

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated : January 23, 2012

Petition No.248(C) of 2011

M/s Nataraja Communications

...Petitioner

Vs.

M/s Digi Cable Network (India) Pvt. Ltd.

...Respondent

BEFORE:

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

For Petitioner : Mr. Vikram Singh, Mr. Kamal Kapoor &
Mr. Bhanu Pant, Advocates

For Respondent : Mr.Navin Chawla & Mr. Tushar Singh,
Advocates

J U D G M E N T

S.B. Sinha

The petitioner, a local cable operator (LCO), has filed this petition against the respondent herein which is a Multi Service

Operator (MSO) having a pan India presence, being aggrieved by and dissatisfied with a public notice dated 20.4.2011 as also a notice dated 9.4.2011 published/issued by the respondent, whereby and whereunder it threatened the petitioner that its signals shall be disconnected.

It has also prayed for a direction upon the respondent to supply 30 Set Top Boxes.

The parties hereto admittedly entered into a franchise agreement on or about 1.9.2009 in terms whereof the respondent agreed to supply signals of the channels, in respect whereof it had been operating as a Multi Service Operator.

In the said agreement the term `subscriber' has been defined in Clause (ii) of the Definition Clause as under:

Definition

(ii) "Subscriber" means the end users in the Territory to whom the cable TV Operators / subscribers/ direct subscribers transmit the cable television signals after receiving the input feed from the Franchisee."

Clause 2.0 of the agreement provides for payments terms.

We may notice Clause 2.0 and 2.1 of the agreement.

"2.0 PAYMENT TERMS

2.0 The Franchisee shall pay the Franchise Fees to the Franchiser on the basis of the number of Subscribers serviced by the Franchisee in the

Territory; in advance i.e. on or before the 7th day of every calendar month (Due Date). The Franchisee has, simultaneously, on the execution of this Agreement, informed the number of Subscribers serviced by the Franchisee as on date to the Franchiser and undertakes to inform the changes in this figure to the Franchiser from time to time within 5 days of such change. The Franchise Fees payable by the Franchisee to the Franchiser shall be calculated and shall vary on the number of pay channels, the subscription rates therefor, the number of Subscribers and/or any other factors as may be agreed between the Parties from time to time.

All payments to be made by the Franchisee must be paid directly to the Franchiser by account payee cheque/draft at their office and the receipts collected immediately.

2.1 The Franchisee agrees to disclose the correct number of Subscribers of his cable TV Network in the Territory to the Franchiser regularly. The Franchiser will have the right to verify the same through its authorized representatives at any time and from time to time during the Term. If the Franchisee fails to inform the Franchiser the accurate number of Subscribers, as required by the Franchiser from time to time, the Franchisee shall be liable to pay the Franchisee fees in respect of the subscribers not disclosed by the franchisee, for the period commencing from the date of commencement of this Agreement or the date on which any such Subscriber registered with the Franchisee whichever is later and ending on the date on which the Franchiser becomes aware of any such discrepancy or the termination of this Agreement, whichever is earlier."

Clause 6.1.1 and 6.1.3 read as under:

"6.1.1 any breach by the Franchisee in performing its obligations under this Agreement, which breach if capable of remedy is not remedied within 15 days from the notice thereof being issued by Franchiser;

.....

6.1.3. If Franchiser is not satisfied with the performance of the Franchisee's operations for any reason whatsoever, as may be determined in the sole discretion of Franchiser; "

Clause 10 provides for variation of agreement.

The area of operation of the petitioner as contained in Schedule A appended to the said agreement states the same to be part of Padamarao Nagar having 30 points at the rate of Rs.150/- per point, the total amount payable being Rs.4500/- per month exclusive of taxes.

Respondent served a notice upon the petitioner in terms of Clause 4.1 of the Telecommunication (Broadcasting & Cable Services) Interconnection Regulation, 2004 (13 of 2004) as amended from time to time (The Regulations) as also a public notice under Clause 4.3 thereof.

Supply of signal to the network of the petitioner also was discontinued. Questioning the said notice as also the public notice, the petitioner filed a petition before this Tribunal which was marked as Petition No.360(C) of 2010.

In the said proceedings, the respondent filed a reply.

