TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 13th April 2023

Broadcasting Petition No. 652 of 2016

Prasar Bharati (Broadcasting Corporation of India) ...PETITIONER

Versus

M/s Chinnar Circuit Ltd. ….RESPONDENT

BEFORE:

HON'BLE MR. JUSTICE RAM KRISHNA GAUTAM, MEMBER

For Petitioner : Ms. Shruti Sharma, Advocate

For Respondent : Mr. Angad Singh Dugal, Advocate
Mr. Ankush Bhardwaj, Advocate

JUDGMENT

1. This petition, under Section 14 of TRAI Act, has been filed by Prasar Bharati (Broadcasting Corporation of India), Petitioner against M/s Chinnar Circuit Ltd., Respondent, with a prayer to declare that the use and possession of Respondent of the licensed infrastructure at Siliguri is unauthorized, illegal and contrary to license agreement, dated 30.03.2006,

with a mandate to Respondent to vacate, by removing its equipment therefrom, instantly, and for awarding the damages, at the rate of five times of the license fee, @ Rs. 13,06,610/-, for the period 25.06.2012 to 31.08.2016, amounting to Rs. 52,81,588/-.

2. In brief, the Petition contends that Prasar Bharati is a statutory corporation, established under the Prasar Bharati (Broadcasting Corporation of India) Act, 1990, and General Manager (Commercial) is filing this Petition for and on behalf of Petitioner. Petitioner is a Public Service Broadcaster in India having its Broadcasting Network for running Doordarshan and All India Radio Networks in the country. It is a Licensor in terms of Section 2(e) of the TRAI Act.

Respondent, a Company incorporated under the Companies Act, 1956, with its registered office at 522, Tobacco House, 1, Old Court House Corner, Kolkata- 700001, is engaged in the Broadcasting business. Government of India had invited a bid for auction of FM Radio Transmission slots, in the year 2005 in respect of various cities, wherein, Respondent was a successful bidder for Siliguri and Gangtok.

An agreement, in form of Grant of Permission Agreement (GOPA), with each entity to which it granted FM License in respect of each station,

had been executed by Government of India, for Siliguri. A Grant of Permission Agreement dated 25th October 2006, was executed with Respondent, which is **Annexure P-2** to Petition. As per terms, successful bidder would have to set up Transmission facilities on Land as well as Tower, to be provided by the Petitioner. Pursuant thereto, and for that purpose, an agreement dated 30.03.2006 was executed, in between, for Licensed Infrastructure at Siliguri. This Licensed Infrastructure was located at the premises of the Petitioner, located at AIR, 2 Mile, Sevoke Road, Siliguri, West Bengal. This Licensed Infrastructure comprised of open space, provided by Petitioner, and Tower aperture. This agreement, dated 30.03.2006, is **Annexure P-3** to Petition. In terms of Agreement at Annexure P-3, Respondent was liable to pay a yearly license fee amounting Rs. 7,19,200/- per year to the Petitioner. In terms of clause 3.2 the License Fee was to be enhanced by 10% every two years for Open/Covered space and common facilities and by 2.5% every year for the Tower.

3. The Petitioner, vide letter dated 05.10.2010, raised an invoice for payment of license fee for the period 16.11.2010 to 15.11.2011, **Annexure-P-4**. A reminder of same was dated 03.02.2011 (**Annexure P-5)**. But it remained unpaid. A notice of termination, dated 10.03.2011, was sent to

Respondent, for making payment within 45 days or to face termination of agreement. In spite of service, there was no response. Again, a show cause notice dated 27.04.2011 was issued and ultimately, Petitioner terminated the Agreement dated 30.03.2006. Termination letter, dated 16.05.2011, is **Annexure P-8**. Subsequently, on 06.06.2011, the Respondent deposited an amount of Rs. 7,86,954/- towards license fee, for the period from 16.11.2010 to 15.11.2011, with a letter of request dated 21.09.2011, for revival of agreement, dated 30.03.2006. This was responded by Petitioner vide letter dated 11.11.2011 (**Annexure P-10)** and it was complied with by Respondent. But again arrear became due, hence, another letter, dated 06.06.2012, was sent to Respondent, mentioning the subsequent arrears of license fee. But as per agreement dated 30.03.2006, Government of India itself, terminated the main agreement w.e.f. 25.06.2012, which is **Annexure P-12** and in view of the agreement dated 30.03.2006, with the termination of GOPA, the agreement, in between, dated 30.03.2006, stood automatically terminated, by virtue of provisions of Clause 10.2 thereof.

