

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated : January 6, 2012

Petition No.234(C) of 2011

Wire and Wireless (India) Ltd. ...Petitioner

Vs.

MSM Discovery Pvt. Ltd. ...Respondent

BEFORE:

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

For Petitioner : Mr.Tejveer Singh Bhatia & Mr.Vadivelu
Deenadayalan, Advocates

For Respondent : Mr.Meet Malhotra, Sr. Advocate with Mr.
A.C. Mishra & Mr. Ravi S.S. Chuhan,
Advocates

J U D G M E N T

Interpretation and/or application of Clause 4 of the Subscription Agreement entered into by and between the parties hereto on or about 20.1.2011 for the period 1.1.2011 to 31.12.2011 is in question in this petition.

The said Clause reads as under:

"4. **Term.** Subject to the Standard Terms, the term of this Agreement shall begin on the Start Date set forth on Page 1 hereto and end on the immediately

following December 31 (The "Initial Term"). This Agreement shall be automatically renewed on the same terms and conditions provided herein for successive years starting on January 1 and ending on December 31 of the following year unless written notice of termination is provided by Distributor to Affiliate no later than 1st November of that year. As used herein, "Term" shall mean the Initial Term together with any renewal thereof."

2. Before, however, entering into the controversy between the parties herein, we may notice the factual matrix involved herein.

The petitioner contends that the automatic renewal Clause contained in Clause 4 was given effect to inasmuch as for the years 2006,2007 and 2008, the subscription fees payable to the Respondent for retransmission of the signals of the channels to the network of various MSOs/ and/or local cable operators and direct subscribers, remained the same. For those years, it is stated, even validation form was not signed by the Petitioner.

3. A validation form was signed by the Petitioner herein only in the year 2006.

On or about 1.4.2009 a validation form was signed for the year 2009 and the Petitioner was permitted to operate without entering into a fresh subscription agreement.

The Petitioner contends that in the year 2009, its area of operation was extended to Ballabgarh apart from Faridabad and thus, validation form was required to be signed.

4. It is furthermore contended that NDTV, a Broadcaster, migrated to another content aggregator and, thus, the Petitioner was entitled to down gradation with effect from 13.12.2010.

The Respondent, however, contends that the Petitioner in violation of the conditions of the agreement as also the provisions of The Telecommunication (Broadcasting & Cable Services) Interconnection Regulation, 2004 (13 of 2004) as amended from time to time (The Regulations) did not supply any SLR nor did it furnish the relevant data and/or informations on the basis whereof the agreement could be renewed for the year 2011.

5. We in this connection may notice some correspondences which passed between the parties. On or about 18.1.2011 as regards renewal of a subscription agreement, the Petitioner by a letter stated as under:

“With regards to the renewal of our subscription agreement that expired on 31-Dec-10 we are inviting you to please approach us for the same.

We are keen on renewing our subscription agreement keeping in mind the removal of the NDTV Package from your bouquet w.e.f. 13-Dec-10.

Looking forward to our meeting.

6. Respondent, however, by a letter dated 3.2.2011 raised a contention that the agreement had expired on 31.12.2010 and a fresh agreement was required to be executed for the year 2011 for which

the process of negotiations for the renewal thereof and execution of a new agreement within the prescribed time frame became necessary.

7. It appears that the parties have been meeting from time to time wherein verbal discussions were made.

Respondent contended:

“Further to our verbal discussions on the subject, we hereby formally request you to contact the MSMD representative of your region for negotiating and concluding the terms and conditions for the renewal of the Agreement for the period 1.1.2011 to 31.12.2011 and executing the same at the earliest. We further request you to furnish the Subscriber Line Report (SLR) and other relevant documents for ascertaining the subscriber base of your network. We reserve the right to scrutinize and verify the contents of the SLR and other documents furnished by you prior to communicating our acceptance of the same.

We look forward towards a long term mutually beneficial business association with you.”

