

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

15TH MAY, 2012

Petition No.18 (C) of 2011

(With M.A. Nos. 18, 62, 63, 64, 65 & 165 of 2011)

Friend Cable Network ... Petitioner

Vs.

ESPN Software India Pvt. Ltd. ... Respondent

BEFORE:

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

For Petitioner : Mr. Navin Chawla, Advocate
Ms. Nidhi Parashar, Advocate

For Respondent : Mr. N. Ganpathy, Advocate
Mr. Kartik Yadav, Advocate

JUDGEMENT

Petitioner, a Multi System Operator has filed this petition praying inter-alia for the following reliefs against the Respondent which is a broadcaster.

(a) *“Hold the disconnection of signals of the Petitioner by the Respondent of its channels as illegal, malafide and in violation of the Interconnect Regulations.*

(b) *Pass an order directing the Respondents to reconnect the supply of signals of its TV channels to the Petitioner.*

- (c) *Direct the Respondent to enter into an agreement for the year 2011-2012 on such terms and conditions as may be held reasonable by this Hon'ble Tribunal.*
- (d) *Direct the Respondent to reconcile the accounts with the Petitioner on the basis of Rs.50,000/- as the subscription fee as agreed between the parties w.e.f. June, 2010."*

2. We may at the outset notice some undisputed facts:-

- (i) The parties hereto entered into an agreement for supply of signals to the Petitioner's network on a monthly subscription fee of Rs.80,078/-.
- (ii) Inter-alia on the premise that some LCOs have left its network and, thus, it is entitled to a down gradation, a request was made in that behalf on or about 30.5.2010. Receipt of the said letter, however, is denied and disputed by the Respondent.
- (iii) According to the Petitioner, Mr. Vishal Bhatia who is the Area Distributor of the Respondent agreed to reduce the subscription fee to Rs.50,000/- per month for the month of June, 2010.

Despite the same, the invoice at the old rate was received for the said month.

A grievance was raised by the Petitioner to the same effect by a letter dated 26.3.2010 addressed to the said distributor. No change however was effected in the invoices although according to the Petitioner, it was assured that the corrected amount would stand reflected in the invoice for the month of August, 2010.

- (iv) Grievances were raised again on or about 26.8.2010 but despite the same, both for the months of September and October, 2010, invoices were served on the Petitioner showing the same amount of subscription fee.

3. Petitioner sent a letter on or about in 20.10.2010 requesting Mr. Vishal Bhatia to the following effect :-

“Now, I have received the invoices for the months of September, 2010 and October, 2010, according to which the monthly billing still runs at Rs.80,078/- (Rupees Eighty Thousand and Seventy Eight Only) per month. I again request you to correct the monthly billing and also send the corrected invoices, so that in future you cannot ask for any dues from me.”

4. Petitioner contends that it had also made an advance payment towards three months' subscription fees and had never defaulted in payment thereof.

5. A Notice under Clause 4.1 of the Telecommunications (Broadcasting & Cable Services) Interconnection Regulations 2004 amended from time to time ('The Regulations') and also a Public Notice under Clause 4.3 were issued on or about 02.12.2010 on the premise that the Petitioner owes the Respondent a sum of Rs.20,5496/- including the amount specified in the bill for the month of November, 2010.

Petitioner's network was disconnected on 28.12.2010, although it is stated that the entire disputed amount was paid by it to the Respondent on 11.12.2010.

6. This petition was filed on or about 10.01.2011.

7. Respondent, on the other hand, contends:-

- (i) No down gradation was effected nor could be effected by Mr. Vishal Bhatia; he merely being the distributor of the Respondent.

- (ii) There was absolutely no reason as to why the Petitioner had all along been approaching only the distributor and not the Respondent itself.
- (iii) The area of operation of the Petitioner being only Subhash Chowk in the town of Sirsa and he having been admitting re-transmitting signals in the entire town of Sirsa as also the neighbouring villages, committed piracy.

In support of the said contention, screen shots of transmission of the signals alongwith the CD have been produced.

7. When the agreement in question was produced before this Tribunal, the Petitioner denied and disputed his signature thereon.