4. By the termination of agreement, Respondent became liable to remove its equipment from the site, in terms of Clause 7.7. But it was not removed, compelling Respondent to make payment, as damages, quantified, at five times of the license fee/ annual rent per sq. meter, on pro-rata basis

@ Rs.13,06,610/- to the Petitioner, in terms of Clause 7.7 of the agreement. Outstanding amount, towards license fee, including delayed payment of interest, was Rs. 7,86,954/-. Since, the Respondent failed to remove its equipment, it became liable to pay damages quantified, at five times the annual rent per sq. meter on pro-rata basis @ Rs. 13,06,610/-. Repeated request was made, but equipments were not removed and site was not vacated. Hence, the damages accrued uptil 31.08.2016, amounted to Rs. 52,81,588/-. Hence, this Petition with above prayer.

5. Written statement was with preliminary objection, that Petition was not filed by a competent person. The Respondent was granted permission to establish, maintain and operate two FM Radio Stations at Gangtok and Siliguri, vide Grant of Permission Agreement (GOPA) dated 30.03.2006, resulting, an agreement executed, in between, with regard to infrastructure at these two locations. These two stations were made operative. But as these two radio stations don't attract much advertising revenue, resulting Respondent in miserable condition, because of severe commercial loss. Order of suspension of service was issued by the Petitioner and Ministry of Information and Broadcasting on 04.05.2011. Whereas, appropriate Bank Guarantees were sent by the Respondent, which were received by Ministry

of Information and Broadcasting, as well as Petitioner, on the same date, i.e. 04.05.2011. While Respondent continued to follow up with the Petitioner regarding the delay in payment of the requisite license fees, and bank guarantees, Respondent was forced to shut down the FM Radio Station, at Siliguri on 23.05.2011. Vide letter, Annexure R-2, a representation was made before Ministry of Information and Broadcasting and a payment in the tune of Rs. 23,40,000/- was made vide cheque dated 28.05.2012. But a Show Cause Notice was issued, in between, on 27.04.2012, which was replied. But, in compliance of direction of this Tribunal, dated 22.02.2017, the Respondent picked up its equipment, from the premises of the Petitioner. Respondent is not liable to pay any damages to the Petitioner. A prayer for its dismissal was made.

6. Replication/Rejoinder was filed by Petitioner with same reiteration of contents of Petition.

7. Court of Registrar of this Tribunal, recorded all evidences of both side. Written submissions by both sides were filed.

8. Heard arguments of learned Counsels for both side and gone through materials placed on record.

9. The Petition had been filed with a prayer to declare and hold that the use and possession of Respondent of the Licensed Infrastructure at Siliguri, is unauthorized, Illegal and contrary to License agreement dated 30.03.2006 with a direction to Respondent to forthwith remove its equipment therefrom. This fact was of no dispute, because on the basis of pleadings, it was very well admitted fact that by the termination of GOPA, by Union of India/ Government of India, the agreement, in between, stood automatically terminated, with effect from 25.06.2012 and as per undisputed agreement, dated 30.03.2006, in terms of Clause 7.7 thereof, the Respondent was to take away its equipment from the site and get the site vacated. But admittedly, this was not vacated, until the order of this Tribunal, on 22.02.2017. Hence, the written statement itself admits the vacation of site in compliance of order of Tribunal dated 22.02.2017. Hence, for all those period from 25.06.2012 to 22.02.2017, the site and the equipment licensed to be used by Respondent, was not vacated. Hence, for this it was unauthorized occupation, and finally, it was got vacated after order of this Tribunal. Hence, the first relief has become infructuous, because of the

admitted situation that unauthorized occupation and its vacation, is an undisputed fact.

