**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**

**NEW DELHI**

**Dated 10/04/2012**

**Petition No. 382(C) of 2011**
**(With M.A. No. 293 of 2011)**

Dish TV India Pvt. Limited … Petitioner

Vs.

ESPN Software India Pvt. Ltd, Gurgaon … Respondent

and

**Petition No. 398 (C) of 2011**

ESPN Software India Pvt. Ltd, Gurgaon … Petitioner

Vs.

Dish TV India Pvt. Ltd, New Delhi … Respondent

**BEFORE:**

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

**Petition No.382(C) of 2011**

For Petitioner : Mr.Maninder Singh, Senior Advocate with Mr.Tejveer Singh Bhatia, Advocate and Mr.Vadivelu Deenadayalan, Advocate for Mrs.Prathiba M. Singh, Advocate.

For Respondent : Mr.C.S.Vaidyanathan, Senior Advocate with Mr.N. Ganpathy, Advocate and Mr.Kartik Yadav, Advocate.

**Petition No.398(C) of 2011**

For Petitioner : Mr.C.S.Vaidyanathan, Senior Advocate with Mr.N. Ganpathy, Advocate and Mr.Kartik Yadav, Advocate.

For Respondent : Mr.Maninder Singh, Senior Advocate with Mr.Tejveer Singh Bhatia, Advocate and Mr.Vadivelu Deenadayalan, Advocate for Mrs.Prathiba M. Singh, Advocate.

**J U D G M E N T**

**S.B. Sinha**

1. Interpretation of some of the provisions of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004 as amended from time to time (hereinafter called and referred to for the sake of brevity as `the said Regulations') falls for consideration in these petitions.

**Factual Backdrop**

2. The Petitioner is a DTH operator; whereas the Respondent is a content aggregator of three channels ESPN Services, STAR Cricket and STAR Sports.

3. The parties hereto entered into a Memorandum of Understanding (MOU) on or about 12.3.2009 which was to remain valid for a period of four years i.e. upto June, 2012.

4. The Telecom Regulatory Authority of India (TRAI) inter-alia relying on or on the basis of the decisions of this Tribunal in ASC Enterprises Ltd. vs. Star India Pvt Ltd. being Petition No.136 (C)/2006 and Tata Sky Ltd. vs. Zee Turner Ltd. and Ors. Petition No.189 (C)/2006, by a press Note 39 of 2008 dated 18.4.2008 directed that so far as the DTH operators are concerned 50% of the rate fixed by the broadcasters for the Non-CAS areas would be applicable.

5. The TRAI thereafter framed a Tariff Order on or about 21.7.2010 whereby and whereunder the rate as far as addressable system was concerned, was reduced to 35% from 50%.

6. By reason of a judgment and order dated 16.12.2010, in various petitions filed by the Broadcasters, the said Tariff Order was set aside by this Tribunal opining that

fixation of ceiling limit to 35% would not subserve the requirements of fixation of `Tariff Order' within the meaning of Section 11 (2) of the Act.

7. Indisputably the TRAI has carried the matter to the Supreme Court of India by preferring an appeal there against the same is pending before it.

8. On or about 18.4.2011 the Supreme Court of India passed the following interim order :-

> "In brief, the DTH operators and MSOs support TRAI whereas the broadcasters support the order of TDSAT.
>
> Interim stay of the impugned order of TDSAT subject to substitution of the figure 42% in place of 35% in the proviso to Clause 4 (1) and in proviso (b) to Clause 4 (2) of the tariff order dated 21.7.2010. <u>This interim order shall be prospective in operation and shall not affect contracts already entered."</u> (underlying is ours)

9. It is not in dispute that the TRAI amended the said Regulations inter-alia by introducing Clause 13.2A, which came into force on or about 1.12.2007.

10. The said Regulations were amended by Regulation 4 of 2009 as also by reason of 6$^{th}$ Amendment of 2010, which came into force w.e.f. 30.7.2010.

11. Pursuant to or in furtherance of the said amended Regulations, Respondent inter alia published its RIO in its website.

12. Legality and validity of some of the clauses of the said RIO being Clause E (V), (4) and (E) (V) (5) came to be questioned by one of the DTH operators before this Tribunal.

It was marked as Petition No.159 (C)/2010 entitled Tata Sky vs. ESPN Software India Pvt. Ltd.

In its judgment dated 5.4.2011, this Tribunal noticed :-

| Clauses of the RIO | Petitioner's Objection |
|---|---|
| Clause E (V) (4) – the current Subscription Fee Plan is an under `DTH Operators shall sell the Service to its subscribers for a minimum period of 1 year.' | The Respondent cannot compel the Petitioner to sell the service of the subscribers for a Minimum period of 1 year. The subscribers are monthly paying subscribers and they pay for what they watch. Its upto them to take or drop any channels at any time and the Petitioner cannot exercise any control over the same and hence the clause is not acceptable. |
| Clause E (V) (5) – DTH Operator shall be liable to pay to the Company all amounts due and payable irrespective of whether the ESS Subscribers have actually paid such amounts | The said clause is not acceptable to the Petitioner as the Petitioner cannot be held responsible if the subscribers of Respondent's channels stop paying the concerned amount and |

| | |
|---|---|
| to him or whether any such ESS Subscribers are active or have been deactivated by DTH Operator. | especially when their services are deactivated. The Petitioner will pay according to the license fee clause as enumerated in the TRAI Regulations. So in this light, this clause is redundant. |

It was furthermore noticed :-

> "(xxi) On the merit of the impugned provisions of the RIO, it was urged :-
>
> (i) Clause E (V) (4) wherein a minimum period of one year has been prescribed, a period of three months may be provided;
>
> (ii) in the case of clause E (V) (5) also a similar period may be read;"

13. According to the Petitioner, however, it was not aware of the stand taken by the Respondent herein in the aforementioned proceeding.

