

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL  
NEW DELHI**

**Dated 4<sup>th</sup> March 2015**

**Petition No. 226(C) of 2011**

(with M.A.No.45 of 2013)

Muthoot Broadcasting Pvt. Ltd.

...Petitioner

Vs.

Union of India & Ors.

...Respondents

**BEFORE:**

**HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON**

**HON'BLE MR. KULDIP SINGH, MEMBER**

For Petitioner

: Mr. Tejveer Singh Bhatia, Advocate  
Mr. Upender Thakur, Advocate  
For Singh & Singh Law Firm LLP

For Respondent Nos. 1, 2, 4 & 5

: Mr. Rajeev Sharma, Advocate  
Ms. Radhalakshmi R., Advocate

**JUDGMENT**

**Kuldip Singh:**

The dispute in the present petition is with regard to the rentals charged by respondent no. 2 for the land licensed to the petitioner for Common Transmission Infrastructure (CTI) at Avadi, Chennai. The petitioner has also sought adjustments for the past periods during which the payments have already been made including the payments

made twice over.<sup>1</sup>

### **Facts of the Case**

2. The petitioner, M/s Muthoot Broadcasting Pvt. Ltd.(MBPL) is a company registered under the Companies Act, 1956 and is a part and parcel of a group of companies known as "Muthoot Group". The predecessor-in-interest of the petitioner is another incorporated company known as Muthoot Finance Limited (MFL)(hereinafter also referred to as "the licensee"), who had participated in the phase –II of auctions of FM License, which was conducted by respondent no. 1, Ministry of Information and Broadcasting, Union of India.

3. The licensee was successful in Chennai city FM tender and was accordingly, allotted spectrum in the band 104.8 MHz. It entered into a Grant of Permission Agreement (GOPA) with respondent no. 1 to operate a FM station in Chennai on 5.1.2007. It then set up an FM radio station in the City of Chennai popularly known as "Chennai Live @ 104.8 FM.

4. Subsequently, Muthoot Finance Limited ("the licensee") demerged the FM business from its portfolio and handed over the

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<sup>1</sup> Amendments made in the petition vide M.A. no. 219 allowed by the Tribunal vide order dated 25<sup>th</sup> August, 2011.

same to the petitioner company namely, M/s Muthoot Broadcasting Pvt. Ltd.(MBPL) in terms of the judgment of Hon'ble High Court of Kerala dated 9.4.2010 in C.P. No. 5 of 2010.

5. Content / programs, which are to be broadcast on FM channels, are produced in studios and then carried to a transmitter where they are suitably modulated on particular frequencies assigned to the channels using a technique called Frequency Modulation (hence the name, FM broadcast). The transmitter consists of electrical equipment which is normally maintained in climate controlled conditions. The output of this transmitter is taken by means of cable to a transmission tower from where the same is broadcast.

6. In terms of the tender document of respondent no. 1 for FM Radio Broadcasting phase II through private agencies, it was mandatory for all Phase II operators to co-locate the transmission facilities in all the 91 cities with that of respondent no.2. While in 84 cities these were to be collocated with existing AIR/DD<sup>2</sup> towers, in 7 cities, new towers were to be constructed by the Ministry (Respondent no. 1) through Respondent no. 3, M/s Broadcasting Engineering Consultants India Ltd. (BECIL), which is a public sector enterprise

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<sup>2</sup> All India Radio/ Doordarshan

established by respondent no. 1. BECIL (Respondent no. 3) was also to act as system integrator for providing the common transmission infrastructure (CTI).

