

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated : 8.2.2012

R.A.No.2/2012 in Petition No.175 (C)/2011

M/s Jak Communication Pvt Ltd.

... Petitioner

Vs.

Star Den Media Services Pvt Ltd & Anr.

... Respondents

BEFORE:

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

HON'BLE MR.P.K. RASTOGI, MEMBER

For Petitioner : Mr.Ajay Kumar, Advocate

For Respondent : Mr.Saurabh Srivastava, Advocate

ORDER

This application for review of the order dated 18.1.2002 has been filed by the Applicant herein inter alia on the premise that while dismissing the petition, this Tribunal had taken into consideration the provisions of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004 (The Regulations) which are applicable to non-CAS areas and failed to take into consideration the relevant provisions of the subscription agreement entered into by and between the parties hereto, from a perusal whereof it would clearly be evident that Clause 3.1 thereof was illegal being in effect and substance a minimum guaranteed clause and not a fixed fee or flat fee as was contended by the Respondent.

Mr. Ajay Kumar, learned counsel appearing on behalf of the Applicant would contend that from a perusal of Clauses 6.12 and 7.3 of the agreement, in terms whereof the Applicant was to pay the subscription charges on the basis of increase in the number of subscribers, the amount of Rs.10 lakhs mentioned in Clause 3.1 thereof should be held to be a minimum guaranteed charges, which is prohibited in terms of the Regulation 6.

Learned counsel, furthermore submitted that Clauses 8.1 and 12 of the Regulations are not relevant for the purpose of determination of the issues between the parties as they apply only in respect of a non-CAS area.

From a perusal of the judgment under review, it does not appear that the Petitioner had relied upon the other clauses of the agreement for the purpose of advancing an argument that upon a conjoint reading of the provisions of the subscription agreement dated 19.3.2010, Clause 3.1 would be violative of the Clause 6 of Regulations.

This Tribunal in the judgment under review proceeded on the basis that the Petitioner keeping in view its conduct could not be permitted to question the validity of the said agreement leaving the question as regards the nature of the consideration stipulated in Clause 3.1 thereof, to be either a minimum guarantee charges or a flat or a fixed fee.

There cannot be any doubt or dispute that a contract has to be read as a whole but in the event, it is also well-settled, the validity of an agreement is questioned, the grounds on which the said plea are premised must be disclosed, in particular, having regard to the provisions of Order VI Rule 8 of the Code of Civil Procedure or the principles analogous thereto.

The agreement in question moreover must be construed having regard to the `Severability Clause' contained in Clause 25 of the Agreement which reads as under: -

"25. SEVERABILITY

In the event that any provision of this Agreement is declared by any judicial, quasi judicial or other competent authority to be void, voidable, illegal or otherwise unenforceable, the Parties shall amend that provision in such reasonable manner as achieves the intention of the Parties without illegality or at the discretion of the Parties, it may be severed from this Agreement and the remaining provisions of this Agreement shall remain in full force and effect unless the Parties decide that the effect of such declaration is to defeat the original intention of the parties in which event, parties shall be entitled to terminate this Agreement by a month's notice."

Applicant in the petition basically questioned the validity of the notice dated 4.3.2011 issued by the Respondent under Clause 4.1 and the public notice dated 6.3.2011 issued under Clause 4.3 of the Regulation.

The validity of Clause 3.1 was not in question. As indicated heretofore even no contention has been raised that Clause 3.1 should be construed in the light of Clauses 6.12 and 7.3 of the agreement.

Submission of Mr.Ajay Kumar that as the provisions of the Regulations have been mentioned in the agreement, the same would mean that it should be law.

A subordinate legislation or a notification may be held to be a 'Law' within the meaning of Article 13 of the Constitution of India but evidently a contractual provision would not be (See Union of India vs. Colonel L.S.N. Murthy & Anr. reported in (2012) 1 SCC 718)

There cannot, however, be any doubt or dispute that for the purpose of judging the validity of a contract, the same has to be read having regard to the provisions of the Statute.

Where, a field is governed by the regulatory regime, it is trite, a contract must give way, in the event of conflict, to the relevant provisions of the Regulations.

Moreover, in this case the Applicant could not have taken advantage of its own wrong nor having taken benefit of the said agreement dated 28.1.2010, it could be permitted to approbate and reprobate.

The doctrine of estoppel has thus been held to be applicable in the present case (In Cauvery Coffee Traders, Mangalore vs. Hornor Resources (Intern.) Company Ltd. - 2011 (10) SCC 420), where it has been held as under :-

34. A party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one

knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience. (Vide *Nagubai Ammal v. B. Shama Rao, CIT v. V.MR.P. Firm Muar, Maharashtra SRTC v. Balwant Regular Motor Service, P.R. Deshpande v. Maruti Balaram Haibatti, Babu Ram v. Indra Pal Singh, NTPC Ltd. v. Reshmi Constructions, Builders & Contractors, Ramesh Chandra Sankla v. Vikram Cement and Pradeep Oil Corpn. v. MCD.*)

35. Thus, it is evident that the doctrine of election is based on the rule of estoppel—the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had."

Had the contentions raised in the review application been raised at the hearing, this Tribunal could have also arrived at a conclusion that no occasion had arisen to determine the effect of Clause 3.1 vis-à-vis the other provisions of the agreement keeping in view Clause 25 thereof, inasmuch as Clauses 6.12 and 7.3 itself could not have been held to be applicable to the fact of the case having regard the positive stand taken by the Respondent herein that the consideration amount mentioned in Clause 3.1 represents a fixed fee/ flat fee and not a minimum guaranteed clause.

It is now also well-settled that ordinarily having regard to the provisions contained in Order XLVII Rule 1 of the CPC, a review petition

may not be maintainable on fresh grounds, although, there are exceptions to the said rule.

Sofar as reference to Clauses 8.1 and 12 of the Regulations is concerned, merely an analogy had been drawn by this Tribunal, while considering the question as to for what purpose the Respondent had inserted a clause asking the Applicant to supply the relevant informations as far as the number of subscriber is concerned.

Moreover the question as regards payment of the amount has been left open.

We, therefore, do not find that any case has been made out for review of our judgment dated 18.1.2002.

It is dismissed accordingly with costs quantified @ Rs.10,000/-.

(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

February 8, 2012/`ns'