8. The Respondent furthermore by a letter dated 15.2.2011 sought for the following details for the purpose of holding negotiations:

“A detailed diagram/map of your cable network as well as the locations of your head ends/control rooms.

Details of your direct subscriber/connectivity.

Declaration before Entertainment/Service Tax Authorities.

Monthly subscriber statement for the period April, 2010 to December, 2010.”

It was stated:

“On satisfactory verification and scrutiny of the lists and documents provided by you we shall proceed towards entering into an Agreement with you for the retransmission of the TOA channels.

Please note that the present communication is being issued without prejudice to disconnection notices (if any) that may have been issued to you.

You will appreciate that negotiations cannot go on endlessly and accordingly we request your cooperation to conclude an agreement at the earliest.”

Yet again on 1.3.2011, the Respondent stated as under:

“We refer to our earlier communications wherein we had intimated you about the expiry of earlier Agreement and had called upon you to furnish the SLR together with other information / data relevant for negotiating and finalizing the affiliation agreement for the period 1.1.2011 to 31.12.2011. We regret to state that till date you have not furnished the SLR and the requested information/ data to us despite several verbal follow-ups as well.

You are aware that you are under a statutory obligation to furnish us the monthly SLR in terms of the relevant regulations framed by TRAI in this regard. You are further aware that the sharing of SLRs and the requested information/ data are the basic requirements based on which an affiliation agreement can be negotiated and finally executed. You are further aware that by not submitting the said SLRs and requested information/date, you have scuttled the entire negotiation process that began in the first week of November, 2010 by mutual discussions and later followed up by our above-referred communication sent to you.

The fact remains that despite honest persistence from our side you have not co-operated with us in the negotiation and finalization of the affiliation agreement for the fresh period for reasons best known to you and thus leading to the failure of negotiation process. Such acts of non cooperation on your part, is detrimental to our business interests and we cannot be assumed to continue to provide the Services to you for infinite time in consideration of historic fees.

We hereby specifically terminate the Agreement with immediate effect for the reasons dealt with in the foregoing. Consequently, you are not authorized to further transmit the signals of the services comprising The OneAlliance bouquet of channels to your subscribers. Please treat this communication as a notice under regulation 4.1 of the Telecommunication (Broadcasting & Cable Services) Interconnection (Third Amendment) Regulation dated 4th September 2006 (10 of 2006) for the reasons of non-submission of SLRS, non-furnishing of information/data relevant for negotiation process and consequent non-signing of the affiliation agreement for the period 1.1.2011 to 31.12.2011. We further notify you that we shall proceed to deactivate the supply of services to you after following the prescribed regulations in this regard.

We entirely leave it to you to avoid such disconnection of Services by coming forward with the SLRs and the requested information/ data and negotiating and executing the affiliation agreement for the period 1.1.2011 to 31.12.2011 between now and the ultimate date of disconnection of the services as notified above.

Please note that this notice is without prejudice to and without derogating from our earlier communications sent to you and is an integral part of the entire communication with you on the subject matter hereof. We reserve all our rights and nothing shall be deemed as waiver of any of our rights in any

manner that may have accrued or is accruing as a result hereof."

10. The said communication was to be treated as a notice under Clause 4.1. of the Regulations .

Yet again on or about 4.3.2011 the Petitioner by a letter sought for down gradation, stating as under:

"Since the NDTV Package has been extracted from the MSMD Pay Channel Bouquet w.e.f 13.12.10 we are keen on receiving a reduction in our payout w.e.f. 14.12.10 and subsequently renew our subscription agreement for the period 01.01.11 to 31.12.11.