7. In 7 cities, that included Chennai, where new towers were required to be constructed, the successful bidders were permitted to operationalize their channels on individual basis for a period of two years or till co-location facility was commissioned, whichever was later, at the end of which they were required to shift their operations to the new facilities. The relevant clauses of the tender are as under:

*3.11.1. It has been made mandatory for all phase – II operators to co-locate transmission facilities in all the 91 cities, on terms and conditions to be prescribed separately. In 84 cities, the facilities would be co-located on existing AIR/ DD towers, while in remaining 7 cities, new towers shall be constructed by the Ministry, through Broadcast Engineering Consultants India Limited ("BECIL"), for the purpose. The details of cities where AIR / DD towers would be utilized for co-location as well as where new towers will be constructed are available at schedule I hereto.*

*3.11.2 Pending creation of co-location facilities by BECIL, in due course, the successful bidders in these 7 cities will be permitted to operationalise their channels on individual basis for a period of two years or till co-location facility is commissioned, whichever is later, at the end of which they shall shift their operations to the new facilities. Permission to run its individual channel will be granted to each successful bidder only after it has entered into an agreement with BECIL and made full payments towards its share in the common infrastructure. In the case of Mumbai, even the existing operators shall be permitted to migrate to phase 2 only after they have entered into*

*agreements with BECIL and made the required payments towards their share in the common infrastructure for co-location.*

8. As per the grant of permission agreement (GOPA) entered into between the petitioner and respondent no. 1 on 5.1.2007, the petitioner was required to operationalize the channel within a period of one year from the date of execution of the same. Further, it was reiterated that where new towers were erected through BECIL, the radio channels could be operationalized on individual basis for a period of two years or till co-location facility was commissioned after which the operations were required to be shifted to the new facilities. The relevant clauses of this agreement are as under:

*"5.1 The Permission Holder shall be liable to operationalise the channel, after installation of the Common Transmission Infrastructure through M/s Broadcast Engineers Consultants India Limited (BECIL), and other broadcast facilities including studio, transmitter program link etc. obtaining of Wireless Operational License and commissioning of the Applicable Systems, within a period of one year from the date of execution hereof.*

*5.2 The permission holder shall be solely responsible for the installation and operation of necessary equipment and systems as well as attending to claims and damages arising out of his operation. The permission holder shall own the transmitter including program links.*

*5.3 The permission holder having permission to establish and operate a FM radio channel in a city, where new tower is to be erected through BECIL, can*

*operationalise its channel on individual basis for a period of two years or till the co-location facility is commissioned., whichever is later, at the end of which it shall shift its operations to the new facility.”*

9. On 16.03.2006, an agreement was made between M/s Muthoot Finance Limited, predecessor of the petitioner, and Prasar Bharti (Respondent no. 2) to co-locate the transmission facilities with existing infrastructure of respondent no. 2. Clause 3 of the agreement provided for consideration for the use of infrastructure facilities of respondent no. 2 as under :

### **3.0 CONSIDERATION**

*3.1 The Licensee shall pay annual License Fee in advance and for the first year at the time of signing of this agreement to the Licensor for the use of the licensed Infrastructure as per details given below:*

<i>S.No</i>	<i>Licensed Infrastructure</i>	<i>Rate@</i>	<i>Quantity</i>	<i>License Fee @ Per Annum</i>
<i>A</i>	<i>Tower</i>	<i>Rs. Lacs per annum</i>	<i>ONE</i>	<i>Rs. NIL</i>
<i>B</i>	<i>Open Space</i>	<i>Rs.6,400/- per sq.mt. per annum</i>	<i>220 Sq.mtr * (As per layout plan submitted by BECIL)</i>	<i>Rs.14.08 lakhs **</i>
<i>C</i>	<i>Covered Space #</i>	<i>Rs.7,600/- per sq.mt. per annum</i>	<i>Sq.mtr * (As per layout plan submitted by BECIL)</i>	<i>Rs. NIL **</i>

D	Common facilities	Rs.1.00 lakh per annum	LS	Rs. 1.00 lakh
E	Antenna#	Rs. ___ lakh per annum	ONE SET	Rs. NIL
F	Taxes (if applicable)	@--- %		Rs. NIL
	Total (A+B+C+D+E+F)			Rs. 15.08 lakh