14. Pursuant thereto or in furtherance thereof, a revised RIO was offered to the Petitioner by the Respondent on or about 6.7.2001. It was accepted by it by a letter dated 25.7.2001, w.e.f. 1.9.2011 stating:-

> "… In view of the above and having regard to the statutory rights available to us under the TRAI Regulations including the Regulations of 2004 and 2007 mentioned in your letter dated 6.7.2011, it is requested that ESS should provide its channels/ bouquet as mentioned below for re-transmission on Dish TV (our DTH

platform) w.e.f 1.9.2011 in terms of the RIO rates revised by ESS and intimated vide the above-mentioned letter dated 6.7.2011. It is stated that we have decided to commence the distribution/ re-transmission of the following ESS channels on the revised RIO rates of ESS w.e.f 1.9.2011 :-

(i) Bouquet (containing ESPN & Star Sports Channels) @ 19.85 per subscriber per month.

(ii) Star Cricket Channel on a la carte basis @ 12.58

(iii) ESPN Channel on a la carte basis @ 14.89

(iv) Star Sports Channel on a la carte basis @ 14.89

You are accordingly requested to kindly raise the monthly invoices from the period starting from 1.9.2011 onwards on the basis of ESS RIO rates as revised by ESS communication dated 6.7.2011 and as per the monthly report pertaining to the number of subscribers available your channels on Bouquet/ Ala carte basis, provided by Dish TV to ESS."

15. The Petitioner furthermore by another letter dated 25.7.2011 informed the Respondent herein that the aforementioned Clauses V (iv) and V (v) are required to be modified in conformity with the TRAI Regulations.

It was contended:-

> " …Regarding the formality for execution of the agreement, we are also required to state here that each of the term and condition of the RIO published and thereafter revised by ESS, has to *be* strictly in conformity with the regulations and norms laid down by TRAI and which are required to be mandatorily followed by each of the broadcaster including by ESS. You would appreciate that the TRAI through its norms *and* tariff has stipulated that no DTH operator would be permitted to charge its subscribers subscription of more than 3 months for any channel being distributed by the DTH operator on ala carte basis if the subscriber chooses to not to avail the signals of such channels. As such, it is not permissible for DTH operators to recover from its subscribers subscription for any channel being distributed on ala carte basis for a period of more than 3 months when the subscriber chooses to discontinue receiving of signals of Sports channels from the DTH operator. Further more, the stipulation of subscription period of minimum 3 months by a DTH operator on its subscribers is permissible only when the channel is being availed by a subscriber from a DTH operator on ala carte basis."

16. The said letter was issued, according to the Petitioner, as it was not aware of the said judgment nor was it informed thereabout by the Respondent.

17. The Respondent, however, by a letter dated 2.8.2011, informed the Petitioner that the said RIO dated 6.7.2011 was not applicable in its case in view of the

aforementioned order dated 18.4.2011 passed by the Supreme Court of India.

18. The Petitioner, however, by its letter dated 8.8.2011 while contending that the `contracts' referred to by the Supreme Court of India were those which were entered into on the RIO basis, requested the Respondent to counter sign the agreement in terms of the Interconnect Regulations.

19. Several communications were exchanged between the parties.

**The Present Proceedings**

20. This petition was filed by the Petitioner on 14.9.2011, praying inter alia for the following reliefs :-

> "(a) Directing the Respondent to make the necessary changes/amendments in its Reference Interconnect Offer so as to bring the same in compliance and in conformity with the applicable TRAI Regulations and the tariff order.
>
> (b) Setting aside and quashing Clause V.4 and V.5 of the RIO of the Respondent;
>
> (c) Directing the Respondent to complete the process of execution of the agreement between the parties for supply of the signals of its 3 Channels (ESPN, Star Sports and Star Cricket) for the DTH service of the Petitioner on non-discriminatory basis and in terms of the Regulations prescribed by the TRAI for this purpose i.e. on RIO basis w.e.f. 1.9.11."

21. The Respondent also filed a separate petition, praying inter alia for the following reliefs :-

> " (a) declare the request made by the Respondent to the Petitioner for entering into a fresh agreement as not binding on the Petitioner.
>
> (b) pass an appropriate order/direction to the Respondent to specifically perform the obligations assumed including with regard to the mode and manner of transmission of the Petitioner's channels as envisaged under the MoU dated 12.3.2009."

22. On a prayer made by the Petitioner for grant of an interim injunction in mandatory form the matter was heard at great length by this Tribunal.

23. It, however, despite finding a prima facie case in favour of the Petitioner in its order dated 30.9.2011 opined as under:-

> " 22. The effect of an agreement, which should have been entered into by and between the parties herein with effect from 01.9.2011, can be worked out.
> The Petitioner can, in other words, be sufficiently compensated on monetory terms.
>
> 25. Moreover, in our opinion, interest of justice would also be sub-served if in the meanwhile, the parties obtain an order of clarification from the Hon. Supreme Court of India in this behalf."

24. However, on 14.10.2011, it may be placed on record, the Respondent filed an application for clarification of the said order dated 18.4.2011, inter alia on the premise that the same would not be attracted in a case involving Add-on packages.

25. The said Application was rejected by the Supreme Court of India in terms of an order dated 18.11.2011.

**The Regulation**

26. We may at this stage notice some of the provisions of the relevant clause of the Regualtion:-

> **13 Reference Interconnect Offer**
> xxx
>
> 13.2A Reference Interconnect Offers for direct to home service
> **13.2A.1** Every broadcaster, providing broadcasting services before the date of commencement of the Telecommunication (Broadcasting and Cable Services) Interconnection (Sixth Amendment) Regulation, 2010 (4 of 2010) and continues to provide such services after such commencement shall, within thirty days from the date of such commencement, intimate to all the direct to home operators existing on that date and coming into existence within the said period of thirty days, its Reference Interconnect Offer specifying, inter-alia, the technical and commercial terms and conditions for interconnection for the direct to home platform, including the terms and conditions listed in Schedule III to these Regulations.
>
> Provided that no broadcaster shall, directly or indirectly, compel any direct to home operator not to make available its direct to home service to any class

of subscribers including commercial subscribers.