For comparison of the disputed signature, the opinion of the CFSL Laboratory, Delhi was sought for. It submitted an inconclusive report on or about 09.12.2011 to which we shall refer to an appropriate stage.

8. Although by an order dated 02.02.2011, several issues were framed, the ones which are relevant, are as under:-

- “(i) Whether the agreed amount of monthly subscription fee of Rs. 80,078/- was downgraded to Rs. 50,000/-?
- (ii) What is the area of operation of the Petitioner?
- (iii) Whether in any event the act on the part of the Respondent disconnecting the supply of signals to the Petitioner’s network is a valid one?

9. Petitioner, in support of its case, has examined Mr. Rakesh Kumar, Mr. Joginder Singh, Mr. Amar Singh, Mr. Ramesh Chowdhary and Mr. Prabodh Rattan.

Respondent has examined one Mr. Prem Kumar who had prepared the screen shots of some shops of Bishnoi market at Sirsa, besides Mr. Atul Malhotra, one of its officers.

10. Mr. Navin Chawla, learned counsel appearing on behalf of the Petitioner brought to this Tribunal’s notice that applications were filed for summoning one Shri Vishal Bhatia, but because the summons could not be served upon him for a long time, the same was not pursued.

11. At the outset, we may notice that an Interim Order was passed by this Tribunal on 11.01.2011 in the following terms:-

“Having heard Mr. Navin Chawla, the learned counsel appearing on behalf of the petitioner and Mr. Ganpathy, the learned counsel appearing on behalf of the respondent, we are of the opinion that that the connection of petitioner may be restored (which had been disconnected on 28.12.2010) on the petitioner’s clearing the entire arrears at the rate of Rs. 80,078/- per month i.e upto 28.12.2010 and from the date of the reconnection till the expiry of the agreement.

Mr. Ganpathy, the learned counsel, however, has pointed out relying on or on the basis of the agreement dated 28.12.2010 that the area of operation of the petitioner was Subhash Nagar in the town of Sirsa but the petitioner, on its own showing, has been retransmitting the signals within the municipal limits of Sirsa town and the adjoining village. As has been offered by the respondent, the authorized representative of the petitioner should meet the authorized representative of the respondent on 17.1.2011 at its Gurgaon office at 11.00 a.m. so as to negotiate the commercial terms for supply of signals to the petitioner. A copy of the agreement may be supplied to Mr. Navin Chawla.

This order is being passed without prejudice to the rights and contentions of the parties and subject to any other or further order which may be passed by us. The supply of signals may continue pursuant to this interim order.”

12. The agreement in question was entered into on 23.02.2010. It was valid from 15.02.2010 till 15.01.2011. Petitioner, therefore, had been enjoying transmission of signals only on the basis of the said Interim Order by this Tribunal.

We have noticed heretofore that the Petitioner has also made a prayer for a direction upon the Respondent to enter into a Subscription Agreement with it.

13. Mr. Navin Chawla, learned counsel appearing on behalf of the Petitioner would contend:-

- (i) In view of the fact that materials have been brought on record to show that even Mr. Vishal Bhatia took part in the negotiations before the execution of the agreement, there is absolutely no reason as to why he cannot be said to be authorized to provide down gradation so far as the subscription fees payable by the Petitioner is concerned.
- (ii) So far as the purported agreement dated 23.02.2010 is concerned, the only contention raised by the Respondent is that the same was signed in the presence of Mr. Atul Malhotra and a copy thereof had been served to the Petitioner immediately thereafter; whereas Mr. Malhotra

in his cross examination having accepted that neither the agreement was signed in his presence nor a copy thereof was furnished to the Petitioner, this petition should be allowed.

- (iii) Petitioner having denied and disputed his signatures on the agreement dated 23.2.2010 and the hand writing expert also having opined that it was not possible to render a definite opinion thereabout, this Tribunal should hold that it has not signed the agreement in question and in that view of the matter, that it's area of operation must be held to be in the entire town of Sirsa and the neighbouring villages must be accepted.
- (iv) Petitioner having paid an advance of three months' subscription fees which have been admitted and acknowledged by Mr. Malhotra, and having also been proved in terms of Exhibit PW 1/A and moreover the Petitioner having paid the amount as specified in the notice under Clause 4.1 of the Regulations, it cannot be said to be a defaulter.
- (v) The Notice issued by a broadcaster in terms of Clause 4.1 and also the Public Notice under terms of Clause 4.3 of the Regulations being required to be supported by reasons, and the reasons assigned therein must be held to be non-existent and, thus, they should be set aside.

