of the policy when floods had started would defeat the main object and intent of the contract. This argument mixes up two situations. The first is a question of pure principle. There is nothing wrong in including such a mutual condition for the cancellation of the insurance. An assured may like to invoke such a condition when the policy is found to differ from the policy he agreed to accept or it contained a term of condition to which he did not agree. He may not accept the same policy from another company to which he did not make a proposal. He may invoke this condition if the company transfers its assets and business to another. Just as the assured may like to terminate the policy without assigning any reasons and at his will, the assurer may also do likewise."

47. Reliance has also been placed on a decision of a learned Single Judge of the Delhi High Court in Classic Motors Ltd. Vs. Maruti Udyog Ltd. 65 (1997) DLT 166.

The High Court opined :-

"32. Let me now examine and apply the principle of the aforesaid factors in order to test the plea of the plaintiff. The plaintiff admittedly did not make any protest before entering into the agreement but on the other hand, went ahead with its performance. The validity of a clause of the agreement is now being sought to be challenged when it was terminated. Even in the earlier two petitions filed by the plaintiff under Section 20 of the Arbitration Act, the

plaintiff did not challenge the validity of the agreement. Thus the plaintiff has taken full advantage under the agreement and reaped benefits from it and now when the same was terminated, the plaintiff immediately rushes to this Court challenging the validity of the agreement. Therefore, the first two questions are to be answered in the negative i.e. the plaintiff did not raise any protest before entering into or soon after entering into the agreement and also did not take any steps to avoid the agreement. Rather it affirmed the agreement and repeated all the benefits of the agreement from 1983 onwards till it was terminated. After having done so, the plaintiff is not entitled to challenge the agreement. In North Ocean Shipping Co. Ltd. v. Hundai Construction Co. Ltd. reported in 1978(3) All E.R. 170, it has been held that if the party complaining of an unfair contract does not do anything to avoid it and accepts it then the complaining party cannot make a grievance of the contract. Therefore, the third factor also stands answered. So far as the question of independent advice is concerned, from the facts delineated above, it is apparent that PW1, the Chairman and Managing Director of plaintiff is a rich and flourishing businessman having number of properties and various businesses. He, therefore, had full knowledge as to the implication of the terms of the agreement and he also had access to the best of advices and suggestions. But inspite of being placed at such an advantageous position PW1 did not react in any manner to the terms of the agreement, rather continued to reap the benefits under the agreement."

The said decision has been relied upon in Vidya Securities Ltd. v. Comfort Living Hotels Pvt. Ltd., reported in AIR 2003 Delhi 214 and has been

referred in *Modi Rubber Ltd. v. Guardian International Corp.*, (2007) 141 DLT 822.

The Delhi High Court in Classic Motors (Supra), furthermore, opined that the expression "without assigning any cause" can be applied by any of the party, stating :-

> *"68. The aforesaid expression appears in Clause 21 of the agreement which states that either party to the agreement could terminate the contract after giving to the other party a notice of 90 days 'without assigning any cause'. The present agreement, it must be remembered, was entered into by the parties in the realm of private law as a result of purely private commercial transaction. It is also to be remembered that in a private contract a party is free to choose the person and the subject matter of the transaction according to its own free Will. No restriction or fetter could be imposed on either of the parties to the manner, mode and the nature of the agreement that they choose to enter into. But the law applicable would be different when such an agreement is entered into in the realm of public law."*
>
> **(Underlining is ours)**

It was, furthermore, opined :-

> *"70. In view of long catena of decisions and consistent view of the Supreme Court, I hold that in private commercial transaction the parties could terminate a contract even without assigning any reason with a reasonable period of notice in terms of such a Clause*

in the agreement. The submission that there could be no termination of an agreement even in the realm of private law without there being a cause or the said cause has to be valid strong cause going to the root of the matter, therefore, is apparently fallacious and is accordingly, rejected."

Reliance has also been placed by Mr. Singh on Photo Production Ltd. Vs. Securicor Transport Ltd. (1980) Vol. I All ER 556.