Provided further that a broadcaster may have a different Reference Interconnect Offer for supply of signals by the direct to home operators—

(a) to the following categories of commercial subscribers, namely:-
(i) hotels with rating of three star and above;
(ii) heritage hotels (as described in the guidelines for classification of hotels issued by Department of Tourism, Government of India);
(iii) any other hotel, motel, inn, and such other commercial establishment providing board and lodging and having fifty or more rooms; and

(b) in respect of programmes of such broadcaster, shown on the occasion of a special event for common viewing, at any place registered under the Entertainment Tax Law and to which access is allowed on payment basis for a minimum of fifty persons.

Explanation:

For removal of doubts, it is clarified that the reference interconnect offer containing various terms and conditions including commercial terms, published by a broadcaster for provision of signals to ordinary subscribers shall apply to provision of signals to commercial subscribers not specified in the second proviso."

**13.2A.2** Every broadcaster shall publish a copy of the Reference Interconnect Offer, referred to in sub regulation 13.2A.1, on its website:

Provided that any broadcaster, who had intimated or published on its website, before the commencement of the Telecommunication (Broadcasting and Cable Services) Interconnection (Sixth Amendment) Regulation, 2010 (4 of 2010), any Reference Interconnect Offer, shall modify such Reference

Interconnect Offer so as to be in conformity with the Reference Interconnect offer referred to in regulation 13.2A.1 and publish the same as required under this sub-regulation.

**13.2A.3** Every broadcaster, who begins to provide broadcasting services after the date of commencement of the Telecommunication (Broadcasting and Cable Services) Interconnection (Sixth Amendment) Regulation, 2010 (4 of 2010) shall, within thirty days of such commencement or before providing such services, whichever is later, intimate to all the direct to home operators existing on that date, its Reference Interconnect Offer specifying therein the technical and commercial terms and conditions referred to in sub-regulation 13.2A.1 and publish the same, before or simultaneously with such intimation, on its website.

**13.2A.4** Every direct to home operator, who has been granted a licence after thirty days from the date of commencement of the Telecommunication (Broadcasting and Cable Services) Interconnection (Sixth Amendment) Regulation, 2010 (4 of 2010), may request a broadcaster for being provided with a copy of Reference Interconnect Offer of such broadcaster and such broadcaster shall, within ten working days from the date of receipt of such a request, provide the same to the direct to home operator.

**13.2A.5** Every broadcaster, who makes any modification to its Reference Interconnect Offer referred to in sub-regulation 13.2A.1 or sub-regulation 13.2A.3 , shall, immediately after such modifications, intimate to all the direct to home operators such modifications so made to its Reference Interconnect Offer:

Provided that all such modifications shall be published and exhibited on its website in the same manner as the Reference Interconnect Offer had been intimated to the direct to home operators and published on the website of the broadcasters.

Agreements between the broadcasters and direct to home operators.

**13.2A.6** (1) The Reference Interconnect Offer of a broadcaster referred to in clause 13.2A.1 or 13.2A.3 or 13.2A.5, as the case may be, and intimated to the direct to home operators and published by the broadcaster on its website shall be the basis for all interconnection agreements to be entered into between the broadcaster and direct to home operators:

Provided that the broadcaster may enter, on non discriminatory basis, into agreements with different direct to home operators modifying the Reference Interconnect Offer on such terms and conditions as may be agreed upon between them:

Provided further that in case a broadcaster had entered, before the commencement of the Telecommunication (Broadcasting and Cable Services) Interconnection (Sixth Amendment) Regulation, 2010 (4 of 2010), into an agreement with any direct to home operator and publishes, subsequently, its Reference Interconnect Offer (including its modifications) under said regulations, such broadcaster shall, after publication of the said offer, give an option to such direct to home operator to either enter into an agreement in accordance with these regulations or continue with the agreement entered before such commencement till its validity.

(2) No broadcaster, who had, before the commencement of the Telecommunication (Broadcasting and Cable Services) Interconnection (Sixth Amendment) Regulation, 2010 (4 of 2010), entered into an agreement with a direct to home operator and such direct to home operator has given an option under sub-regulation (1), to enter into an agreement with such broadcaster in accordance with the Reference Interconnect Offer published after such commencement, shall disconnect signals (except in accordance with these regulations or any other law for the time being in force) during the period beginning from the date on which such operator gave the option and ending on the date on which such agreement was entered in accordance with the Reference Interconnect Offer or the date of expiry of earlier agreement, whichever was earlier.

(3) No broadcaster, who had, before the commencement of the Telecommunication (Broadcasting and Cable Services) Interconnection (Sixth Amendment) Regulation, 2010 (4 of 2010), entered into an agreement with a direct to home operator and such direct to home operator has given an option under sub-regulation (1), to continue with the agreement entered, before such commencement, with such broadcaster, shall disconnect signals of such operator (except in accordance with these regulations or any other law for the time being in force) during the validity of such agreement.

Time limit for entering into agreements between the broadcasters and direct to home operators.

**13.2A.7** (1) Every broadcaster shall, within a period of forty-five days from the date of receipt of request from a direct to home operator for entering into interconnection agreement or for modification of an interconnection agreement already entered, shall enter into an agreement, or, modify such agreement already entered, with such direct to home operator, in accordance with the Reference Interconnect Offer published under these regulations.

(2) In case a broadcaster intimates any modification as referred to in regulation 13.2A.5, the agreement referred to in sub-regulation (1) shall be modified at the option of the direct to home operator, in the same manner as that of entering into of an agreement under sub-regulation (1).

**13.2A.8** In case the broadcaster and the direct to home operator fail to enter into an interconnection agreement, then both of them may jointly, without prejudice to the provisions of section 14A of the Act, at any time, request the Authority to facilitate in the process for entering into an interconnection agreement.