*(# Strikeout whichever is not applicable)*

*\* This includes common area on shared basis among the Private Broadcaster.*

*\*\* The license Fee/ Security deposit is subject to change and balance license Fee/ Security deposits shall be payable/ refundable as per the final measurements, which shall be determined/ measured jointly by M/s BECIL and AIR/DDK authorities after completion of Installation.*

*@ Licence Fee in respect of S.No. A, B and C is in accordance with the rates prescribed/ approved by Prasar Bharti/ Government for different categories of cities.(to be notified separately)*

*Note : The license shall also pay taxes whenever applicable from time to time.*

*3.2 The annual license fee shall be increased by :*

- a) 10% after every two years for open/covered space and common facilities*
- b) 2.5% after every year for tower*

*3.3 For the purposes of effectiveness of the payment under this agreement, the first year shall be deemed to commence from the date the Tower aperture and Open space/ Covered space respectively, is made available to the Licensee or BECIL on behalf of the Licensee.*

*3.4 Subsequent payment of license fee (with specified*

*increment) will become due every year after completion of twelve months as advance rental for the next year. The payments for which will be made within 15 days of becoming due falling which interest is chargeable @ prevailing SBI PLR + 2 % per annum.*

*3.5 All payment shall be made in favour of "Prasar Bharti, New Delhi" through a Demand Draft drawn on a scheduled Bank payable at par at N. Delhi.*

10. As the tower at permanent location in Chennai was not ready, on 15.5.2006, the petitioner wrote a letter to respondent no. 2 requesting it to co-locate its transmission facility with existing infrastructure of respondent no. 2 in terms of clause 3.11.2 of the tender document till creation of permanent set up. This request was accepted by respondent no. 2 vide letter dated 16.6.2006 subject to payment of rentals as under :

<i>"Category</i>	<i>Annual tower rentals (including maintenance charges ) Licensed Infrastructure</i>	<i>Annual lease charges for open space</i>	<i>Annual lease charges for covered space</i>
<i>A+</i>	<i>Rs. 13.20 lacs</i>	<i>Rs. 6400 per sq. mtr</i>	<i>Rs. 7600 per sq. mtr."</i>

11. On 1.6.2007, a license agreement was executed between the petitioner and respondent no. 2 for establishing interim set up. As per the agreement, the licensee was required to pay license fee as given in clause 2.1 of the same. Further, for the purpose of effectiveness of

the payment under this agreement, the first year was to commence from date of execution of the same. Clause 2.3 of this agreement reads as under :

*2.3 For the purpose of effectiveness of the payment under this agreement, the first year shall be deemed to commence from date of execution of this agreement which will also be the deemed date of handing over of the licensed infrastructure to the licensee.*

12. On 1.6.2009, a completion certificate was issued by BECIL (Respondent no. 3) stating that the CTI at Chennai has been successfully commissioned into regular service w.e.f. 2.2.2009. On 16.11.2009, the petitioner wrote to respondent no. 2 stating that it has shifted the interim set up to the CTI Avadi on 2.2.2009. It was also stated that it had shifted all the materials from interim location to CTI on the same date except Antena and Cable, which were vacated on 23.06.2009.

### **Issue of Jurisdiction**

13. It is the contention of respondent no. 2 that in so far as the dispute between the petitioner and it is concerned, it is more in the nature of a Lessor-Lessee dispute which does not fall within the jurisdiction of this Tribunal. The issue of jurisdiction is also raised by

respondent no. 3 on the ground that it is neither a licensee nor a service provider under the TRAI Act.

We are unable to agree with this contention of the respondents. The petitioner had not taken the land infrastructure of respondent no.2 on its own volition but was mandated by the terms of the tender to collocate its transmission facilities with infrastructure of respondent no.2 who incidentally is also a service provider as per the TRAI Act. The collocated service was to be used for broadcasting FM signals, which is a telecom service, and respondent no. 2, as a service provider and broadcaster, had a role in the same.