In that case, the Respondent therein while providing security services, employed one Musgrove. He deliberately started a fire by throwing a match on some cartons resulting ultimately in substantial damage/industrial undertaking of the Appellant therein.

The following clause was contained in the said agreement :-

"Under no circumstances shall the Company (Securicor) be responsible for any injurious act or default by any employee of the Company unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the Company as his employer; nor, in any event, shall the Company be held responsible for; (a) Any loss suffered by the customer through burglary, theft, fire or any other cause, except in so far as such loss is solely attributable to the negligence of the Company's employees acting within the course of their employment."

Lord Wilberforce, who delivered the leading judgment, applied the principle of no liability, stating :-

> *"The contract which falls to be considered was a contract for the rendering of services by the defendants ('Securicor') to the plaintiffs ('Photo Productions'). It was a contract of indefinite duration terminable by one month's notice on either side. It had been in existence for some 2.1/2 years when the breach that is the subject-matter of these proceedings occurred. It is not disputed that the act of Securicor's servant, Musgrove, in starting a fire in the factory which they had undertaken to protect was a breach of contract by Securicor; and, since it was the cause of an event, the destruction of the factory, that rendered further performance of the contract impossible, it is not an unnatural use of ordinary language to describe it as a 'fundamental breach'."*

Lord Diplock opined that such a clause may not be applicable in a case involving fundamental breach of contract.

On fact it was held that no such fundamental breach had taken place, stating the law thus :-

> *"My Lords, it is characteristic of commercial contracts, nearly all of which today are entered into not by natural legal persons, but by fictitious ones, i.e. companies, that the parties promise to one another that something will be done, for instance, that property and possession of goods will be transferred, that goods will be carried by*

ship from one port to another, that a building will be constructed in accordance with agreed plans, that services of a particular kind will be provided. Such a contract is the source of primary legal obligations on each party to it to procure that whatever he has promised will be done is done. (I leave aside arbitration clauses which do not come into operation until a party to the contract claims that a primary obligation has not been observed.)

Where what is promised will be done involves the doing to a physical act, performance of the promise necessitates procuring a natural person to do it; but the legal relationship between the promisor and the natural person by whom the act is done, whether it is that of master and servant, or principal and agent, or of parties to an independent sub-contract, is generally irrelevant. If that person fails to do it in the manner in which the promisor has promised to procure it to be done, as, for instance, with reasonable skill and care, the promisor has failed to fulfil his own primary obligation. This is to be distinguished from 'vicarious liability', a legal concept which does depend on the existence of a particular legal relationship between the natural person by whom a tortuous act was done and the person sought to be made vicariously liable for it. In the interests of clarify the expression should, in my view, be confined to liability for tort.

A basic principle of the common law of contact, to which there are no exceptions that are relevant in the instant case, is that parties to a contract are free to determine for themselves what primary obligations they will accept. They may state these in express words in the contract itself and, where they do, the statement is determinative; but in practice a commercial contract never states all the primary obligations of the parties in full; many are left to be incorporated by implication of law from the legal nature of the contract into which the parties are entering. But if the parties

wish to reject or modify primary obligations which would otherwise be so incorporated, they are fully at liberty to do so by express words."

48. We may, however, notice that Photo Production Ltd. has been relied upon George Mictchell (Chesthall) V. Finney Lock Seeds (1983) AC 803.

"The duty of Securicor was, as stated, to provide a service. There must be implied an obligation to use care in selecting their patrolmen, to take care of the keys and, I would think, to operate the service with due and proper regard to the safety and security of the premises. The breach of duty committed by Securicor lay in a failure to discharge this latter obligation. Alternatively it could be put on a vicarious responsibility for the wrongful act of Musgrove, viz. starting a fire on the premises; Securicor would be responsible for this on the principle stated in Marris v. C.W. Martin & Sons Ltd. This being the breach, does condition 1 apply? It is drafted in strong terms, 'Under no circumstances, any injurious act or default by any employee'. These words have to be approached with the aid of the cardinal rules of construction that they must be read contra proferentem and that in order to escape from the consequences of one's own wrongdoing, or that of one's servant, clear words are necessary. I think that these words are clear. Photo Productions in fact relied on them for an argument that since they exempted from negligence they must be taken as not exempting from the consequence of deliberate acts. But this is a perversion of the rule that if a clause can cover something other than negligence, it will not