- As per the TRAI Bouquet Rates on 01.12.07 the MSMD Bouquet 2 with 14 channels was priced at Rs.65/- per subscriber per month.
- W.e.f. from 01.04.08 Ten Sports shifted out of Bouquet 2 to join Zee Turner and the rate for MSMD Bouquet 2 was reduced to Rs.54.95/- per subscriber per month.
- The NDTV channels individual cost within MSMD Bouquet 2 as per TRAI is, NDTV profit Rs.6/- per subscriber per month, NDTV 24X7 Rs.8.50/- and NDTV India.
- (FTA)
- On 01.01.09 TRAI allowed at 7% hike in Bouquet rates thus revising the MSMD Bouquet 2 rate(Bouquet 2 contains the NDTV Package) to Rs.58.80/- per subscriber per month. The NDTV channels individual cost accordingly revises to, NDTV profit Rs.6.42/- per subscriber per month, NDTV 24x7 Rs.9.10/- and NDTV India remains FTA. **The cost effect of both pay channels of NDTV as on date is Rs.15.52/- per subscriber per month.**

As per our current agreement we are paying MSMD a monthly fee of Rs.52,450000/- (NDTV channels included @Rs.15.52/-) for the following units covered under agreement:

Now the reduction we are keen on with the removal of NDTV Package is as given below in detail.

Serial No.	WWIL Unit	Paid Subscribers as per current agreement	Current Monthly fee	Rebate sought (with NDTV package removal) per subscriber	Net affect to be reduced per unit (Rs.)
1.	Faridabad and Ballabhgarh	2074	357500	15.52	32188.48
	Total	2074	357500		32188.48

11. Respondent by a letter dated 22.3.2011 called upon the Petitioner to furnish the documents specified therein, stating:

"That with reference to your query about the discount post the exit of the NDTV channels from the MSMD bouquet, we state that as far as deductions for NDTV exit are concerned the same shall be settled as per the TRAI norms/regulations in this respect. Please note that the basis of your calculations for discount and the amount arrived at is denied in toto.

With reference to the subscription agreement between the MSMD and WWIL for the areas of Faridabad and Ballabhgarh, we state that the said agreement has expired on 31.12.2010. Accordingly, pursuant to our previous communications and meetings we once again give you a final reminder to

finalise and execute a fresh subscription agreement for the period beginning 01.01.2011, as we have not been able to conclude the fresh agreement in the absence of relevant documents which please note that you have not provided to us till date, despite repeated reminders."

12. The Petitioner, however, was called upon to furnish the relevant documents.

By its letter dated 23.3.2011, the Petitioner for the first time raised a contention that in terms of Clause 4 of the subscription agreement renewal thereof was not necessary.

13. According to the Petitioner, the matter relating to renewal of the agreement has been raised as the IPL Season which is telecast on its channel Set Max was forthcoming. It was alleged:

"In the said meeting despite assurance given by WWIL officials in providing SLR at the time of signing validation form for 2011 which was also made available to your officials on earlier occasions as well, but your officials demanded an exorbitant monthly subscription fee of Rs.5,36,250/- i.e. 50% increase on present monthly subscription fee of Rs.3,57,500/- without any reason and logic and that too w.e.f. January 2011 despite the fact that our existing agreement is valid till 31/12/2011."

14. It was contended that the increase in the monthly subscription fee was unreasonable and arbitrary.

Indisputably with the said letter dated 23.3.2011, the SLR as on 31.12.2010 and line diagram showing entire operational areas in Faridabad and Ballabgarh was attached.

15. Respondent by its letter dated 11.4.2011 accused the Petitioner of concealing its actual subscriber base on the premise that it had chosen to submit the same with an intention to cover up its subscriber base which, according to the it, was greater than what had been declared to it.

It was stated:

“It is this reason for which you have not submitted your SLR as we are of the firm opinion that your network has connected a far greater number of subscribers that for that which you are paying MSMD for. Being a well known MSO, it should be well within the purview of your knowledge on how a SLR is to be prepared and furnished.