The matter was considered at some length by the Tribunal in its order dated 21 April, 2011 in the matter of Clear Media (India) Pvt. Ltd. Vs. Prasar Bharti and Anr.<sup>3</sup> The Tribunal in that case observed as under:

It is not a case where the parties entered into an agreement of tenancy on their own volition. The petitioner was forced to enter into the agreement as a pre-condition of tender documents.

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Section 14 (A) of the Act clearly provides that the Central Government would be the licensor. It may also be a service provider. In a situation of this nature, particularly, having regard to the fact that the petitioner was forced to enter into

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<sup>3</sup> Petition No. 174( C) of 2010.

agreements in terms of the tender documents with Prasar Bharti and respondent no.2, we are of the opinion that Tribunal has the requisite jurisdiction to determine the issues between the parties.

### **Issue of rental**

14. As per the petitioner, it was unilaterally decided by respondent no. 2 prior to GOPA that a ground rental of Rs. 6,400/- per sq. meter would be charged in A+ cities. It is the contention of the petitioner that this ground rental charged on the petitioner by way of license fee was essentially a unilateral and arbitrary decision that does not have any nexus with the ground realities as pertaining to any of the cities or the sites in which the towers were to be put up. This rate was fixed taking into consideration the price of the commercial space prevalent in Delhi and Mumbai where the decisions were taken but the rentals in Chennai are much lower than that in Delhi or Mumbai. The price fixed by respondent nos. 1 and 2 has resulted in perverse and lop-sided situation where the fair price of purchasing land in Avadi, where the CTI is located in Chennai, was only Rs. 4310/- per sqm. till 2010 as fixed by Government of Tamil Nadu.

15. Mr. Tejveer Singh Bhatia, learned counsel appearing for the petitioner submitted that the petitioner was not aware of the rates at

the time of submission of bid and further, it was not in a position to bargain as it was mandatory for it to collocate its transmission facility with the CTI at the site of respondent no. 2.

As per the petitioner, it was coerced and subjected to undue influence when it entered into the agreement with respondent no. 2 and it continues to do so even at this point of time. As the petitioner had been constrained to comply with the arbitrary and unfair terms of the same, to that extent the agreement is void in law and is liable to be held as such.

16. As per the petitioner, the site provided to it was non-compliant with the requirements of GOPA. The location of CTI at Avadi being 26 Kms from Chennai was resulting in huge transmission loss affecting quality and consequent financial loss. It raised the issue of poor coverage at Chennai as well as the rental being excessive in its letter dated 26.2.2010 addressed to respondent no. 2. In this regard, our attention was drawn to the minutes of a meetings held on 25.3.2010 between the representatives of the petitioner and respondent no. 2.

17. Ld. Counsel for the petitioner also referred to a communication from the office of the Chief Engineer (Buildings), PWD (page 56 to 71 of the paper book) and submitted that as per this communication, the

plinth area rates for the purpose of arriving at the valuation of buildings for rental calculation as well as for collection of stamp duty by the registration department during the year 2010-11 were much lower than the amount of rental charged by respondent no. 2.

18. Mr. Rajeev Sharma, Ld. Counsel appearing on behalf of respondents no. 1, 2 and 4, submitted that the agreement for payment of license fee was arrived at on 16.3.2006 and it is after five years that the petitioner has raised the issue of license fee being unreasonable and arbitrary. He further submitted that the petitioner has paid the license fee without demur upto the period 8.11.2009. We, however, note that the agreement is for a term of 10 years and the rentals are being paid on an ongoing basis.

19. It is the contention of respondent no. 2 that the petitioner was aware of the rate at which it had to make payment for utilizing its land prior to submission of its bid and after having submitted the same, is now estopped from challenging this rate. Further, the same rate was accepted by the petitioner for the interim set up at the same premises where the regular setup is located.