**13.2A.9** Nothing contained in clause 13.2A.8 shall be construed to take away any legal right conferred upon the broadcaster and the direct to home operator under any law for the time being in force and either of them may, at any time during the facilitation process, exercise such right conferred upon them under any law for the time being in force.

**13.2A.10** Nothing contained in clause 13.2A.8 or 13.2A.9 shall apply to any matter or issue for which

(a) any proceedings are pending before any court or tribunal under the Act or any other law for the time being in force; or

(b) a decree, award or an order has already been passed by any competent court or tribunal or Authority, as the case may be.

Compulsory offering of channels on a-la-carte basis."

**Contentions**

27. Shortly stated, the contention of the Petitioner is that having regard to the statutory scheme contained in the aforementioned Regulations, it was obligatory on the part of the

Respondent to provide an option to the Petitioner either when the original RIO was issued and/or when the modified RIO was issued.

28. It was urged that to opt for an RIO based contract or continue with the non-RIO based contract is the prerogative of the parties and once a DTH operator opts for an RIO contract, the `Broadcaster' will have no other option but to agree thereto.

29. The Respondent, on the other hand, urged:-

(i) The Supreme Court having made its order dated 18.4.2011 only with prospective effect, this petition is not maintainable.

(ii) As the order of the Hon'ble Supreme Court would not apply to an existing contract, this Tribunal has no jurisdiction to decide the issue;

(iii) Clause 13.2A.6 should be read with Clause 13.2A.10 of the Regulations, from a perusal whereof, it would be absolutely clear that the RIO issued in 2010 cannot be the subject matter of migration from a non-RIO based contract to an RIO based contract;

(iv) The offer made by the Respondent being not a voluntary one, the same would not constitute an

`offer' within the meaning of Section 5 of the Indian Contract Act;

(v) In any event the parties having acted within of a non-RIO contract for such a long time, this Tribunal should not exercise its jurisdiction, as on the expiry of the four years term, the parties may enter into a RIO based contract or a non-RIO contract by mutual consent.

**Construction of Statute**

30. What would be the effect of the proviso appended to clause 13.2 A of the Regulation is the principal question.

31. A proviso has four different meanings. (See S. Sundram Pillai 1985(1) S.C.C. 591 at 613 and Dipak Chandrda Ruhidas vs. Chandan Kumar Sarkar (2003) 7 SCC 66 at 71).

32. In this case the second proviso must be read in the context of the main provision. The purpose and object of the Regulations and particularly several sub-Clauses of Clause 13.2A should be taken into consideration therefor.

33. It is also well-known that plain meaning should be given to the words of the legislature. The language used in the said provision is quite clear and unambiguous.

34. It would be, in our opinion, futile to go into the question as to whether it operates as a substantive provision or only by way of `Exception'.

**Purposive Construction.**

35. The doctrine of 'purposive construction' may be resorted to when following a literal meaning of the enactment would lead to an anomaly and in a case where the literal meaning would not be in accordance with the legislative purpose.

36. Francis Bennion 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.'

37. 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 [197*1] 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."

38. The Supreme Court of India in M. Nizamudeen v. Chemplast Sanmar Limited, (2010) 4 SCC 240 at page 255, stated the law in the following terms :-

> "**38.** It is well settled that if exception has been added to remedy the mischief or defect, it should be so construed that it remedies the mischief and not in a manner which frustrates the very purpose. Purposive construction has often been employed to avoid a lacuna and to suppress the mischief and advance the remedy. It is again a settled rule that if the language used is capable of bearing more than one construction and if construction is employed that results in absurdity or anomaly, such construction has to be rejected and preference should be given to such a construction that brings it into harmony with its purpose and avoids absurdity or anomaly as it may always be presumed that while employing a particular language in the

> provision absurdity or anomaly was never intended.
>
> **39.** Notwithstanding imperfection of expression and that exception clause is not happily worded, we are of the view that by applying purposive construction, the expression, "in the port areas" should be read as "in or through the port areas". The exception in Para 2(*ii*) then would achieve its objective and read, "except transfer of hazardous substances from ships to ports, ships to terminals and ships to refineries and vice versa, in or through the port areas". This construction will be harmonious with Para 3(2)(*ii*) which permits the activity of laying pipelines in the CRZ area."

39. We must also consider that the provisions of the RIO had been made for the benefit of the DTH operators.

40. If such a beneficial provisions can be applied we do not see any reason as to why the same should be denied to the operations.

41. The DTH operators were otherwise entitled thereto. Denying the same would defeat the purpose for which the Regulations were framed (see Mohd. Saud and Anr. vs. Dr. (Maj.) Shaikh Mahfooz) reported in (2010) 13 SCC 517, Central Board of Secondary Education and Anr. vs. Aditya Bandophayay and Ors. reported in (2011) 8 SCC 497 and Employees Provident Fund Commissioner vs. Official Liquidator of ESSKAY Pharmaceuticals Ltd. reported in (2011) 10 SCC 727).

42. In Grid Corporation of Orissa Ltd vs. Eastern Metals & Ferro Alloys, (2011) 11 SCC 334, the Supreme Court of India stated the law thus:-

> "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 Bihar1 and Kanai Lal Sur v. Paramnidhi Sadhukhan2 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."

**Effect of the I.A. filed by the Respondent**

43. In our order dated 30.9.2011, it was observed :-

> "25. Moreover, in our opinion, interest of justice would also be sub-served if in the meanwhile, the parties obtain an order of clarification from the Hon. Supreme Court of India in this behalf."