be applied to negligence. Whether, in addition to negligence, it covers other, e.g. deliberate, acts, remains a matter of construction requiring, of course, clear words. I am of opinion that it does and, being free to construe and apply the clause, I must hold that liability is excluded. On this part of the case I agree with the judge and adopt his reasons for judgment. I would allow the appeal."

It was, however, clarified in Yasuda Fire & Marine Insurance Co. of Europe Ltd. Vs. Orion Marine Insurance Underwriting Agency Ltd. & Another 1995 QB 174.

Photo Production (supra) has been noticed by the Supreme Court of India in LIC of India and Another Vs. Consumer Education & Research Centre and Others reported in (1995) 5 SCC and in Central Inland Water Transport Corporation Ltd. and Another Vs. Brojo Nath Ganguly and Another reported in (1986) 3 SCC 156.

It is of some significance to notice the following passage from the Law of Contract (Butterworths Common Law Series) at page 1528 :-

"7.42 Right not divested. Any right, such as the right to damages, which accrued prior to the time of termination remains enforceable and is governed by the contract. This may be explained in terms of the distinction between primary and secondary obligations. Although termination discharges the unperformed primary obligations of the parties, it does not discharge secondary obligations such as the obligation to pay compensation. This proposition holds true even in cases where the promisor possessed a right to recover damages prior to the promisee's election to

terminate. The secondary obligation may be additional to a primary obligation.

Moreover, because termination discharges the unperformed obligations of a promisor, the promisor may be held liable to pay damages not only in respect of the obligations which fell due for performance prior to termination, but also in respect of obligations which would have fallen due for performance after termination. These are usually referred to as loss of bargain damages.

Where damages are assessed in respect of a future performance obligation, it may be necessary to discount the award. Such discount may take account of future contingencies, or the fact that the award relates to a money sum which was not due at the time of termination. The concept of 'future contingencies' includes events which might have happened had the contract not been terminated. Thus, if the party whose breach or repudiation led to termination would have been entitled to terminate the agreement under an express provision, the plaintiff's damages may be reduced accordingly."

49. Photo Production Ltd. (supra) was dealing with a case involving primary obligation.

50. Keeping in view the decisions of this Tribunal referred to hereinbefore, I may consider the question of application of Clauses 4.2 and 4.3 of the Regulations. Clauses 4.2 and 4.3 have statutory effect.

It was presumably inserted in the Regulations to protect the interests of all concerned.

If reasons for termination are assigned, it is possible for a party to the contract, would remedy the effect, if any. It may enter into negotiations. It may take recourse to law.

Similarly, the viewers would have a right to make suitable arrangements or even approach a Court of Law.

51. Construction of a statute, it is well known, must be resorted to upon taking into consideration the language used therein.

I have noticed heretobefore that Clauses 4.2 and 4.3 of the Regulations use negative words. They also use the expression 'shall'.

52. It is, however, true that no consequence with regard thereto has been laid down, but on construction of a statute as to whether the same is directory or imperative in character, must be judged on the terms of the provision.

If it is held to be mandatory, as has been held in the cases of Zee Turner Ltd. Vs. Prasar Bharati (Supra) there is no escape from the conclusion that the termination would be illegal.

53. This gives rise to the question as to what relief the Broadcaster may be entitled to.

It is not in dispute that the consequence of termination of the agreement like the placement agreement, is that the Respondent has refused to carry the channel of the Petitioner. This channel is, therefore, not available on the platforms of Respondent Nos. 1, 2 & 3. Clauses 4.2 and 4.3 clearly state about the disconnection of supply of signals. The contract, which would not affect the third party's interest, as for example in this case viewers, may be terminated in terms of the contract.