The parties, however, did not adduce any oral evidence, as the core issue which fell for consideration therein revolved round the interpretation of the terms of the agreement.

By a judgment and order dated 20.10.2010, the respondent was directed to restore the connection of the petitioner, in support whereof reasons were assigned on or about 1.12.2010.

We may notice one of the relevant paragraphs of the said judgment :

“10. The respondent, by its notice under Regulation 4.1 first terminated the agreement, assuming that the same was served. It did not give an opportunity to the petitioner herein to remedy the defect, if any, as is required under clause 6.1.1 of the Agreement. The respondent evidently acted on the basis of the complaint made against the petitioner. The franchisees of the respondent purported to have divided their respective areas of operations amongst themselves. The franchisees of a multi service operator cannot do so in law. Even the broadcasters cannot take recourse thereto in terms of the provisions of the Regulations. The Regulations contemplate competition. Such competition is necessary for the purpose of protecting the interest of the consumers; quality of supply of signal is also required to be maintained. As is possible that the different parts of the same premises may have connections from different local cable operators and, thus, no exception thereto can be created nor is contemplated in terms of the Regulations.”

The reason, inter alia, for setting aside the notice under Regulation 4.1 was that no termination could be effected forthwith either in terms of

Clause 6.1.1 of the agreement or in terms of Clause 4.1 of the Regulations.

As regards the area of operation it was observed:

"17. The area of operation of the petitioner being Padmarao Nagar and having regard to the fact that it comprises of several colonies as contained in the Andhra Pradesh Gazette Extra Ordinary published by the State of Andhra Pradesh for holding the elections in Greater Hyderabad Municipal Corporation, it now stands admitted that the petitioner had not gone beyond the said area. Furthermore, the term 'part of Padmrao Nagar' used in the agreement, is also vague. It did not specify as to which part of Padmrao Nagar would be the area of operation of the petitioner. The respondent, if it so desired, could have fixed the specific areas of operation of the petitioner. It did not do so. It, therefore, must be held that there must have been compelling reasons therefor. If the petitioner had increased the number of subscribers within the area allotted to it, it cannot be said to have committed any piracy. Piracy in a situation of this nature would only mean that one has transgressed its area of operation. It does not contemplate grant of supply of signals to the subscribers where another LCO is operating, although the same would come within the area of operation of the LCO."

It was furthermore held that in one of the public notices published in the newspapers, no reason had been assigned.

It was opined:

"25. We, therefore, are of the opinion that the action on the part of the respondent in disconnecting the supply of the signal of the petitioner relying on or on the basis of the impugned notices as also the

public notice issued by the respondent must be held to be bad in law. These are the reasons in support of our order dated 29.10.2010."

On or about 9.12.2010, a notice was issued by the respondent wherein inter alia it was stated that the petitioner had been authorized retransmission of its signals to "Part of Padmarao Nagar" i.e. area behind Neil Methodist Church.

It was furthermore stated:

"7. That further, in terms of the Clause 12 of the Interconnect Regulations, you are also liable to give your monthly SLR to us. You have failed to comply with this statutory requirement. We hereby call upon you to furnish to us your SLR starting from the date of the Agreement till date. Please note that your failure to give the SLR would not only be a breach of the Franchise Agreement but also of the Interconnect Regulations and your signals would be liable to be disconnected on this ground as well. PLEASE TAKE NOTICE ACCORDINGLY."

Petitioner responded thereto in terms of its letter dated 16.12.2010, inter alia, contending:

"I am in the receipt of the captioned letter dated 09.12.2010. In reply to the contents of the said letter, I just humbly wish to mention that the area prescribed in the said Subscription Agreement is self-explanatory and till the time I am operating within the circumference of the said area (Padma Rao Nagar), no culpability of any sort can be fastened on me.

On the related note in order to help me understand better and also to make your point clear, kindly let me know about the name of the area(s)

which according to you is not falling under "Padma Rao Nagar". As per me, I am only catering within the territory of the said area and nowhere else. Your mentioning of "Neil Methodist Church" in the said letter is a useless exercise and is of no consequence as it is totally oblivious of the area mentioned in the Agreement."