(vi) Mr. Atul Malhotra having admitted in his cross-examination that neither the Petitioner nor the representative of the Respondent signed the agreement in his presence, it would be incorrect to say that the area of operation in term thereof was confined to Subhash Chowk.

14. Mr. N. Ganpathy, learned counsel appearing on behalf of Respondent, on the other hand, urged:-

- (i) In view the prayer made by the Petitioner, this petition has become infructuous and should be dismissed as such.
- (ii) Petitioner despite receipt of the notice dated 02.12.2010 under Clause 4.1 of the Regulations, having not paid the due subscription amount and having also defaulted in payment despite obtaining the Interim Order dated 11.01.2011 and issuance of bills for the months of March and April as would appear from the order sheet dated 29.4.2011 as also for the month of August, 2011 as would appear from the order sheet of 24.8.2011, this petition should be dismissed.

- (iii) Petitioner is not entitled to any equitable relief as even in its rejoinder, it has not contended that due subscription amount was paid.
- (iv) From a perusal of the CFSL report, it would appear that hand writing expert did not observe any dissimilarity in the signatures of Shri Prabodh Rattan in the agreement vis-à-vis, his admitted signatures, it may be held that the contention of agreement stand proved.
- (v) In any event, the proprietor of the Petitioner concern, having not examined herself before this Tribunal, her General Power of Attorney holder cannot be said to be a competent witness and, thus, no case for interference has been made out.

15. The TRAI made the Telecommunications (Broadcasting and Cable Services) Interconnection Regulations, 2004 (The Regulations).

The said Regulations were amended in March 2009 whereby and whereunder Clause 4A.1 was inserted. It reads as under:-

“4A.1 It shall be mandatory for the broadcasters of pay channels and distributors of TV channels to reduce the terms and conditions of all their interconnection agreements to writing.”

16. By reason of the aforementioned provision, the Broadcasters are obligated not only to insist that the operator(s) must enter into an agreement in writing with it but also a copy thereof must be served upon the Distributor of the T.V. channels within 15 days, wherefor acknowledgement must be obtained.

17. RW-I, Mr. Atul Malhotra in his affidavit clearly stated:-

“I say that the Petitioner has not made any advance payment in the sum of Rs.80,0878/- per month for three months. The Petitioner is put to strict proof thereof. The Counsel for the Petitioner was furnished a copy of the service contract at the hearing on January 11, 2011 even though a photocopy had also been furnished to the Petitioner at the time of signing of the service contract. The Service contract dated February 23, 2010 executed between the parties is filed herewith and marked as Exhibit ‘R1’.”

He, in his cross-examination however, stated as under:-

“The subscription agreement was signed by the Petitioner at this Sirsa office. I do not remember the date of signing the subscription agreement.

Vol: As per normal practice of the respondent company, after negotiations we receive the printed form of the agreement from the respondent company. Thereafter in the present case, the said agreement was sent to the

petitioner's office through some local field staff of the distributor, who obtained the signatures of the Petitioner. I was personally not present at the time of signing of the subscription agreement by the Petitioner. I will have to check as to who signed the agreement on behalf of the respondent company.

Vol: At that time Mr. Bihash Jha was the Regional Head of the respondent company and he must have signed it. He did not sign the agreement in my presence.”

He is, therefore, not a witness to execution of the agreement.

18. He furthermore stated that to the best of his knowledge and belief, Mr. Prabodh Rattan has signed the agreement.

As regards service of a copy of the said agreement, he stated:-

“The respondent company has not given a copy of the agreement to the petitioner after its execution. The petitioner never asked for the same.”

19. It was also stated:-

“We have a system in our company that before entering the subscription agreement the MSO is made to sign on pre-agreement form. The petitioner had signed this form”

20. We may place on record that according to Shri Prabodh Rattan he had only signed a three paged form.

21. He stated:-

“I further state that a bare perusal of the Agreement would show that the Respondent in a hurry to fabricate the agreement has named me as the sole proprietor of the petitioner herein whereas I am only the authorized signatory of the petitioner and the sole proprietor of the petitioner is in fact Mrs. Sonia Gagneja.”