I, therefore, am of the opinion that in a case of this nature, Clause 4.2 and 4.3 would apply.

54. What would be the consequences of illegal termination, is the question? The relief required to be granted to a party would depend upon the facts and circumstances of each case.

In a given case, it is possible to direct restoration of supply of signals. In another set up of facts only the damages or nominal damages can be awarded.

55. In this case, admittedly, the agreement has come to an end in the month of July, 2011. It is, therefore, not possible to direct restoration of supply of signals.

56. The only question, therefore, which survives for consideration is as to whether the Petitioner is entitled to any damages. For the purpose of proving the quantum of damages, the Petitioner has not brought on record any basic document.

57. As the principles for awarding damages have been considered by this Tribunal in details in Viacom Vs. MSM Discovery – Petition No. 220 (C) of 2010 disposed of on 23.12.2011, the same may not be repeated.

Suffice it to say that as has been opined by the Supreme Court in Panna Lal Janki Das Vs. Mohan Lal (1950) SCR 979, the dominant principle of law in that behalf is the principle of Restitution Integrem.

The principle, therefore, is that the claim of damage should extend only to the compensation of real and direct losses.

58. Has the Petitioner been able to prove the same?

I do not think it has.

No basic document has been brought on record. No Balance Sheet has been filed. No Auditor's Report has been placed on record. No Profit & Loss statement has been filed.

59. The blocking of the news is based upon a newspaper reports.

It is inadmissible in evidence being hearsay in nature.

As regards admissibility of a newspaper Report has been laid down in Laxmi Raj Shetty vs. State of Tamil Nadu holding newspaper reports to be inadmissible.

There is no dispute with regard to the said proposition of law. I, may, however, notice the similar views have been expressed recently in Joseph M. Puthussery Vs. T.S. John (2011) 1 SCC 503 and Bharat Sanchar Nigam Ltd. vs. BPL Mobile Cellular Ltd. (2008) 13 SCC 597, opining statements contained in a newspaper report are merely hearsay.

60. Mr. Bhatia, however, would contend that PW-1 in his cross examination categorically stated that he being In-charge of the News Room, was required to constantly monitor the same.

He furthermore stated that there are records to prove the said fact. No record, however, has been produced.

61. Mr. Naresh Kumar is a person from Accounts Department.

He, however, proved certain charts and graphs. No basic document in support of the said charts or graphs has been filed.

On what basis he had formed his opinion, is not known.

At page 20 of his deposition, Mr. Rakesh Kumar has provided for calculation of revenue on per day basis. Evidently, it was based on the Expected revenue. The witness has filed a Tariff Card, from a perusal whereof it appears that the 'Day & Night News' is free to air channel available not only on Cable TV but also on DTH and IPTV from August, 2004. **(Exh. PW2/2).**

In paragraph 1 of his affidavit, he stated :-

> *"I state that the petitioner used to sell the available minutes in the slot of 10 seconds each in the price band of Rs.500/- to Rs.900/- at a week day depending upon the period in which the advertisement to be showed. Similarly for week end, the rate of 10 second slot varied from Rs.500/- to Rs.1000/-. Copy of the target revenue per week day and per week-end is exhibited as herewith PW2/2."*

In the projected revenue of January to July 2011, according to the said witness, there was an average drop of fifteen percent in TRP because of disruptions and blackouts of the channel. Apart from the said statement, no documentary proof has been adduced to support the same.

From the months of November 2010 to July 2011, according to him, net projected revenue could have been Rs.16,76,97,180/- upon giving of about fifteen percent discount.