Petitioner furnished a purported SLR containing the names of thirty subscribers who are residents of different colonies of Padmarao Nagar.

It, by a letter dated 31.3.2011, requested the respondent to provide at least 30 Set Top Boxes.

The said letter was issued on the premise that it had visited the respondent's office on 18.11.2010, 29.12.2010, 11.1.2011 and 4.3.2011 and made the said request but the respondent expressed its inability to accede thereto.

Respondent denied and disputed the contents of the said letter by its letter dated 9.4.2011, inter alia, stating:

"We, request you to desist from indulging in sending us such false and fake communications designed with ulterior motives. Further your claim that, we have been providing set top boxes to the operators in other areas and that we expressed inability to supply to you as stocks exhausted is once again a false story invented by you as a part of your usual style of sending malicious and biased communications.

Please send fully details and addresses of those 30 subscribers, who according to you are

allegedly insisting you to supply set top boxes for our verification.

We once again caution you to confine your areas of operation to the areas behind "Neil Methodist Church" situated in Padma Rao Nagar, as required by us vide our earlier communication dt 9th Dec. 2010, failing which we may have to initiate unpleasant action."

Petitioner sent another letter to the respondent on or about 25.4.2011, whereby and whereunder the details of SLR were supplied, stating:

"In respect of areas of operation please refer our letter dated 16.12.2010 against your letter dated 9th December, 2010, and also go through the Order of the TDSAT and we never crossed our limits by operating as we are operating since beginning. Further in respect of full details of 30 subscribers, you are requested to go through our letter dated 16th December, 2010 against your letter dated 9th December 2010. However, we are enclosing a copy of the same for your reference to supply of set top boxes for your verification. Further we are very much ready to make payment immediately as and when hearing from you for supply of set top boxes."

On the aforementioned premise, the respondents served a notice under Clause 4.1 inter alia contending that the petitioner had been supplying signals to 110 more subscribers in various other areas such as Madhura Nagar, Abhinav Nagar Colony, Pallavi Towers, Sikandagiri, Bapuji Nagar, Musheerabad & Srinivas Nagar, which are situated beyond "Neil Methodist Church" of Padma Rao Nagar.

It was furthermore stated :

"3) In view of your defiant attitude to transgress into areas beyond authorization even after various requests made by us asking you to confine to your area i.e. being "Neil Methodist Church", having no other option, we are constrained to inform you that signal services to your network shall be disconnected on the expiry of 21 days from the date of publication of Public Notice to be followed simultaneously from the date of this notice issued under Clause 4.1 of the interconnection Regulations of TRAI dt 4th September, 2006."

A public notice was issued on 20.4.2011, stating as under:

"Whereas the above said cable operator, since was found to have transgressed into areas beyond authorization and having not disclosed the subscribers connected by the cable operator without prior permission from the company, thereby committing breach of the agreement and constraining the company to cause this public notice being issued under clause 4.3 (inter connection Regulations of TRAI) through which all concerned are hereby informed that, service to the above mentioned cable operator shall be deactivated after three weeks from the date of this publication for the reasons indicated hereinabove."

On the aforementioned contentions, the present petition has been filed on or about 10.5.2011. Supply of signals to the petitioner's network was again stopped.

By an order dated 11.5.2011 it was directed:

"Mr.Navin Chawla, the learned counsel for the respondent has handed over to the list of 112 subscribers whom the petitioner is said to have been serving. Although he has submitted a SLR report of 30 only, the petitioner shall in its rejoinder deal with this aspect of the matter also. However, subject to

any order which may be passed in future on the basis of the aforementioned submissions of Mr.Chawla vis-à-vis the said list of subscribers of the petitioner, we for the time being, direct that the respondent shall restore the supply of signals to the petitioner's network without prejudice to the rights and contentions.

We have passed this order keeping in view of the two factors namely, the order of this Tribunal in Petition No.360(c) of 2010 as also in view of the fact that the respondent has disconnected the supply of signals to the petitioner's network before the expiry of 21 days"

Respondent in its reply reiterated its stand taken in its aforementioned letters including the notice issued under Clause 4.1 of the Regulations.