20. We may note that the tender document was put on the web site [www.mib.nic.in](http://www.mib.nic.in) and the same was to be used for giving various information including draft of agreement with respondents 2 and 3. Bidders were advised to visit the site as frequently as possible. Clause 1.14 of the tender document in this regard is as under:

#### 1.14 WEB SITE

1.14.1 The Government of India has also put this Tender document on its web site [www.mib.nic.in](http://www.mib.nic.in) and will use this web site as the principal means of giving general clarifications, if any, or intimation about the changes, if any, in the Tender conditions or bidding process etc. Similarly, all relevant documents such as the draft LOI/GOPA/Agreement with Prasar Bharti/BECIL, various Formats and Appendices etc. will be posted on this web site from time to time. All prospective applicants and QIPs are, therefore, strongly advised to visit the website as frequently as possible to remain fully apprised of the latest developments in respect of the implementation of FM Radio Broadcasting Phase II Policy.

Last date for submission of GOPA application was 6.1.2006. Mr. Sharma submitted that the rates for tower rentals and lease charges for land were notified on the web site on 5.1.2006. This is, however, contested by Mr. Bhatia.

21. In the reply filed by respondent no. 1, UOI, it is categorically stated that the rates to be charged were notified by it and uploaded on its website on 5.1.2006. We also note from a computer printout (page 118 of paper book) that the rates for category A+ cities are mentioned as Rs. 6400 for open space. As per another printout at page 119, the above PDF was created on 5.1.2006 at 3:24:02 pm. Mr. Bhatia referred to a letter from respondent no.1 to respondent no.2 (page 40 of M.A. folder) and submitted that on the margin of the letter, it is marked for needful action on 9.1.2006. We, however, note that though respondent no.2 might have taken action on the same later, the letter itself is dated 5.1.2006. We may note from the evidence tendered by the petitioner's witness 1 that they were aware of the need to check the website of respondent no.1. The petitioner's witness states in para 5 of its affidavit " .....However, as a matter of precaution we did revise the notices up-loaded by the 1<sup>st</sup> Respondent on its website even on the morning of 05.1.2006, but the rental rates were not seen by us. Even though Respondent no. 1 states that the land rental rates were uploaded on 05.1.2006, we were not at any time informed of the same at the time of submission of bids for GOPA....." However, during cross-examination, the P.W. states that the web site was seen one week prior to the bid.

Q.9 On which date did Mr. Sunil Kumar access the website of M/O I&B?

A. One week prior to final bid and also the week after. He was also checking the website for months before the final bid.

22. With regard to the contention of the petitioner that the rental charges were arbitrary and excessive, Mr. Sharma submitted that the rental charged for open space in Phase 1 was Rs. 8000 for A+ cities and the same was proposed by respondent no.2 vide letter dated 28.12.2005 , a copy of which is at page 198 of paper book. Respondent No.1 , however, reduced the same to Rs. 6400 which was a considered decision.

Mr. B.S. Rawat, who submitted evidence by way of affidavit on behalf of respondent no.1, confirmed the above averment of respondent no.2. He also stated that NIC cell, which was maintaining the website of respondent no.1, confirmed that the necessary updation of rates on the website has been done on 5.1.2006. The statement of the witness is as under:

That one of the matters considered in the Ministry of Information & Broadcasting prior to the bidding for FM licences was the rates to be charged by Prasar Bharti for the licensing of its towers/ open land to FM Lincesees. As soon as the phase II FM Radio Policy was notified, Prasar Bharti was requested to intimate the

latest rates of land and towers for various locations. Prasar Bharti had communicated the rental rates for open space which were as under :

Category	Rates
A+	Rs. 8,000
A	Rs. 6,500
B	Rs. 5,000
C	Rs.2,800
D	Rs. 2,100

**The rates proposed by Prasar Bharti were considered in the Ministry of Information and Broadcasting and it was proposed that there should be a 20% deduction in the rates for category A+ and A, and 40% deduction for category B,C & D.** This was done keeping in view the overall policy objective in mind, which was to facilitate expansion of FM Radio Network. This proposal was ultimately approved on 4.1.2006 by the competent authority i.e. the Secretary, Ministry of Information and Broadcasting, who also directed that the rates be put on the website. The rates thus approved were as under :