44. ESPN had filed an IA for clarification before the Supreme Court of India. It is true that the said application was filed much prior to the date of passing of the said order. The Respondent in its reply contended as under :-

> "…It would be relevant to mention that the Respondent has filed IA bearing no.9 of 2011 before the Hon'ble Supreme Court to seek variation/vacation of its interim order dated 18.4.2011. The said IA was listed for hearing on September 30, 2011 when notice was issued and directions were also issued to all parties opposing the same to file their respective replies. The Respondent submits that in the event the Hon'ble Supreme Court eventually modifies and/or vacates the said interim order dated 18.4.2011 and in the meantime, this Hon'ble Tribunal passes any order allowing the relief at prayer (c) of the petition, the Respondent would be severely prejudiced. Therefore, it is submitted that it would be in the fitness of things if status quo is maintained till decision on IA No.9 of 2011 is taken by the Hon'ble Supreme Court."

45. It is not in dispute that the Petitioner has not filed any other I.A. The said IA was dismissed by the Supreme Court of India by an order dated 18.11.2011, opining :-

> "We have heard learned counsel for the parties and perused the record.
>
> In our view, there is no valid ground or justification to modify order dated 18.4.2011.
>
> Interlocutory Application No.9 is accordingly dismissed."

46. The ESPN could have filed another IA. If it did not choose to do so, at this stage it does not lie in its mouth to contend that the Petitioner also could have filed an IA.

47. The Petitioner was not concerned with RIO contract at that time and, thus, it was not necessary for it to file any application for clarification.

**Interpretation of the Regulations**

48. The said Regulations cover the field of Broadcasting and Cable services.

49. There cannot be any controversy that the terms of a contract would give way to a statute in a regulatory regime.

50. RIO has been defined in Clause 2 (o) of the Regulation to mean :-

> "**2. Definitions:**
>
> 2 (o) "RIO" means the Reference Interconnect Offer published by a Party, prescribing conditions by fulfilling which other Parties would be entitled to obtain interconnection from that party."

51. The TRAI provided for RIO so far as non-addressable system is concerned in the year 2007. Clause 13.2A provides for RIO for `Direct to Home' service. Clause 13.2A.1 imposes a statutory duty upon the broadcaster to intimate to all the Direct to Home operators as on the date of coming into force, the original order or the 2010 order to intimate to them that it has a right to opt for RIO.

52. By reason of imposition of such a duty, a corresponding right has been created. Clause 13.2A.2 mandates the Broadcaster to publish the said RIO.

53. Clauses 13.2A.3 and 13.2A.4 are not relevant for our purpose.

54. Clause 13.2A.5 takes note of any modification to the RIO by a Broadcaster which is also required to be intimated to all the DTH operators.

55. The proviso appended thereto postulates that such a modification shall also be published and exhibited on its website so as to intimate the DTH operators.

56. Clauses 13.2A.6 provides for agreements between the broadcasters and DTH operators. It refers to Clauses 13.2A.1 being the original RIO and 13.2A.5 being the modified one.

57. It mandates, subject to the parties agreeing to a non-RIO contract that such published RIO shall be the basis for all interconnect agreements. The proviso appended thereto, however, gives liberty to the parties to freedom of contract.

58. Indisputably, despite the 2007 Amendment to the Regulation, the parties had entered into a Memorandum of Understanding.

59. The crucial clause for this matter is the second proviso appended to the said 13.2A.6.

60. We may at this stage may also notice Paragraph 19 of the Explanatory Memorandum of the TRAI.

61. It reads as under:-

> "The Reference Interconnect Offer is only a methodology for arriving at interconnection agreements and the service providers and broadcasters can also enter into an interconnection agreement on mutually agreed terms and conditions. However, since the overriding principle is provision of signals on non discriminatory basis, the broadcaster shall be required to offer the same terms and conditions to any other DTH Operators if so requested by such other DTH Operators."

62. The second proviso appended to Clause 13.2A.6, in the event, it is capable of two meanings, must be read with the said Explanatory Memorandum.

63. A perusal of the said paragraph would clearly go to show that if the Regulation permits the DTH operator to exit from a non-RIO contract, there is, in our opinion, no way whereby it can be restrained/ prohibited from getting the said benefit.

64. In the aforementioned context, we may also notice that for the purpose of giving effect to such an option, sub-Clause 2 of Clause 13.2A.8 clearly prohibits a Broadcaster from disconnecting signals during the period beginning from the date when such option is exercised by the operator and ending on the day on which the agreement is entered into in accordance with the RIO or the date of expiry of the agreement, whichever is earlier.

65. The said provision also is a pointer to show that exit from a non-RIO contract having regard to the provisions contained in the Regulations must be held to be permissible.

66. The time limit for entering into such an agreement or modified agreement as provided for in the Clause 13.2A.7 must also be taken into consideration for the purpose of appreciating the regulatory scheme. It provides not only for a new agreement to be entered into but also an agreement which stands modified by reason of such modified RIO. Sub-Clause 2

of Clause 13.2A.7 is not a proviso to Clause 13.2A.6. It refers to Clause 13.2A.5 which would clearly mean a modified RIO and the rights and obligations of the Parties flowing therefrom.

67. Mr.Vaidyanathan, learned senior counsel relied upon Clause 13.2A.10 to contend that as the proceedings pending before a court of law would not come on the way of the said regulations, the Supreme Court's order cannot be set at naught. We are of the opinion, that the said provision has no application.

68. Clause 13.2A.10 was introduced keeping in view the provisions of Clause 13.2A.8 and Clause 13.2A.9. Despite the fact that in terms of the TRAI Amendment Act, 2000, the TRAI has been deprived of its adjudicatory power, in terms of Clause 13.2A.8 it assumed the jurisdiction of a facilitator, subject of course, to the condition that both the parties agreed thereto.

69. Clause 13.2A.9, however, clearly provides that even when such facilitatory provision is resorted to, any party thereto may move an appropriate court.

70. It is in furtherance of the said provisions only Clause 13.2A.10 was enacted which has nothing to do with the construction of an order passed by the Hon'ble Supreme Court of India.

71 Mr.Vaidyanathan, learned senior counsel would contend that the second proviso appended to Clause 13.2A.6 applies only if a new RIO is published after the 2010 Amendment came into force and in respect of any RIO issued prior thereto.