Petitioner filed a rejoinder thereto wherein, it was contended:

"(C) That in reply to Para (C), it is respectfully stated that in a non-addressable platform, the Agreement is based on the negotiated Subscriber base, which in the present case is 30. It is further respectfully submitted that since this Hon'ble Tribunal on 11.5.2011 directed the petitioner to deal with the issue of subscriber base in the Rejoinder and therefore, the Petitioner states that till the date of filing this rejoinder, it is having the actual subscriber base of 88. It is also respectfully stated that all this subscribers are within the circumference of the area "Part of Padmarao Nagar." The list of the subscribers is attached hereto and is marked as ANNEXURE-PA."

This Tribunal keeping in view the rival contentions of the parties framed the following issues:

- (i) Whether the petitioner has complied with the terms of the Regulations so far as the declaration of subscriber base to the respondent is concerned?
- (ii) Whether the petitioner can be held to be indulging in transgression of signals inspite of the fact that as per the respondent also, it is retransmitting the signals within the circumference of the areas "Padma Rao Nagar"? If not, its effect?
- (iii) Whether the petitioner is required to take any prior permission from the respondent to increase its subscriber base within the authorized area? If not, its effect?
- (iv) What would be the effect of dissimilar grounds taken in the notice under Regulation 4.1 and the public notice under Regulation 4.3?
- (v) Whether the notice under Regulation 4.1 and public notice under Regulation 4.3 are otherwise legal?

Mr. Vikram Singh learned counsel appearing on behalf of the petitioner would contend:

1. The reasons stated in the notice under Clause 4.1 and the public notice under Clause 4.3 being not common, they are not sustainable in law.
2. Having regard to the allegations of piracy made against the petitioner, it was obligatory on the part of the respondent to specify the areas where, according to it transgression took place.
3. The area of operation in terms of the agreement being part of Padamarao Nagar, the attempt on the part of the respondent to specify the area of operation of the petitioner in its letter dated

9.4.2011 as also its notice issued under Clause 4.1 of the Regulation must be held to be wholly illegal.

4. Respondent's witness Shri U.V. Satyanarayna Araja having stated that the petitioner had been operating in Srinivasa Nagar must be held to have made out a third case.
5. Having regard to the provisions contained in Sections 91 and 92 of the Indian Evidence Act, the respondent were not entitled to adduce any evidence altering or modifying the terms of the agreement.
6. Keeping in view the judgment and order of this Tribunal dated 1.12.2010, it must be held that the area of operation as specified by this Tribunal has attained finality.
7. In terms of the definition of `subscriber base' as contained in Clause 2(p) of the Regulations vis a vis the provisions of Clauses 9.1, 10.1 and Clause 12 thereof, it must be held that the petitioner's subscriber base of 30 covered the entire part of the Padmarao Nagar and same was a negotiated figure.

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

- (a) The parties are bound by the terms of agreement including the definition of `subscriber base' as also Clauses 2 and 2.1,

which having admittedly been breached by the petitioner, it is not entitled to any equitable relief.

- (b) The area of its operation said to be being part of Padamarao Nagar admittedly is not the whole of Padamarao Nagar and, thus, the petitioner is not correct in contending that it was entitled to operate on the circumference of the entire area of Padamarao Nagar.
- (c) For the purpose of identifying the area of part of Padamarao Nagar in terms of the sixth proviso appended to Section 92 of the Indian Evidence Act, oral evidence was admissible in evidence and petitioner's proprietor having not examined himself before this Tribunal must be held to have accepted its area of operation as contended by the respondent as also the number of subscribers it had been serving.
- (d) The petitioner only in its rejoinder having raised the issue of subscriber base in terms of the provisions of the Regulations for the first time cannot be permitted to contend that it had 88 subscribers and the figure of 30 was a negotiated one.

The questions, which would arise for our consideration in view of the rival submissions made by the parties hereto, are:

1. What was the true and correct subscriber base of the petitioner?

2. Whether the petitioner had committed piracy and/or breached any condition of the agreement warranting issuance of notice under Clause 4.1 and 4.3 of the Regulations.

Before, however, advertent to the said issues, we may notice the relevant provisions of the Regulations.