Moreover as far as the subscription agreement for the period as mentioned in our communication to you is concerned, we would request you to furnish the following SLR related documents as per the TRAI regulations:

- (a) Complete and detailed list of cable operators/franchisees affiliated with you (please mention their addresses as well)
- (b) Complete and detailed list of subscribers catered by you directly and by cable operators/franchisees affiliated with you.
- (c) Evidence exchanged between you and cable operators/franchisees affiliated with you on the subscriber base (including the subscriber base of similarly placed cable operators / franchisees and local survey.)
- (d) Copies of invoices raised on the cable operators for the last 6 months.
- (e) Copy of Entertainment Tax returns filed by you and your cable operators for the last 6 months.

Needless to state that no meetings can be conclusive in the absence of necessary information being provided by yourself.

We once again reiterate that the agreement executed between both the parties clearly states that the term of the agreement expires on 31.12.2010. You are also aware of this fact as the same was signed by you (after expiry of the term after repeated follow-ups) and a duly signed copy was also forwarded to you on 24.01.2011 vide speed post number dated ED667677435 IN. In light of the same it is requested that please refrain from making false statements same is not in your business interest nor ours.

Neither shall this instant communication have any overriding effect to any of our earlier communications to you nor does it amount to waiver of any of our rights of any sort that may have accrued or is accruing as a result thereof."

16. Public notices were issued on or about 12.4.2011 only on the ground of non-renewal of agreement.

This petition has been filed on or about 29.4.2011.

17. Mr. Tejveer Singh Bhatia, learned counsel appearing on behalf of the petitioner would contend:

1. Having regard to clause 4 of the subscription agreement as has been interpreted by this Tribunal in Durga Citi Cable Network vs. MSM Discovery Petition No.322(C) of 2011, the Respondent

could not have called upon the Petitioner to renew the agreement.

2. Clause 4 of the agreement being clear and explicit, there is no reason as to why this Tribunal should interpret the said clause relying or on the basis of the conduct of the parties as the same is prohibited in terms of Section 92 of the Indian Evidence Act.
 3. Keeping in view the language used in Clause 4 of the agreement, the same having been signed on 20.1.2011, must be held to be valid for the entire year of 2011 as it was executed on the basis of the negotiations held between the parties.
 4. The public notice issued in terms of Clause 4.3 having been issued only on the ground of non-renewal of the agreement, it is idle to contend that the alleged non furnishing of SLR resulted in non renewal.
 5. Apart from the SLR upto 3.12.2010 the Petitioner during pendency of this petition also supplied SLR on 5.5.2011.
18. Mr. Meet Malhotra, learned senior counsel and Mr. A.C. Mishra, learned counsel appearing on behalf of the respondent, on the other hand, urged:
- (a) The agreement having been terminated in terms of Clause 17(1) thereof, the Petitioner is not entitled to contend that the automatic renewal clause would be attracted particularly

in view of the fact that the agreement had come to an end in 2010.

- (b) The Subscriber Base furnished by the Petitioner with its SLR on 23.3.2011 being only 2100 but it having entered into a subscription agreement on a subscriber base of 8000 with ESPN, it is evident that Petitioner has deliberately suppressed its true and correct subscriber base.
- (c) Having regard to the regulatory regime, a balance has to be struck between the conflicting interests of the broadcasters and a multi service operators and in that view for the matter, furnishing of SLR being a regulatory requirement, the same was required to be complied with.
- (d) In construing the provisions of Clauses 4.1 and 4.3 of the Regulations read with paragraph 6 of Explanatory Memorandum issued by the TRAI, there cannot be any doubt or dispute that whereas detailed reasons were to be furnished in the notice issued by the Broadcaster in terms of Clause 4.1 of the Regulations, assignment of brief reasons would subserve the statutory requirements while issuing a public notice in Clause 4.3 of the Regulations.