72. We are not in a position to agree to the said submission. We would, however, consider this aspect a little later.

73. Sub-Clause 2 of Clause 13.2A.6 laying down the time limit for entering into agreements between the Broadcasters and DTH operators govern the subsequent clauses; in terms whereof such an agreement has to be entered into within a period of 45 days from the date of request received from DTH operator either in respect of the original RIO or in modification of interconnection agreement already entered. Such agreement has to be entered into in accordance with the RIO published under the Regulations. Sub-clause 2 of the said provision refers to the modification of RIO at the option of the DTH operators in the same manner as that of entering into an agreement under sub-Regulation 1.

74. A plain reading of the aforementioned provisions would lead to the following.

(i) The parties may be governed by the RIO regime, but they would be at liberty to remain outside the same.

(ii) Broadcaster, however, is under a statutory obligation to intimate thereabout to the DTH operators not only sofar as the original RIO is concerned but also the modification thereof and the DTH operators on such intimation may opt either for (a) to continue with the non-RIO agreement or (b) to opt for the modified RIO.

(iii) The offer made by the broadcaster by way of intimation to the DTH operator would be at two stages i.e. (a) when the original RIO was published; or (b) when the modified RIO was published.

(iv) The time frame fixed therefor postulates that in the event the DTH operators elect to migrate from non-RIO contract to RIO contract, such an agreement has to be entered into within a period of 45 days.

75. It is not in dispute that the Respondent has already published its RIO in 2007. If that be so, it was open to the parties concerned to opt for entering into a non-RIO agreement.

76. Furthermore, it is not in dispute that the Respondent herein made an offer to the Petitioner by giving an intimation thereabout on or about 6.7.2011 which was accepted by the Petitioner on 25.7.2011. On acceptance of such an offer and/or exercise of an option to migrate to RIO agreement from non-RIO agreement, the parties should have entered into an agreement within a period of 45 days.

77. Petitioner, however, by its letter dated 25.7.2011 contended that Clauses E (4) and E (5) of the RIO were not in consonance with the TRAI Regulations.

78. It is now accepted that the judgment of this Tribunal in Tata Sky (supra) has attained finality and the Respondent, in view of the decision of this Tribunal, cannot give effect thereto.

79. In that view of the matter it is difficult for us to agree with the contention of Mr.Vidyanathan that after 2010, the Respondent had no statutory obligation to give an option to the Petitioner herein in terms of the second proviso appended to Clause 13.2A.6.

80. Mr.Vaidyanathan would contend that the situation in terms of the said proviso is different and distinct from the main provision.

81. It is now a well-settled principle of law that the provisos have four different roles to play. It has been so held in S. Sundaram Pillai (Supra).

82. It has been a common ground that except in a case where the freedom of contract is resorted to, the RIO provisions would govern the field.

83. The question is that whether despite entering into a Memorandum of Understanding for a period of four years, the Petitioner was entitled to opt for an RIO agreement upon modification thereof?

84. Our answer thereto is in the affirmative. The main provisions contained in Clause 13.2A.6 confers a duty upon the Broadcaster to make RIO as the basis for all interconnection agreements.

85. Whereas the first proviso contains an exception thereto, the second proviso refers to an agreement which had already been entered into by the concerned parties before the 2010 amendment.

86. What is postulated by reason thereof is a publication of such RIO including its modification subsequently which in the context of the regulatory regime should mean publication of a modified RIO also.

87. Even prior to 2010, such a statutory duty was fastened on the broadcaster i.e beginning from 2007.

88. That is how even the Respondent also understood the same as indeed it had made an offer to the Petitioner.

89. If the second proviso is attracted, an option is required to be given to the DTH operators. Such an option would be to either to enter into a new agreement or continue with the old one.

90. Statute as it is well-known, may be read keeping in view the history of legislation.

91. It is difficult to conceive that on the one hand a right has been conferred to the DTH operators to exercise its option one way or the other by reason of 2010 Regulation the same has been taken away.

92. Mr.Vaidyanathan, submitted that Clause 13.2A.6 advisedly does not refer to Clause 13.2A.2.

93. The said clause on a plain reading only provides for publication of the RIO and is not a charging provision.

Publication of RIO would be a ministerial act. It does not for all intent and purport create any right or impose any duty.

94. Sofar as modification of the original RIO is concerned, the same is covered by Clause 13.2A.5 of the Regulations; in terms whereof the operators are required to intimate even such modifications to the DTH operators. Intimation to the DTH operators in terms of Clause 13.2A.1 or Clause 13.2A.5 is not an empty formality. It is required to be acted upon one way or the other.

95. By reason of such intimation, if option is to be granted to the DTH oerator the same must be held to have a purpose. It cannot be held to be operating in a vacuum.

96. What would be the effect of the option has specifically been stated in the said proviso, namely, the parties would either enter into an agreement in accordance with the Regulations or continue with the agreement during the period of its validity.

97. Whenever any amendment had been made, the same has been substituted in the main provision but by reason thereof the effect of the earlier provision cannot be said to have been taken away.

98. It is true that the second proviso does not provide for any new right. It was not necessary, as the rights were already conferred on the DTH operators in terms of the Regulations.

99. It is true that the first proviso appended to Clause 13.2A.6 recognizes a contract different from the RIO but for the purpose of giving an effective meaning thereto, the entire statutory scheme has to be read as a whole.

100. In any event both the provisos must be read keeping in view the rights and obligations of the parties in terms of main provision.

101. It is thus, difficult to agree that the second proviso postulates a situation when an RIO is published for the first time in 2010 as it, in our considered view, includes the modified RIO also.

102. With that backdrop, we may notice the provisions of Clause 13.2A.7. Both clauses 13.2A.6 and 13.2A.7 undoubtedly are part of the same scheme.

103. However, as indicated hereto before, the purpose for which Clause 13.2A.7 has been made is different.

104. In any event, the rights of a DTH operator, namely, when a RIO contract is to be entered into by and between the

parties within the purview of provisions of Clause 13.2A.1 and Clause 13.2A.5, the same is required to be done within a period of 45 days.