`Subscriber base' and `Subscriber Line Report' have been defined in Clauses 2(p) and 2(q) of the Regulations which read as under:

"2(p) **subscriber base**" means the number of subscribers –

(i) as agreed to by two service providers in a non-addressable system on the basis of which payments are made by one service provider to the other, or

(ii) as reflected by the Subscriber Management System, where addressable systems are employed.

2(q) **subscriber line report**" or "**SLR**" means a monthly statement wherein, in a nonaddressable system, a multi system operator and a cable operator agree upon the subscriber base for that month."

Clause 9.1 of the Regulations, which although has no direct application in the instant case but having regard to the fact that the same according to the counsel for the parties may be necessary to be taken into consideration for the purpose of construction of the Regulations, may also be noticed.

"9. Finalising Subscriber Base at the time of first agreement

First agreement between Multi System Operator and Cable Operator

9.1 In non-addressable systems, while executing an interconnection agreement for the first time between a multi system operator and a cable operator, the parties to the agreement shall take into account the subscriber base of the cable operator on the basis of the Subscriber Line Report (SLR) where such SLR exists. Where such SLR does not exist, this shall be negotiated on the basis of the evidence provided by the two parties on the subscriber base, including the subscriber base of similarly placed cable operators and local survey.

Explanation

The Subscriber Line Report (SLR) is only an indicative basis for arriving at the subscriber base and the subscriber base as mutually agreed by the two parties could be more than or less than the number indicated by the SLR. First agreement between Multi System Operator and Broadcaster."

Clause 10.1 providing for variation of the subscriber base during validity of the agreement between Multi Service Operator and Cable Operator reads as follows:

"10. Variation of Subscriber Base during validity of agreement

Between Multi System Operator and Cable Operator

10.1 In non-addressable systems, the subscriber base agreed upon by the parties at the time of execution of the interconnection agreement between a multi system operator and a cable operator shall remain fixed during the course of the agreement except in exceptional circumstances that warrant an increase or decrease in the

subscriber base. In such an eventuality, it is for the service provider seeking a change in the subscriber base to provide reasons and accompanying evidence including local survey for the proposed change.”

Clause 11.1 provides for finalization of `subscriber base' at the time of renewal of the agreement between a MSO and a cable operator.

Clause 12, however, provides that in a non-addressable system, the MSO would furnish the updated list of cable operators along with its subscribers base to the broadcaster on a monthly basis.

Do the provisions of the contract and in particular Clauses 2.1 and 2.2 thereof are violative of the Regulations?

From a perusal of the definition of `subscriber base' and `subscriber line report', it is evident that both for all intent and purport represent the figures of the number of subscribers which have been arrived at upon negotiation between the parties to the contract.

Subscriber base is determined where a subscriber line report exists.

Where such subscriber line does not exist `subscriber base' would be subject to negotiations on the basis of the evidence provided by both the parties including those of the similarly placed cable

operators and local survey, as would appear from Clause 9 of the Regulations.

Existence of the `subscriber line report', therefore, plays an important role in the matter of determination of `subscriber base'. Although it is to be on a monthly basis, at the time of entering into an agreement the same may not exist and only in that event the other evidences as laid down in Clause 9.1 for the purpose of arriving at a `subscriber base' are necessary to be considered.

With a view to negotiate on the `subscriber base', the multi service operator must know the number of subscribers to whom the MSO would be supplying signals of the channels for the purpose of their re-transmission.

Unless the Universe is known, the question of arriving at a `subscriber base' upon holding negotiations, having regard to the relevant factors would not arise.

The Regulations do not prohibit that in a given case a local cable operator having regard the facts and circumstances may agree for 100% subscriber base and insist on lowering the rates therefor.

An agreement between the parties is arrived at when there is *ad idem* on the terms and conditions thereof.

What is prohibited in law, *inter alia*, having regard to the provisions contained in Section 23 of the Indian Contract Act is that

the contract should not, inter alia, be against public policy or in violation of the mandatory provisions of a statute.

The question as regards legality of a contract, therefore, must be determined keeping in view the provisions of the statute.

The parties may negotiate keeping in view the `universe' of the local cable operator, the rate at which supply of signals shall be supplied, the popularity of the channels, the number of them, the quality of supply of signals and other relevant factors.