22. The hand writing expert, Mr. Manmohan Singh, a Senior Scientific Assistant (Documents) in his report dated 24.10.2011, in his report, stated as under:-

“Result of Examination:-

I. The questioned English signatures marked as Q-1 to Q-13 when compared with the standard English signatures marked A-1 to A-3 and A-5 to A-10 and S-1 to S-120. The following observations have been made:-

(i) Similarity has been observed in the execution of shape of the body oval of the small letter ‘a’, its movement as well as its start between both sets of signatures at one place or the other within the range and extent of their natural variations.

(ii) Manner of execution of small letter ‘r’ of the work ‘Parbodh’ with retrace/tent like formation of its body as observed in the questioned signatures is similarly observed in the standard signatures.

(iii) Similar manner of execution of combination ‘ar’ between both sets of signatures.

(iv) Manner of execution of small letter ‘d’ as observed in Q-3 is similarly observed in A-2.

However, there are certain characteristics features in the execution of certain strokes comprising the letters could not be accounted for and a stronger opinion on the available standard material cannot be expressed.”

23. To enter into an agreement in writing is a statutory requirement. It was, thus, obligatory on the part of the broadcaster to prove the same, particularly in a case of this nature where not only the execution of the agreement but also service of the copy thereof is denied and disputed.

24. RW-I, Shri Atul Malhotra is not a competent witness on that issue.

His evidence in this examination-in chief and also cross examination are self contradictory and inconsistent in so far as

whereas in his affidavit he affirmed that not only Mr. Prabodh Rattan had signed the agreement but a copy of thereof has been served, in his cross-examination he stated he had no knowledge as to who had signed the said agreement.

25. It is one thing to say that the parties had entered into an agreement but it is another thing to say that the parties had entered into a specific agreement which is sought to be brought on record.

26. Keeping in view the fact that Petitioner has denied the execution of the agreement, the Respondent should have proved the same in accordance with law. For the purpose of proving the agreement, the signatures of both the parties should have been proved.

Mr. Atul Malhotra even does not prove the signatures of Mr. Prabodh Rattan or Mr. Jha who is said to have signed on behalf of the Respondent.

The said agreement, therefore, has not been proved. The consequence thereof would be that relying on or on the basis of this agreement, it cannot be said that the area of operation of the Petitioner was confined to Subhash Chowk of the town of Sirsa and not the entire town of Sirsa.

What was the area of operation of the Petitioner, therefore, must be considered from other evidences which have been brought on record. PW/1 husband of the proprietor of the Petitioner concern Mrs. Sonia Gagneja, in his evidence not only stated that the parties had entered into agreement for supply of signals for the entire town of Sirsa and the surrounding villages but to the said effect, the Petitioner has also entered into agreement with Star Sony and Ten Sports.

27. Mr. Ganpathy himself has referred to the agreement with the TAJ Television which is at page 102 of the paper book, on a perusal whereof it appears that the Petitioner had been paying a sum of Rs.9,979.50p in respect of the following areas:-

“Any part of Sirsa Municipal limit with Village.”

28. The area of operation of a Sports channel which is a competitor of the Respondent although not decisive but may form one of the circumstances.

Mr. Malhotra in his evidence sated:-

“As on 23.2.2010, there might have been another MSO, namely, DEN existing in Sirsa Town, however, it had almost stopped operations. The entire Sirsa Town might

have been getting cable connection. This might be from DEN as well. DEN completely stopped working around March-April 2010. It might have happened that parts of Sirsa were not getting the signals of respondent company in 2010. I cannot say if the signals of the respondent company were available in most part of Sirsa and surrounding villages in 2010.”

29. It is difficult to concede as to how the Area Manager of the Respondent who had been visiting the town of Sirsa very often and more so when he had even met Mr. Prabodh Rattan more than hundred times would not know his exact area of operation. A Broadcaster would be interested in transmission of signals of the channels to a large area where the residents did not have the opportunity of watching a sports channel.