It reads as under :-

Normal Per Day	*712800*
Week End Per Days	*741600*

Month (2011)	*Days*	*Week End*	*Value*	*Normal Days*	*Value*	*Spot Value*	*Avg. Scroll Value*	*Grand Total*	*15% Disc*	*Net Projected Revenue*
Nov.10	*30*	*8*	*5932800*	*22*	*15681600*	*21614400*	*50000*	*21664400*	*3249660*	*18414740*
Dec.10	*31*	*8*	*5932800*	*23*	*16394400*	*22327200*	*50000*	*22377200*	*3356580*	*19020620*
Jan	*31*	*10*	*7416000*	*21*	*14968800*	*22384800*	*50000*	*22434800*	*3365220*	*19069580*
Feb	*28*	*8*	*5932800*	*20*	*14256000*	*20188800*	*50000*	*20238800*	*3035820*	*17202980*
Mar	*31*	*8*	*5932800*	*23*	*16394400*	*22327200*	*50000*	*22377200*	*3356580*	*19020620*
Apr	*30*	*9*	*6674400*	*21*	*14968800*	*21643200*	*50000*	*21693200*	*3253980*	*18439220*
May	*31*	*9*	*6674400*	*22*	*15681600*	*22356000*	*50000*	*22406000*	*3360900*	*19045100*
June	*30*	*8*	*5932800*	*22*	*15681600*	*21614400*	*50000*	*21664400*	*3249660*	*18414740*
July	*31*	*10*	*7416000*	*21*	*14968800*	*22384800*	*50000*	*22434800*	*3365220*	*19069580*
Total	*273*	*78*	*57844800*	*195*	*138996000*	*196840800*	*450000*	*197290800*	*29593620*	*167697180*

A GRP chart has also been annexed to contend that GRP rate has a direct relationship with advertisement and, thus, drop in GRP caused huge loss in business to the Petitioner.

We may notice the following statements in his cross-examination :-

> *"Q. Is it correct that the channel of the petitioner is available on DTH platform, IPTV as also on other cable networks?*
>
> *A. Yes.*
>
> *Q. Is it correct that by exhibit PW2/2 you wanted to show what revenue was expected by the petitioner company and not the actual revenue of the company?*
>
> *A. This is actual figure opportunity to earn revenue. And it is the actual figure."*

62. PW-3, in his evidence, sought to prove the expenditures incurred by the Petitioner.

There is no proposition of law that in a case of breach of contract, the Respondent was to restitute all expenditure made by the Petitioner. There are sufficient materials on record to show that despite termination of the contract, the Petitioner's channel is available on the platforms of 4 out of 5 DTH operators working throughout the country.

Its channel is also available on the platforms of cable operators and the channels of various other MSOs.

63. The channel is also available on IPTV besides on cable network in other states namely Haryana, Himachal Pradesh and Jammu & Kashmir. The news items, which are said to have been blocked, appear to have been carried in other national channels. As indicated heretobefore, according to the witness, there was a recording with regard to the purported disruptions, but the same has not been produced.

64. It is not in dispute that the Petitioner's revenue is confined to advertisements as the product is not a pay channel but a 'free to air' channel. The loss of advertisement directly attributable to the act of the Respondents herein, therefore, should have been proved.

65. Incurring any loss by the Petitioner on that account could have been proved by direct evidence namely what was the quantum of revenue before the agreement was terminated and the fall, if any, immediately thereafter.

66. In terms of Section 73 of the Indian Contract Act, the damages sustained by a party to a contract must be proved. Proof of damages, it will bear

repetition to state, should be brought in regard to the direct losses. Quantum of damages cannot be determined only on surmises and conjectures.

It has been so held in IndusInd Media Vs. City Cable – Petition No. 67 (C) of 2008 disposed of on 27.7.2011.

67. I, keeping in view the facts and circumstances of the case, need not apply my mind with regard to the prayer (i) to (iv). The Competition Commission may consider the prayers in that behalf on their own merits.

68. In the facts and circumstances of this case, however, I am of the opinion that the Petitioner may be awarded nominal damages quantified at Rs.1,00,000/- as against Respondents 1 to 3 jointly and severally.

This Petition is allowed to the aforementioned extent with the aforementioned observations and directions.

There shall, however, be no order as to costs.

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(S.B. Sinha)
Chairperson

rkc