It is not the case of the petitioner that his universe is different or is larger than disclosed in Petition No.380(C) of 2010.

In the earlier round of litigation also the petitioner proceeded on the basis that its subscriber base is 30 and it was a small time operator.

It was not contended that its subscriber base of 30 was a negotiated figure.

Respondent, we have noticed heretobefore, indicated that the petitioner had 110 more subscribers apart from the 30 it had disclosed.

It had also asked for supply of 30 set top boxes in its various letters.

An LCO ordinarily would have two different modes of operation, i.e., one through digital mode and another through analogue mode.

It is not disputed that by reason of retransmission of signals through a digital mode, the number of channels would be much more than the number of channels which can be retransmitted through cable services. The quality of supply of signals in the latter case would also be better.

Keeping in view that aforementioned legal propositions in mind the SLR submitted by the petitioner as annexed to its letter dated 16.12.2010 must be held to be its subscriber base; it having not disclosed its `universe' and/or the number of subscribers to whom it had been servicing any time before.

Petitioner only in its rejoinder in response to the contentions of the respondent that it had 110 more subscribers than its declared subscribers disclosed that it had been supplying signals to at least 88 subscribers.

In terms of Clauses 2.1 and 2.2 read with definition of `subscriber' as contained in the agreement dated 1.9.2009, the petitioner was under a contractual obligation to supply informations thereabout to the broadcaster.

The said information was required to be supplied in terms of the contract although it might not be necessary in terms of Clause 12 of the Regulations.

Mr. Singh rightly urged that Clause 10.1 shifts the burden on the MSO to show that it became entitled to increase in the amount of subscription fees. Even if that contention of Mr. Singh is accepted, perusal of the said provision would clearly show that increase and decrease in the agreed amount of subscription fees may be resorted to if an exceptional case is made out.

It is possible for a Multi Service Operator to raise a contention that the petitioner is liable to pay enhanced subscription fees as it had been supplying signals to a large number of subscribers, apart from those mentioned by it in its SLR and/or agreed to by and between the parties to the contract.

It may be true that with regard to the area of operation of the petitioner, some observations have been made in our judgment dated 1.12.2010 passed in Petition No360(C) of 2010.

Petitioner, having not been retransmitting signals to the entire Padamarao Nagar, cannot be held guilty of commission of an act of piracy. If it has re-transmitted signals to more consumers, it may only be liable to pay enhanced subscription fees in terms of clause 10.1 of the Regulations; he having not transgressed its area of operation.

Mr. Chawla, however, would contend that part of Padamarao Nagar would not be whole of Padamarao Nagar.

Learned counsel is correct. But for the purpose of determination as to which part of Padamanagro Nagar is the subject matter of 'area of operation' of the petitioner should have been clarified.

It was not stated even in the earlier proceedings that the petitioner's area of operation was confined to the area behind Neil Methodist Church or as has been contended by Shri U.V. Satyanarayna Araja, the witness examined on behalf of the respondent, that the same was Srinivasa Nagar which falls behind the Neil Methodist Church. Even though, the said two areas are different.

The confusion with regard to the area of operation of the petitioner has been created by the respondent itself in taking different stands.

If according to it, the subscribers of the petitioner whose names have been disclosed by the petitioner itself were residents of the area behind Neil Methodist Church or Srinivasa Nagar the same should have been explicitly stated.

We are, thus, of the opinion that in that view of the matter the petitioner cannot be held to be guilty of acts of piracy.

Mr. Chawla has placed strong reliance upon a decision of Supreme Court of India in Raj Kumar Rajinder Singh vs. State of Himachal Pradesh & Ors. (1990) 4 SCC 320, wherein while considering the area which was the subject matter of a grant wherein

Khatoni numbers, total number of plots had been mentioned but the Khasra numbers have not been mentioned; the total area in respect of which the grant made was 263.4 bighas and part of 'uncultivated jagir'.

Only in the aforementioned factual background, the Apex Court opined:

"19.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 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. In such a case the subsequent conduct of the parties furnishes evidence to clear the blurred area and to ascertain the true intention of the author of the document."