In a case of this nature, the Respondent could have shown that another MSO was re-transmitting signals in other areas. Moreover, the Petitioner, for whatever worth may be, has filed affidavits of four local cable operators, who categorically stated that they although were operating in different areas had been receiving signals from the Petitioner.

30. The trend of cross examination of the said witnesses was confined only as to how and at whose instances, they had come to

depose. According to the said witness, they had come before this Tribunal to depose at the instance of the President of the local cable operators. The President of the local cable operators, Mr. Ramesh Choudhary has himself been examined.

31. The evidence brought on record by the parties hereto clearly demonstrates that subscription amount payable by the Petitioner was Rs.80,078/-. Although down gradation has been sought for, the Petitioner, however, has not been able to prove the ground therefor.

PW1 in his cross examination stated :-

“Attention of the witness is drawn to para 9 of his affidavit.

On 30th April, I met Mr. Vishal Bhatia and requested him to check my connections, which according to me had gone down on account of DTH. Mr. Vishal Bhatia told me that I could start paying Rs.50,000/-. I also wrote a letter on the same date at Mr. Bhatia’s request that I should be given a reduction in the subscription fee. The date of the letter is 30th April, 2010. Mr. Vishal Bhatia has never represented to me that he owns ESPN but I associate ESPN with Mr. Vishal Bhatia. Mr. Atul Malhotra had also asked me to send payments to Mr. Bhatia, I did not find out from Mr. Bhatia as to whether he had or had not the authority to agree for any reduction in subscription fee. ESPN never assured any reduction in subscription fee nor any discussions took place on the subject. Mr. Bhatia

also has not given me any such reduction of subscription fee in writing.

Ques: How come despite receiving the invoices for Rs.80,078/-, payment has been made for Rs.50,000/-?

Ans: I paid the lesser amount based on the assurances of Mr. Bhatia and Mr. Malhotra to reduce the subscription fee. I requested them continuously as well as sent them letters complaining about the invoices.

I was informed by Mr. Atul Malhotra in November, 2010 that Mr. Vishal Bhatia was no longer the ESPN distributor and I was requested to pay the subscription fee directly to the ESPN, Gurgaon office. I paid the subscription fee of December, 2010 in the last week of November 2010. I paid a sum of Rs.50,000/- by cheque bearing No.36448 dated 30.11.2010 towards subscription fee for December, 2010 (page No.31 of Petition). I have been paying regularly every month Rs.50,000/- by cheque from the month of June, 2010 onwards. By a letter dated 21st December, 2010 I enclosed a cheque dated 15.1.2011 for the sum of Rs.80078/- and sent the same to Mr. Bibash of ESPN on the instruction of Mr. Atul. I have not checked up whether this cheque for the sum of Rs.80078/- has been encashed by ESPN. I will have to check this with my bank. The cheque No. is 36451 on the Sirsa Central Cooperative Bank Ltd. at page 43 of the petition. Court directed me to have a meeting with ESPN officers on 17.1.2011. I did not attend the meeting because I had back pain and I sent Mr. Rakesh Kumar, my nominee, alongwith a Medical Certificate. Mr. Rakesh Kumar asked the ESPN officers for a statement of account in the meeting. ESPN did not furnish the statement of account.

Mr. Vishal Bhatia did not ask from me any details about my connectivity and thus I did not furnish any details of my connectivity and connectivity of operators attached to my network.”

32. The said witness does not dispute that Mr. Malhotra had been sitting in the office of the distributor. He did not even enquire as to whether Mr. Vishal Bhatia had the authority to agree for reduction in the subscription fee.

Submission of Mr. Navin Chawla that as the Petitioner proceeded on the basis that as Mr. Vishal Bhatia negotiated with the Petitioner, he had the power to accept down gradation, but from the evidence of RW1, it would be evident that the negotiation was done both by Mr. Bhatia and also by Mr. Malhotra.

33. Only because the distributor of the broadcaster took part in the negotiation, the same would not mean that he had the authority to enter into an agreement. It is one thing to say that Mr. Vishal Bhatia had the authority to enter into the agreement on behalf of the Respondent but it is another thing to say that he had the authority only to take part in negotiations. Mr. Bhatia being the distributor, if so authorized, could have entered into an agreement with the Petitioner. For obvious reasons he did not. He is also not, even

according to the Petitioner, the confirming party to the agreement. Mr. Prabodh Rattan, in his evidence did not say that the agreement on which he had put his signatures was to be executed by Mr. Bhatia. Matter might have been different if according to him, the agreement which had executed was with Mr. Bhatia alone.