Category	Rates
A+	Rs. 6,400
A	Rs. 5,200
B	Rs. 3,000
C	Rs.1,680
D	Rs. 1,260

**In view of the approval granted by the Secretary, Ministry of Information and Broadcasting as contained in his note dated 4.1.2006, by my note dated 5.1.2006 I had requested the NIC cell, which was maintaining the website [www.mib.nic.in](http://www.mib.nic.in) to upload the rates on the website immediately. The NIC cell under the signature of Mr. Pawan, Senior System Analyst (SSA) vide its note**

**dated 5.1.2006 confirmed to the Ministry of Information and Broadcasting that the necessary updation had been done in the Ministry's website.** The note dated 5.1.2006 sent by me to NIC Cell is Exhibit RW 1/2. The said note bears my signature. The said Exhibit also carries the note dated 5.1.2006 of Mr. Pawan, SSA, NIC Cell (Emphasis supplied).

23. From the foregoing, we are convinced that the rates for rental were fixed after due consideration. Further, the petitioner was not only advised to check the website of respondent no.1 but was also aware of the need to do so. We find that the rates were duly notified on the website on 5.1.2006 and it was for the petitioner to check the same before bidding on 6.1.2006.

### **Issue of area**

24. As per the petitioner, the area of open space of 220 sq. meter is excessive and not required for the facilities deployed. Our attention is drawn to examination in chief of Mr. S. Athiyaman, who is a practicing chartered engineer and approved valuer at Chennai. He appeared as the petitioner's witness no. 3. The witness confirmed that he was asked to measure two sites and identified the documents filed at pages 25 and 30 of the evidence folder as well as his signatures on these. The documents were marked as Ex. PW-3/1 and Ex. PW-3/2. The

witness confirmed that the measurements shown on these exhibits are in conformity with the respective sites and buildings. As per the witness, the CTI fencing area was 728.72 sq. mtrs. When asked about the HTA substation, the witness admitted that he did not know about it but one transformer was located outside the fencing area. He further admitted that he did not count the number of earth pits and length of power and RF cables as well as the water supply lines. The relevant part of the cross examination is as under:

Q.27: How many generators were located within the CTI setup?

A: I do not know. I only measured the boundary.

Q.28: Did you measure the sub station area?

A: No. I measured the transformer area.

Q.29: Did you measure the CTI fencing area?

A: Yes.

Q.30: How much was the CTI fencing area?

A: 728.72 sq. mtrs.

Q.31: Is it correct that the HTA sub station is located outside the fenced area?

A: I do not know the HTA sub station but one transformer is outside the fencing area and I measured it.

Q.32: Is it correct that there are generators outside the fencing area?

A: No.

Q.33: Are you suggesting that there are no generators outside the fencing area?

A: Generator is within the fencing area.

Q.34: Did you count the number of earth pits?

A: No.

Q.35: Did you measure the length of power cables and RF cables?

A: No.

Q.36: Did you measure the area occupied by the water supply lines and the bourwills?

A: No.

Q.37: Did you measure the area between the fenced area and the constructed portion?

A: Yes.

Q.38: How much is that?

A: For CTI building front side 4.19 meter, right side 2.13 meter, rear side 3.16 meter and left side 9.14 meter from the boundary to the CTI building.

Q.39: Is it correct that a number of earth pits are located in the area referred by you in answer to question no. 38?

A: May be, I did not notice.

Q.40: At what time did you visit the CTI area?

A: I did not notice but it may be approx. 12 pm.

Q.41: At what time did you visit the Interim Setup?

A: I cannot remember.

Q.42: Are you aware of the extent of area licensed to the petitioner by AIR for the Interim Setup?