The sixth proviso appended to Section 92 of the Indian Evidence Act was, thus, resorted to by the Apex Court for the purpose of

ascertaining the real intention of the parties, keeping in view the fact that the language employed in the deed of grant was ambiguous. An area which is the subject matter of the grant must be fixed keeping in view the fact that thereby title in respect of a property is sought to be transferred. A party acquires a right, title and interest in the property only within the four corners of the grant and not beyond the same.

In a case involving broadcasting and cable services, however, the situation may be different in so far as the local cable operator acquires a right to supply signals to a large number of customers within its area of operation.

Respondent is a big Multi service Operator having its operations throughout India. It is, therefore, expected to know that area of operations plays an important role in the matter of transfer of right of retransmission of signals by a local cable operator to its subscribers.

It may be presumed that the Multi Service Operator knew that a LCO would not be held to have committed acts of piracy, if it merely increases its number of subscribers but confined its activity within the agreed area of operation.

There cannot be any doubt or dispute that part of Padamarao Nagar is not and cannot be whole of Padamarao Nagar. The parties, therefore, could have led evidence as to the intention of the parties.

They can still do so. Modification/novation of a contract is provided under the Indian Contract Act itself.

The notice of the respondent dated 9.4.2011 stated that Petitioner had been supplying signals to 110 subscribers in addition to 30 subscribers in the areas which are beyond Neil Methodist Church of Padmarao Nagar and it has extended its network beyond Neil Methodist Church areas notwithstanding the protest from the neighboring cable operators and only on that basis he committed the acts of unauthorised transmission.

The public notice, however, states:

- A. The petitioner has transgressed into the areas without authorization; and
- B. It has not disclosed the subscribers connected by the cable operator without prior permission of the company.

Obtaining prior permission from the respondent was not the subject matter of the agreement.

In its notice under Clause 4.1 of the Regulations, the respondent did not state that prior permission of the company was necessary.

The only reason which was assigned therein was that the petitioner has retransmitted signals to subscribers who were residing beyond the area of Neil Methodist Church.

We, therefore, are of the opinion that the petitioner cannot be said to have committed any act of piracy within the meaning of the said term as was originally understood namely transgressing its area of operation.

Mr. Chawla, however, has relied upon a decision of this Tribunal in *Mona Cable Network, Saharanpur (UP) vs. ESPN Software India Private Ltd.* New Delhi, Petition No.145(C) of 2009 disposed of 20.11.2009, wherein it was held as under:

"The agreement clearly provides that the quantum of subscription fee was entered into having regard to some subscription base. In that sense it was not entirely a negotiated contract where subscribers base would have no role to play. The agreement clearly provides that increase in the number of subscribers base should be disclosed to the respondent.

Mr. Kathpalia urged that the agreement being a negotiated one and having nothing to do with SLR, no question for updating the subscription base for every month arose in terms of Regulation 8.1 of the Regulations.

We are unable to accept the said contention in view of the clear stipulations contained in the agreement.

It may be true that it was for the respondents to produce evidence to show that there has been an increase in the subscribers base. It may also be true that the respondent in one of its letters being dated June 10, 2009 and its reply to the petition had given two different figures as regards subscriber base, namely 35000 and 26000."

The said observations were made in a different context i.e. having regard to the fact that the dispute with regard to `subscriber base' between the parties thereto. The matter was considered having regard to Clause 8.1 of the Regulations. The subscription fee payable by the LCO having been agreed, it was held that the negotiated subscriber base must have some role to play. The LCO, however, was bound to disclose the increase in the number of subscribers.

That question being not the subject matter of notice under Clause 4.1 and public notice under Clause 4.3, cannot be taken into consideration.

This petition, therefore, must be allowed.

However, there cannot be any doubt or dispute that the respondent would be entitled to enter into fresh negotiation with the petitioner for demarcating its area of operation.

The petitioner is bound to disclose its `universe' so as to enable the respondent to take recourse to Clause 10.1 of the Regulations.

The petitioner admittedly having more than 88 subscribers, it is not entitled to a direction upon the respondent to supply 30 STBs as has been prayed for.

This petition is allowed to the extent mentioned heretobefore and with the aforementioned observations and directions.

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

(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

January 23, 2012
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