We, therefore, have no hesitation in rejecting the contention that Mr. Bhatia either in fact or in law could accept the offer of down gradation for the Petitioner's network.

34. It is possible that the Petitioner had broached the subject. It is also possible that Mr. Bhatia had given some assurance but the same indisputably was to be accepted by the Respondent.

As Mr. Prabodh Rattan had been meeting Mr. Atul Malhotra, there is absolutely no reason why he did not broach the subject with him.

There is absolutely no reason as to why no assurance in writing had been given.

35. There is another aspect of the matter. The Petitioner admittedly had been receiving invoices regularly and the invoices were being raised not by Mr. Bhatia but by the Respondent. He is said to have

protested so far as the invoices for the months of July, August, etc are concerned but again the letters were addressed to the distributor and not to the Respondent. Petitioner admittedly had been paying a sum of Rs.50,000/- per month from the month of June, 2010 onwards before seeking down gradation. Petitioner keeping in view the provisions contained in the second proviso appended to Clause 10.2 of the Regulations was bound to make out an exceptional case.

36. PW1 addressed on his reply to the notice dated 02.12.2010 to Mr. Atul Malhotra and not to Mr. Vishal Bhatia.

Although in the first para, he states that there was no outstanding but in the next paragraph, he starts the sentence with 'However'.

He had sent the cheque prior to 11.12.2010. He did not say that he did so under protest or without prejudice to the rights and contentions.

He paid the entire amount due to the Respondent without any demur. He also expressed his intention for renewal of the agreement with Mr. Atul Malhotra.

We, therefore, for the reasons aforementioned, are of the opinion that the Petitioner owed a sum of Rs.2,05,496/- to the Respondent.

37. Respondent in his notices under Clause 4.1 and the Public Notice under Clause 4.3 of the Regulations did not state that the Petitioner had been committing piracy. If piracy was one of the grounds for terminating the agreement, the same should have specifically been stated. This point was raised for the first time in its reply by the Respondent. Respondent also did not specifically say that the Petitioner had transgressed its area of operation; the same being confined to Subhash Chowk only. This issue is, therefore, decided in favour of the Petitioner and against the Respondent.

38. However, that would not mean that Respondent could have given effect to the Notice and Public Notice dated 02.12.2010, Petitioner rectified the defect by making payments of the entire sum. The network of the Petitioner could not have been disconnected for the alleged dues of subscription fee for the month of December, 2010. In absence of any term in the agreement, the subscription fee for the month of December, 2010 could have been paid within a reasonable time. It was not necessary for the Petitioner to pay the same by 11th December, 2010. Respondent does not show as to when the payment for the month of December, 2010 became due.

39. We would assume that there was some default on the part of the Petitioner in complying with the order of this Tribunal dated

10.01.2011. The remedy of the Respondent was to bring the same to our notice. This Tribunal could have passed appropriate orders with regard thereto.

This issue is answered in favour of the Petitioner and against the Respondent.

40. Submission of Mr. Ganpathy that this petition has become infructuous and should be dismissed as such is stated to be rejected. Various disputed question of fact arose between the parties. They have examined witnesses on their behalf.

One witness, viz, the distributor of the Respondent was also summoned but the same was not served for the long time.

The Tribunal referred the disputed signature of PW1 for comparison to the CFSL, New Delhi by an order dated 23.02.2011.

41. The report was received by this Tribunal after issuance of several reminders sometime in the month of December, 2011 as would appear from order sheet dated 09.12.2011. Copies thereof were served on the counsel for the parties so that objection thereto if any may be filed by them. However, as they did not file any objection, as it

would appear from the order sheet dated 19.12.2011, the matter was fixed for hearing on 11.01.2012.

For one reason or the other and as evidently this Tribunal was busy in some other matters, this petition could be heard only on 10.02.2012.

42. A court of law, there cannot be any doubt or dispute, has the power and jurisdiction to give relief to a party keeping in view the subsequent events as provided for in Order VII Rule 7 of the Code of Civil Procedure.