A: No.

Q.43: Are you aware as to how much area was occupied by the petitioner for the Interim Setup before it vacated that portion?

A: No.

25. As per the reply filed by respondent no.2, a tentative space of about 220 sq.m. has been earmarked for each broadcaster by BECIL, respondent no.3. In addition to 10 sq.m. used for FM transmitter and UPS, space is required for HT pole transformer, HT sub-station, DG set, water supply, pantry, toilet, monitoring cum reception room, combiner room, etc. As per respondent no. 3, the final payment of ground rent was to be adjusted by respondent no.2 as per actual measurement.

We note from the evidence tendered by way of affidavit by P. Selvakumaran, who was posted as Junior Engineer (Civil) at AIR, Avadi since April, 2007, that a joint inspection of the CTI area at Avadi was carried out by the officials of respondent no. 2 in the presence of BECIL and FM Licensees to measure the area of the CTI. A site plan and report bearing the signatures of the witness were identified by the witness and marked as RW 2/1. As per this report, the total open space area is 780.10 sq.m. Admittedly, this is to be divided between six licensees. The area of each, therefor, is 130.03 sq,m. We further

note from the report that additional areas of 7.35 sq.m. is being used by the petitioner. We find that in the invoice dated 3/10/2012, respondent no. 2 has revised the area of open space as 137.35 sq.m. (page 59 of M.A. folder). We further note that vide letter dated 12.12.2011 (page 58 of M.A. folder), an amount of Rs. 20,34,274 has been refunded to the petitioner. Therefore, nothing survives in this issue.

### **Issue of double payment**

26. It is the contention of the petitioner that it has been charged twice over by respondent no. 2 for the same period both under the agreement dated 16.3.2006 for permanent set up, and agreement dated 1.6.2007 for the interim set up. Though, it was utilizing only one set up at a time, respondent no.2 raised invoices under both the agreements. Details of these invoices are given at page 8 of the M.A. folder and are as under:

Annual Invoice	Invoices for Interim set up
9.11.07 to 8.11.08- Rs. 16,94,389/- [Page 79-Invoice dated 18.10.07]	1.6.08 to 31.8.08- Rs. 4 lakhs approx (For Open Space + common facilities) [Page 80-

	Invoice dated 16.5.08]
9.11.08 to 8.11.09- Rs. 18,63,828/- [Page 84- Invoice dated 15.10.08]	1.9.08 to 30.11.08 – Rs. 4.5 lakhs approx. (For Open Space + common facilities) [Page 81- Invoice dated 15.9.08]
9.11.09 to 8.11.10- Rs. 18,29,657/- [Invoice dated 16.10.09]	1.12.08 to 31.5.09 – Rs. 8.5 lakhs approx. (For Open Space + common facilities) [Page 86- Invoice dated 16.12.08]
9.11.10 to 8.11.11- Rs. 20,12,622/- [Invoice dated 29.10.10]	1.6.09 to 23.6.09 – Rs. 1.2 lakhs (For Open Space + common facilities) [Page 93- Invoice dated 29.10.09]

27. We note from the above table that for the period from 1.6.2008 to 23.6.2009, petitioner has been invoiced for the interim set up. During this period, petitioner has also been invoiced for the permanent

set up. We further note that though the petitioner has been charged for the permanent set up with effect from 9.11.2007, as per the letter of respondent no. 3 dated 1.6.2009, the CTI at the same was completed only on 2.2.2009 (Exhibit PW1/6). We also note from the evidence by way of affidavit of Mr. George M. George, witness for the petitioner, that the petitioner started operations at the CTI by 2.2.2009.