- (e) From the correspondences exchanged between the parties, it would be evident that the parties themselves understood that the agreement is valid for one year only.
- (f) So far as the judgment of this Tribunal in Durga Citi Cable Network is concerned the same must be held to be not applicable as therein attention of this Tribunal had not been drawn to Clause 4.4 of the Regulations.

19. It is not in dispute that Clause 4 being a part of the agreement dated 20.1.2011 is required to be given effect to. By reason of the said term automatic renewal of the agreement on the same terms and conditions is provided. The said provision cannot be ignored. It cannot be rendered otiose. From a bare perusal of Clause 4, it is evident that the agreement would stand renewed for successive years starting on 1st January and ending on 31st December unless written notice of termination is served by the Broadcaster to the affiliate not later than 1st November of that year. The intention of the parties become clear as the word 'term' has been defined to mean not only the initial term but also the renewed term, which would in turn mean, term renewed in terms of Clause 4.

20. Admittedly, certain channels of NDTV namely NDTV 24X 7, NDTV India, NDTV Profit migrated from the respondent's network to another content aggregator with effect from 13.12.2010.

21. The petitioner was, thus, entitled to the requisite down gradation in regard thereto.

22. Mr. Malhotra, however, would contend that the subscription fee being payable per month, the Petitioner will not get any benefit of reduction of the amount of subscription for a fraction of a month.

23. Keeping in view the points involved in this petition it is not necessary for us to dilate on the said question. But at least from January, 2011, the Petitioner was to get the benefit thereof.

We may for the purpose of appreciating the argument of Mr. Malhotra may notice some other clauses of the agreement, being

"5. **Reports.** Within 10 days after the end of each month of the Term, Affiliate will provide a report for the previous month (the "Subscriber Report") to Distributor on a System-by-System basis that sets out the number of households. When applicable, the number of local cable operators or sub-distributors receiving the Services, the total number of Affiliate's subscribers and such other information relating to Affiliate's subscribers as is requested by Distributor, including channel position of the Services and all other services carried by Affiliate (including broadcast television services), allocation of subscription by tier, and prices of all tiers or services."

17.1(I) To accommodate unforeseen circumstances;

17.1(M) Affiliate is in breach of any representation, warranty, covenant or undertaking in this Agreement;

24. Clauses 4.1, 4.3 and 4.4 of the Regulations as also paragraph 6 of the Explanatory Memorandum read thus:

“4. Disconnection of TV channel signals

4.1 No broadcaster or multi system operator shall disconnect the TV channel signals to a distributor of TV channels without giving three weeks notice to the distributor clearly giving the reasons for the proposed action.

Provided that a notice would also be required before disconnection of signals to a distributor of TV channels if there was an agreement, written or oral, permitting the distribution of the broadcasting service, which has expired due to efflux of time.

Provided further that no notice would be required if there is no agreement, written or oral, permitting the distribution of the signals.

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.

Explanation

1 In case the notice is published in two newspapers on different dates then the period of three weeks shall start from the latter of the two dates.

2. Broadcaster/multi system operator/ distributor of TV channels may also inform the consumers through scrolls on the concerned channel(s). However, issue of notice in newspapers shall be compulsory.

4.4 The notice in the newspapers must give the reasons in brief of the disconnection."

"Explanatory Memorandum

.....

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."

25. Both a notice under Clause 4.1 and a public notice under Clause 4.3 of the Regulations require assignment of reasons for termination of the contract. It is true, having regard to paragraph 6 of the Explanatory Memorandum read with Clause 4.4 of the Regulations; whereas detailed reasons are to be assigned including reference to the relevant clauses, violation whereof is alleged, brief reasons only in respect of the public notice would subserve the statutory requirements.

26. Brief reasons, however, in my opinion would not mean a reason which per se is non-existent or which would be contrary to or inconsistent with the reasons assigned in the notice issued under Clause 4.1 of the Regulations.

27. In *Durga Citi Cable (supra)*, this Tribunal by a judgment and order dated 4.11.2011, inter alia, framed the following issue:

“iii) Whether the petitioner has supplied the requisite documents including the SLR for the renewal of agreement for the year 2011?”