105. Sub-Clause 2 of Clause 13.2A.7 merely reinforces the said proposition, namely, in respect of even a modified agreement, if an RIO agreement had already been entered into, such modified agreement must be entered into within the same period i.e. 45 days.

106. Mr.Vaidyanathan, urged that the offer made by the Respondent was not a valid one.

107. If by reason of the provision of a statute, the Broadcaster was fastened with certain duties, it was bound to follow the same as otherwise the consequences flowing therefrom shall ensue. The Broadcaster, even may face appropriate criminal proceeding for violating the statutory provisions.

107. The TRAI can compel a Broadcaster to amend the RIO, if it is not in terms of the Regulations or not otherwise governed by granting freedom of contract to the parties clause. The freedom of contract in regard thereto has been recognized.

108. It is, therefore, difficult for us to agree with the submissions of Mr.Vaidyanathan, that the offer of the

Respondent being not voluntarily, no contract could have been entered into in terms thereof.

**The effect of the Order of the Supreme Court of India**

109. This Tribunal in the matter before it was dealing with the Tariff Order of 2010 issued by the TRAI. The contracts, which were entered into by and between the Broadcasters and the DTH operators and who were concerned with the effect of the Tariff Order before this Tribunal, indisputably were the RIO ones.

110. When the matter went before the Supreme Court of India, it was concerned with the appeal arising from the said order dealing with the validity of the Tariff Order. It was not concerned with the non-RIO contracts and/or the effect thereof.

111. It was also not concerned with the question as to whether a DTH operator who had entered into a non-RIO contract with a Broadcaster, having regard to the provisions contained in the Regulations could migrate to RIO contract and if so to what effect.

112. Construction of a judgment, it is trite, depends upon the nature of the order as also the points involved therein.

113. An order/ judgment passed by a court of law, it is trite, is not to be read as a Statute. In the event construction thereof is required, the subject matter before the Court concerned must be taken into consideration. For the said purpose even the pleadings of the parties may have to be noticed.

114. It is evident that the Supreme Court was not concerned with a non-RIO contract. It is also apparent that so far as the rates fixed by a Broadcaster payable by a DTH operators is concerned, prior to coming into force the said Tariff Order same was 50% of the non-CAS rates.

115. By reason of the Tariff Order, 2010, the same was brought down to 35%.

116. In this case the parties did not enter into a non-RIO contract. It was a lump sum contract. It had nothing to do with the subscriber base. It had nothing to do with the rate fixed by the TRAI. The interim order passed by the Supreme Court of India fixing 42% of the rates applicable to non-CAS areas would therefore, must be read in that context.

117. The TRAI itself later on said that the rate would be 42%. The parties were bound thereby.

118. There is no doubt or dispute that one RIO contract can always be replaced by the other. Moreover, the Supreme Court was not concerned with the interpretation of the Regulations. It was not concerned with the right of a DTH operator and the consequent statutory obligations of this Broadcaster in terms of the Regulation.

119. Regulations being law within the meaning of Article 13 of Constitution of India, in absence of any order passed by a Superior Court, any person claiming a right thereunder is entitled to invoke the jurisdiction of a competent court of law if such right is denied to it.

120. This aspect of the matter came up for consideration before the Supreme Court of India in Rama Narang vs. Ramesh Narang and Ors. reported in (1995) 2 SCC 513.

121. In that case the Petitioner therein was convicted of an offence. He preferred an appeal against the judgment of conviction and sentence before the Delhi High Court. The High Court passed an order staying the operation of the said judgment and order.

122. The question which arose for consideration of the High Court was as to whether the effect of the said order vis-a-vis Section 267 of the Companies Act, 1956.

123. The Supreme Court posed a question as to whether by reason of the said order, the operation of Section 267 of the Companies Act was stayed, so far as the Petitioner therein was concerned

124. It was held that the same had not been stayed, stating :-

> "… By not making a specific reference to this aspect of the matter, how could the appellant have persuaded the Delhi High Court to stop the coming into operation of Section 267 of the Companies Act? And how could the Court have applied its mind to this question if it's pointed attention was not drawn? As we said earlier the application seeking interim stay is wholly silent on this point. That is why we feel that this is a case in which the appellant indulged in an exercise of hide and seek in obtaining the interim stay without drawing the pointed attention of the Delhi High Court that stay of conviction was essential to avoid the disqualification under Section 267 of the Companies Act. If such a precise request was made to the Court pointing out the consequences likely to fall on the continuance of the conviction order, the Court would have applied its mind to the specific question and if it thought that case was made out for grant of interim stay of the conviction order, with or without conditions attached thereto, it may have granted an order to that effect. There can be no doubt that the object of Section 267 of the Companies Act is wholesome and that is to ensure that the management of the company is not in soiled hands. As we have pointed out earlier the Managing Director of a company holds a fiduciary position qua the company and its shareholders and, therefore, different

considerations would flow if an order is sought from the Appellate Court for staying the operation of the disqualification that would result on the application of Section 267 of the Companies Act. Therefore, even on facts since the appellant had not sought any order from the Delhi High Court for stay of the disqualification he was likely to incur under Section 267 of the Companies Act on account of his conviction, it cannot be inferred that the High Court had applied its mind to this specific aspect of the matter and had thereafter granted a stay of the operation of the impugned judgment. It is for that reason that we do not find in the order of the High Court a single reason relevant to the consequence of the conviction under Section 267 of the Companies Act. The interim stay granted by the Delhi High Court must, therefore, be read in that context and cannot extend to stay the operation of Section 267 of the Companies Act.."