We may notice in this regard that the Supreme Court of India, in *Shikharchand Jain v. Digamber Jain Praband Karini Sabha*, reported in (1974) 1 SCC 675, has held as follows:-

“But it is open to a Court (including a court of appeal) to take notice of events which have happened after the institution of the suit and afford relief to the parties in the changed circumstances where it is shown that the relief claimed originally has (1) by reason of subsequent change of circumstances become inappropriate; or (2) where it is necessary to take notice of the changed circumstances in order to shorten the litigation; or (3) to do complete justice between the parties. (See Sai Charan Mandal v. Biswanath Mandal.6)”

43. A party to the lis only because there has been some delay in disposal of the petition for one reason or the other can not become remediless. It's constitutional right to have access to justice would not be frustrated only because of delay. In any event delay in disposal of a matter assuming there is a fault on the part of the court shall not prejudice a litigant.

This petition in our opinion has, thus, not become infructuous.

44. Mr. Ganpathy submits that Mr. Prabodh Rattan was not a competent witness being a GPF holder of the proprietor of the Petitioner's concern.

45. In this case, Mr. Prabodh Rattan, the husband of the proprietress has been looking after the business of the Petitioners concern. It is he who not only had signed the agreement, but also had taken part in the negotiations. He had been looking after the business.

46. Respondent's representative, Mr. Atul Malhotra and also its distributor Mr. Bhatia had been interacting with him only. It was Mr.

Prabodh Rattan and not the proprietress of the Petitioner concern who interacted and exchanged letters with the Respondent and its Distributor.

Mr. Malhotra does not say that he had ever interacted with the Proprietress of the Petitioner concern. PWI examined himself having personal knowledge of the material facts which are required to be proved in this petition.

He, therefore, in our conceded opinion, could have examined himself and he has not appeared only as a general power of attorney holder to depose.

47. Mr. Ganpathy urged that the Respondent may be permitted to disconnect the signals of the Petitioner immediately.

We are surprised that such a prayer has been made. An Interim Order had been continuing from 11.01.2011.

We do not find any reason to discontinue the same immediately after hearing the counsel for the parties.

48. The only question which survives is as to whether to what relief the Petitioner is entitled to?

Admittedly the agreement between the parties expired in 2011; (15th Jan, 2011 according to the Petitioner but 22nd/28th February 2011, according to the Respondent).

49. Petitioner in its letter dated 11.12.2010 clearly expressed its intention to commence negotiations for renewal of the agreement.

For one reason or the other hand, particularly, in view of the conduct of the Respondent in disconnecting supply of signals to the Petitioner's network arbitrarily, the negotiations did not take place. The Regulations provide for continuation of the terms of the contract for a period of three months from the date of expiry of the agreement. All the terms of the contract, therefore, continued till May, 2011.

The second proviso appended to Clause 8.1 of the Regulations provides for continuation of the commercial terms till the network is disconnected by taking recourse to the manner as provided for under Clause 4.3 of the Regulations.

50. In this case, an order of injunction was passed by this Tribunal. We, therefore, are of the opinion that the parties must meet within one

week from date for holding negotiations. Petitioner shall visit the office of Respondent at Gurgaon with all his papers and documents including current SLR. He may also show and /or supply the terms and conditions of the agreements entered into with other Broadcasters.

We are not oblivious of the fact that for the purpose of renewal of the agreement, area of operation plays an important role.

Such negotiations should be completed within a period of six weeks thereafter, if not earlier.

In terms of Clause 8.1, the commercial terms may be given a retrospective effect. The parties may negotiate keeping the same in view. The Petitioner shall, however, continue to pay the subscription fees unless otherwise agreed by and between the parties @ Rs.80,078/- per month.

51. We hope and trust that the Respondent as a responsible company and keeping in view its statutory obligations as envisaged under the Regulations would enter into negotiations with the authorized representatives of the Petitioner in a fair and reasonable manner.

This petition is disposed of with the aforementioned observations and directions. The parties in the facts and circumstances of the case shall pay and bear their own costs.

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(S.B. Sinha)
Chairperson

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(P.K. Rastogi)
Member

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