It was opined:

“Clause 4 of the said agreement was explicit and clear. It is not ambiguous. For the purpose of invoking the said clause, no condition has been attached. No notice therefor was required to be issued by the petitioner. Notice was required to be issued for termination of the said agreement any time before 1st November, in which event the agreement would expire on the expiry of the month, in December of the relevant year.

Mr. Singh would contend that the respondent issued the aforementioned public notice on a bonafide belief that the agreement came to an end on or about 31.12.2010.

I am, however, of the opinion that in a case of this nature the question of entertaining a bona fide belief does not arise.

The respondent was bound by the terms of the agreement. Keeping in view the fact that the agreement for the year 2010 was executed on 1.3.2010 and having regard to the Clause 4 aforementioned, there could not have any confusion in the mind of the

respondent that the agreement was to remain valid till 31.12.2011, subject, of course to the condition, that the agreement could be terminated on the ground of violation of the terms and conditions of the contract upon compliance of the mandatory provisions of the Regulations.

The only ground stated in the public notice was non-renewal of the agreement. No violation of the breach of terms and conditions on the part of the petitioner was alleged. The respondent, although, in its notice under Clause 4.1 contended that the petitioner had not furnished the SLR, the said reason was not assigned in the public notice issued under Clause 4.3 of the Regulations.

Mr.Singh submitted that no reason was required to be assigned as the public notice was meant for the public in general and not for the operator. This contention cannot be accepted having regard to the clear terms of Clauses 4.1 and 4.3 of the Regulations, in terms whereof reasons are required to be assigned."

It was, however, directed that :

"A subscription agreement can remain valid for a number of years. It does not require registration. The parties may by mutual consent subject to Regulatory regime may renew the agreement. If the respondent wanted to discontinue the agreement inter alia on the plea that fresh commercial terms were to be negotiated, notice could be issued at any time before 1st November of the relevant year so that the agreement could come to an end, in the event, the parties failed to settle commercial terms for renewal thereof.

Keeping in view the fact that in this case the agreement is valid till 31.12.2011, the termination of the agreement, if any, by reason of aforementioned notice dated 21.5.2011 shall come into effect only after 31.12.2011.

This petition is, therefore, allowed. The interim order is made absolute subject to the following conditions.

Keeping in view the terms of the notice dated 21.5.2011, the parties must enter into negotiations forthwith. The petitioner may furnish the Subscriber Line Report to the respondent within one week from date, on the basis whereof, the parties may negotiate for settling the commercial terms for renewal of the agreement in terms of clause 8.1 of the Regulations."

28. Correctness or otherwise of the said judgment is not in question.

Mr. Malhotra, however urged that the effect of Clause 4.4 has not been considered therein.

29. The notice under Clause 4.1 of the Regulations was issued on 1.3.2011. The reasons stated therein was non submission of SLRs, non furnishing of information /data relevant for initiating the process of negotiation and consequent non signing of the Affiliation Agreement.

30. It is one thing to say that in absence of a SLR, which is necessary to be furnished, inter alia, in terms of Clause 12 of the Regulations may lead to difficulties in the matter of holding further negotiations between the parties for renewal of the agreement, but it is another thing to say that the same essentially leads to non renewal of the agreement.

31. Moreover, from the various documents to which my attention has been drawn to by Mr. Malhotra, it is evident that despite issuance of notice under Clause 4.1 of the Regulations the Petitioner wanted to

continue to negotiate with the respondent so as to arrive at a mutual agreement. If pursuant thereto and in furtherance thereof the petitioner had furnished SLR, no exception thereto can be taken.

32. It is possible that because the petitioner had furnished SLR before issuance of public notice under Clause 4.3 of the Regulations, the same had not been mentioned as a reason for termination of the agreement.