125. It was furthermore observed :-

"If that was his intention he was clearly trying to hoodwink the Court by suppressing it instead of coming clean. If he had frankly and fairly stated in his application that he was seeking interim stay of the conviction order to avoid the disqualification which he was likely to incur by virtue of the language of Section 267 of the Companies Act, the Delhi High Court would have applied its mind to that question and would have, for reasons to be stated in writing, passed an appropriate order with or without conditions. We are, therefore, satisfied that the scope of the interim order passed by the Delhi High Court does not extend to staying the operation of Section 267 of the Companies Act."

126. Following the aforementioned authoritative pronouncement of Supreme Court of India, it must be held that this petition is maintainable.

127. The Supreme Court of India while passing the interim order dated 18.4.2011, was concerned with an appeal from a judgment and order of this Tribunal dealing with a Tariff Order.

128. It was not concerned with the non-RIO contracts. It was concerned only with the RIO contracts.

129. It is difficult to conceive that the Supreme Court, by passing an interim order, which presumably was not done in terms of Articles 141 and 142 of the Constitution of India, would not be making any clear statement to injunct a party to take benefit of the statutory provisions, had it intended to do so.

130. A person is entitled to take the benefit of law. It cannot ordinarily be prevented thereform having regard to the provisions of Section 41 of the Specific Relief Act, 1963. Such prevention, in our considered view, would require an express direction.

131. Once the RIO contract is entered into, there cannot be any doubt or dispute that any order passed by the Supreme Court of India shall be binding on the petitioner. This position is

accepted by the learned counsel appearing on behalf of the Petitioner

133. If the Petitioner had exercised its option and it has undertaken that it would be bound by the judgment of the Supreme Court of India, in the event the petition is allowed, the same would not be a fait accompli. The Petitioner would be bound by any other or further order that may be passed by the Supreme Court of India.

134. It is, therefore difficult to conceive as to how an anomalous situation would arise, if the petition is allowed.

**Estoppel Issue**

135. Mr.Vaidyanathan, submitted that having entered into the contract for a period of four years, it must be held that a representation had been made by the Petitioner that at least for that period he shall not opt out therefrom.

136. We fail to see any logic behind the said argument. It in terms of the Regulations, the Petitioner was entitled to migrate from a RIO contract to a non-RIO contract, the question of any representation having been made by it would not arise.

137. If such a construction is accepted, by the same yardstick, the Respondent having made an offer to the Petitioner

could not be held to have raised a contention that such an offer made by it cannot be acted upon nor could it be heard to say that a decree for Specific Performance of the old contract should be granted.

138. A party to a commercial contract, save and except the provisions of a statute and/or interpretation of an agreement, enters into the same with its eyes wide open.

139. If the parties were aware that they were to act either in terms of the said contract or remain outside the preview thereof, the question of invoking the doctrine of `unjust enrichment' also, as has been contended would not apply.

140. It is not for the Respondent to contend that it is entitled to restitution or recover the expected profit from the Petitioner.

141. Keeping in view our findings on the aforementioned issue we may consider the Respondent's petition.

142. It is difficult to conceive as to how a declaration can be made in respect of a lis at the instance of another party thereto.

143. It is also difficult to appreciate as to how in a case of this nature a suit for Specific Performance of Contract would be maintainable.

144. In the event the petition of Dish TV is allowed, the Respondent is bound to give effect to the provisions of the Regulations. It cannot raise any contention, contrary to such declaration, that a further declaration be made that the first declaration was null or void or Specific Performance of a Contract should be granted in respect of the earlier contract.

145. We have no doubt in our mind that the said petition is wholly misconceived.

**Effect of the Interim Order**

146. By our interim order dated 30.9.2011, it was observed as under:-

> "21. We agree with Mr. Ganpathy that in the event, an interim order is passed in favour of the Petitioner as has been prayed for, for all intent and purport, the petition would stand allowed.
>
> On the other hand, if hearing of the matter is expedited, even if it is ultimately found that the Petitioner has made out a case for allowing the petition, this Tribunal can sufficiently compensate it on monetary terms. The equities between the parties can also be adjusted."

147. In P.No.398 (C)/2011 one M.A. No.318/2011 has been filed wherein, inter-alia, the following prayer was made :-

"(c) Permit the Petitioner to place on record the letter dated October 31, 2011 addressed to it by the Respondent herein;

148. Evidently, by the said letter a SMS report for the of November, 2011 was sought to be furnished.

149. The Petitioner in its reply stated :-

i) The subscriber reports for the month of October 2011 and November 2011 is as under :

| S.No. | Bouquet/ Channels | Average Subscriber Numbers for the month of October 2011 | Average Subscriber Numbers for the month of November 2011 |
|---|---|---|---|
| 1 | Bouquet containing ESPN and Star Sports | 885899 | 913908 |
| 2 | Star Cricket | 900033 | 928047 |

ii) The numbers of the subscribers who were available the channels of the Petitioner on annual basis and having next recharge date on or after 365 days is as under :

| S.No. | Bouquet/ Channels | As on 1.8.2011 | As. On 1.9.2011 |
|---|---|---|---|
| 1 | Bouquet containing ESPN and Star Sports | 8316 | 6544 |

| | | | |
|---|---|---|---|
| 2 | Star Cricket | 15650 | 12209 |

150. The informations sought for so far as SMS reports for the months of December 2011 and January, 2012 are concerned, the figures have been furnished.

151. Mr.Maninder Singh, learned senior counsel would contend that there is no dispute with regard to the said figures.

152. However, we are of the opinion that the interest of justice would be made, if the Petitioner is declared to be entitled to the restitution of the amount which has been paid to it for the months of September, 2011 till date, subject, of course, to the amount which the Respondent was entitled to on the basis of the SMS reports. The parties, may reconcile their respective accounts on this behalf.

**Conclusion**

153. For the reasons aforementioned the petition of Dish TV is allowed. The parties are directed to enter into an agreement with effect from 1.9.2011 which would be governed by the modified RIO.

154. The petition filed by the ESPN Software is dismissed.

155. Petitioner is entitled to costs.

156. Advocate's fee assessed at Rs.50,000/-.

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

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

**April 10, 2012**
**`ns'/mm**