28. We may note that in the case of Clear Media (India) Pvt. Ltd. Vs. Prasar Bharti and Anr.,<sup>4</sup> the facts were similar as in the present case. The petitioner therein had, inter-alia, prayed for a direction that its obligation to pay rent for the CTI open/covered licensed infrastructure may commence from the date of commencement of FM broadcast from the CTI facility. While examining the construction of the contract between the parties in that case, the Tribunal had observed "It must be noticed that this is one of the cases where there was no element of negotiation between the parties at all. The contract was imposed by the UOI on the petitioner. Entering into the said agreement was imperative for the petitioner to obtain a GOPA. Compliance of the terms and conditions of the agreement entered into by and between the petitioner, on the one hand, and the respondents, on the other, was imperative so as to enable it to carry on its broadcasting

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<sup>4</sup> Petition No. 174( C) of 2010, Judgment delivered on 21 April, 2011.

operations, or otherwise it could have been served with a termination notice from the UOI which it could ill afford." While allowing the petition against Prasar Bharti (respondent no. 1 in that case), the Tribunal further observed as under:

We have noticed heretofore that all the agreements were inter linked. They were entered into for the purpose of achieving broadcasting of FM radios on an integrated basis. BECIL was appointed not only as a contractor pure and simple for construction of the tower in seven cities but also as a system integrator. Prasar Bharti another public sector undertaking had also a very important role to play. It was not only interested in providing the basic infrastructure at initial stage but also continued to contribute to the achievement of the ultimate objective of the parties hereto. It is with the aforementioned purpose, the intention of the parties for entering into the agreements in question should be kept in mind.

The disputed clause, namely, Clause 3.3 is required to be construed on its own terms. It deals with a particular subject i.e. the date from which the payment under the agreement for the 1<sup>st</sup> year shall become effective. A legal fiction had to be raised. It is not a case where a landlord or a licensor becomes entitled to the rent and/or license fee for grant of lease/ license in respect of 'land' on and from the date it ceases to use the same for itself. The annual license fee although had been provided for in clause 3.1 but the same was to be increased. The annual license fee was to be increased by 2.5% every year for the tower. It is on the aforementioned premise the importance of the 'tower aperture' so as to enable the broadcaster to use the same must be taken into consideration.

The matter might have been different if the lease was for a tenure of only 10 years. In all the agreements referred to by us heretofore, the 10 years' term begins from its operationalisation. It is, thus, evident that the payment of rent

would start from a point of time when the 1<sup>st</sup> year of operationalisation of tower begins.

It is now a well-settled principle of law that the legal fiction must be given its full effect.

29. Mr. Sharma submitted that the petitioner has not asked for this relief of charging the rent from the date of operationalization in its pleadings and, therefore, may not be granted this relief. We, however, find that in the amended pleadings, the petitioner has sought adjustments for rents paid twice over for interim and final set up and this was also framed as one of the issues by the Tribunal. Though, rent for interim set up has been charged from 1.6.2008, in view of the Tribunal judgment in Clear Media, we do not see any reason why the petitioner should be asked to pay rent for the permanent set up for the period from 9.11.2007, from when it has been invoiced, to 2.2.2009, the date when the site was successfully commissioned.

30. It was submitted on behalf of the petitioner that though, the open space at interim set up was vacated on 2.2.2009 and the Tower on 23.6.2009, it has been wrongly charged for both at the interim set up till 23.6.2009. Mr. Sharma, however, submitted that the equipment and cables of the petitioner was lying at the interim set up and even the open space was not fully vacated.

We find that open space and tower are linked facilities and part of the licensed infrastructure whose purpose is the transmission of FM signals. They cannot be viewed in isolation and, therefore, the petitioner is liable to pay rent for the interim set up till the same is completely vacated on 23.6.2009.

31. In view of the foregoing, we find that the petitioner is entitled to an adjustment for the rent paid by it for the regular set up from 9.11.2007 till 2.2.2009. Respondent no. 2, Prasar Bharti, is accordingly directed to adjust this amount against the rent payable by it. The petition is allowed to this extent with no order as to costs.

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**(Aftab Alam)**  
**Chairperson**

.....  
**(Kuldip Singh)**  
**Member**

/NC/