33. Non renewal of the agreement, it is trite, may be for different reasons; one of them being that the parties are not interested with regard thereto or no negotiation had been held as is mandatorily required under Clause 8.1 of the Regulations, the affiliate being a defaulter, the content aggregator may not like to renew the agreement with a defaulter.

34. It may also be possible for a Broadcaster to refuse to renew the agreement with an affiliate who had taken recourse to piracy and/or violated the other terms of conditions or if the affiliate has become insolvent, or the entity with whom the earlier agreement was entered into has become dysfunctional.

35. There, thus, may be several reasons for non-renewal. If there is non-renewal of the agreement within the meaning of Clause 8.1 of the Regulations, the commercial terms may be brought to an end upon

expiry of the stipulated period by issuing a notice in the manner laid down under Clause 4.3 of the Regulations.

36. The Respondent, however, had alleged violation of the terms of contract and/or Regulations on the part of the Petitioner. If that be so the reasons of non-furnishing of SLR and which is violative of Clause 12 of the Regulations and/or violation of the terms of the agreement or a valid termination of the agreement under Clause 17 thereof should have been stated as the reasons for issuance of public notice under Clause 4.3.

37. Keeping in view the plain language used in Clause 4 of the agreement stating that the renewal is automatic, the same could be refused, if there had been a violation of the terms and conditions of the contract and/or the provisions of a statute.

38. If a simplicitor termination was, however, to be effected, a notice not later than 1st November was required to be issued. A notice during the currency of a contract on the ground of violation of the agreement for the purpose of taking recourse to termination of agreement under Clause 4.1 and 4.3 could be issued.

39. In *Raj Kumar Rajinder Singh vs State of Himachal Pradesh & Ors.* 1990 (4) 320 relied upon by Mr. Bhatia, the law has been stated thus:

"It is true that ordinarily the intention of the parties to a document must be gathered from the language in which the relevant terms and conditions are couched and no oral evidence can be permitted with a view to varying or contradicting the terms of the document. To put it differently, if the terms of the document are clear and unambiguous, extrinsic evidence to ascertain the true intention of the parties is inadmissible because Section 92 mandates that in such a case the intention must be gathered from the language employed in the document. But if the language employed is ambiguous and admits of a variety of meanings, it is settled law that the 6th proviso to the section can be invoked which permits tendering of extrinsic evidence as to acts, conduct and surrounding circumstances to enable the Court to ascertain the real intention of the parties. In such a case such oral evidence may guide the Court in unravelling the true intention of the parties. The object of admissibility of such evidence in such circumstances under the 6th proviso is to assist the Court to get to the real intention of the parties and thereby overcome the difficulty caused by the ambiguity."

40. In *M/s Hindustan Lever Ltd. Bombay vs. The Monopolies & Restrictive Trade Practices Commission, New Delhi & Ors.*, (1977) 3 SCC 227 whereupon again Mr. Bhatia placed reliance, it was stated:

14. In the *Telco* case, the agreement could not be understood without reference to the actual facts to which they were sought to be applied. Those facts explained the nature of the special agreements for restriction or distribution of areas. In the case before us, the problem is entirely different. This is not a case in which certain terms of the agreement require to be explained by the facts to which they were meant to be applied. It is a clear case in which the meanings of the clauses are decisive. If these clauses are capable of being so used, on the meanings which appear un- ambiguously from them.

as to undoubtedly restrict trade, the intention to so use them to restrict trade could reasonably be inferred without any difficulty. Otherwise, why have them? No oral evidence could be led to deduce their meaning or to vary it in view of the provisions of Sections 91 and 92 of the Evidence Act, the principles of which were, we think, rightly applied by the Commission. The Telco case, on the other hand, was one in which extraneous evidence could be led under Section 92, Proviso (6) of the Evidence Act which may be set out here with Section 92:

92. When the terms of any such contract, grant or other disposition of property or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives-in-interest, for the purpose of contradicting, varying, adding to or subtracting from, its terms:

Proviso (6) Any fact may be proved which shows in what manner the language of a document is related to existing fact.

41. I am not oblivious of the fact that in Mahindra and Mahindra Ltd. vs. Union of India & Anr. (1979) 2 SCC 529, on a construction of Section 33(1) and Section 2(o) of MRTP Act, 1969, on the premise that a trade practice does not become a restrictive practice merely because it falls within one or the other clause of Section 33(1) but also must satisfy its definition as contained in Section 2(o), Section 91 and 92 of the Indian Evidence Act have been held to be inapplicable and, thus, overruled Hindustan Lever (supra), but I have proceeded in this

case on the basis that Sections 91 and 92 of the Indian Evidence Act would be applicable.

42. Moreover, it is a trite law that if provisions of the contract are clear and unambiguous, recourse to interpretation thereof would not be permissible, keeping in view the provisions of Section 92 of the Indian Evidence Act. (See State of U.P. vs. Sayed Abdul Jalil, 1973 (2) SCC 26).

43. I am, therefore, of the opinion that on the aforementioned ground alone this petition must succeed. It is stated at the Bar that the Respondent has already served a notice of termination of the agreement. Mr. Malhotra would submit that the same has been done by way of abundant caution. It may be or may not be. Be that as it may, the effect of the said notice being not in question before this Tribunal, no observation need be made with regard thereto.

44. Suffice it to say that in the event the parties hereto intend to renew the agreement on mutual terms, they may do so.

45. Before parting, one aspect of the matter must be considered which has been highlighted by learned counsel for the Respondent.

In his cross-examination, attention of the petitioner's witness Mr. V. Suresh Kumar was drawn to an invoice dated 9.3.2010.

We may notice the same:

"Q.26: Is this the invoice raised upon the petitioner?"

A: The invoice raised by ESPN on the petitioner company is correct but it is not mentioned for which unit the invoice pertains to.

The document is marked as "x"

Q.27: Petitioner's Delhi Office at Lawrence Road receives invoices for which all units?

A: All units in India."

The said invoice was not taken on record having not been marked as an exhibit.

46. The word Faridabad was handwritten in the said invoice. Whether the invoice in question was in respect of Faridabad or not should have been put to the witness.

47. In any event the Respondent while examining its witness Mr. Anshul Parikh, should have proved the said document.

48. Mr. Malhotra would draw our attention to some correspondences to show that the word `Faridabad' had been written by hand only thereupon. Because in some correspondences the word `Faridabad' in handwriting finds place, the same would not per se lead to a conclusion that the invoice in question also related to Faridabad.

49. RW-1, Mr. Anshul Parikh stated "Also, the subscriber base declaration made to ESPN itself for Faridabad for 2010 was around 8000." He with his deposition did not annex the said invoice. In verification of his affidavit, he stated that whereas contents of paragraph 1 of the affidavit were based on his personal knowledge,

paragraphs 2 to 18 thereof were true and correct to the best of his knowledge as derived from the official records maintained by the Respondent-company in the ordinary course of its business and believed to be true.

50. The aforementioned verification of the statements made in the affidavit, being not in terms of Order XIX Rule 3 of the Code of Civil Procedure, does not inspire confidence. It even suffers from a total non-application of mind as it was not stated as to on the basis of which record said to be maintained by the Respondent-company in ordinary course of its business, the said statement had been made.

51. For the reasons aforementioned this petition is allowed and the notices issued under Clause 4.1 and 4.3 are quashed. However, the parties must complete negotiations for renewal of the agreement for the year 2012 within two weeks from date. This order is being passed keeping in view the fact that the Respondent has already served a notice for termination of the agreement much prior to first November 2011.

52. In the facts and circumstances of the case however, there shall be no order as to costs.

(S.B. Sinha)
Chairperson

January 6, 2012
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