10. The second relief, is with regard to payment of damages, in the tune of five times of the license fee @ Rs. 13,06,610/-. Now, this agreement is undisputed, and as per law laid down by Hon'ble Apex Court, this has been very well propounded by Hon'ble Apex Court in Roop Kumar vs. Mohan Thedani, (2003) 6 SCC 595, in its paragraphs 13 to 21. For correct perspective, Paras 13 to 21 are being reproduced here below –

> *"13. Section 91 relates to evidence of terms of contract, grants and other disposition of properties reduced to form of document. This section merely forbids proving the contents of a writing otherwise than by writing itself; it is covered by the ordinary rule of law of evidence, applicable not merely to solemn writings of the sort named but to others known some times as the "best evidence rule". It is in reality declaring a doctrine of the substantive law, namely, in the case of a written contract, that of all proceedings and contemporaneous oral expressions of the thing are merged in the writing or displaced by it. (See Thayer's Preliminary Law on Evidence p.397 and p.398; Phipson Evidence 7th Edn. P.546; Wigmore's Evidence p.2406.) It has been best described by Wigmore stating that the rule is in no sense a rule of evidence but a rule of substantive law. It does not exclude certain data because they are for one or another reason untrustworthy or*

undesirable means of evidencing some fact to be proved. It does not concern a probative mental process - the process of believing one fact on the faith of another. What the rule does is to declare that certain kinds of facts are legally ineffective in the substantive law; and this of course (like any other ruling of substantive law) results in forbidding the fact to be proved at all. But this prohibition of proving it is merely that dramatic aspect of the process of applying the rule of substantive law. When a thing is not to be proved at all the rule of prohibition does not become a rule of evidence merely because it comes into play when the counsel offers to "prove" it or "give evidence" of it; otherwise, any rule of law whatever might reduced to a rule of evidence. It would become the legitimate progeny of the law of evidence. For the purpose of specific varieties of jural effects - sale, contract etc. there are specific requirements varying according to the subject. On contrary there are also certain fundamental elements common to all and capable of being generalised. Every jural act may have the following four elements:

(a) the enaction or creation of the act.

(b) its integration or embodiment in a single memorial when desired;

(c) its solemnization or fulfillment of the prescribed forms, if any; and

(d) the interpretation or application of the act to the external objects affected by it.

14. The first and fourth are necessarily involved in every jural act, and second and third may or may not become practically important, but are always possible elements.

15. The enaction or creation of an act is concerned with the question whether any jural act of the alleged tenor has been consummated; or, if consummated, whether the circumstances attending its creation authorise its avoidance or annulment. The integration of the act consists in embodying it in a single utterance or memorial commonly, of course, a written one. This process of integration may be required by law, or it may be adopted voluntarily by the actor or actors and in the latter case, either wholly or partially. Thus, the question in its usual form is whether the particular document was intended by the parties to cover certain subjects of transaction between them and, therefore, to deprive of legal effect all other utterances.

16. The practical consequence of integration is that its scattered parts, in their former and incohate shape, have no longer any jural effect; they are replaced by a single embodiment of the act. In other words, when a jural act is embodied in a single memorial all other utterances of the parties on the topic are legally immaterial for the purpose of determining what are the terms of their act. This rule is based upon an assumed intention on the part of the contracting parties, evidenced by the existence of the written contract, to place themselves above the uncertainties of oral evidence and on a disinclination of the Courts to defeat this object. When persons express their agreements in writing, it is for the express purpose of getting rid

of any indefiniteness and to put their ideas in such shape that there can be no misunderstanding, which so often occurs when reliance is placed upon oral statements. Written contracts presume deliberation on the part of the contracting parties and it is natural they should be treated with careful consideration by the Courts and with a disinclination to disturb the conditions of matters as embodied in them by the act of the parties. (See Mc Kelvey's Evidence p.294). As observed in Greenleaf's Evidence page 563, one of the most common and important of the concrete rules presumed under the general notion that the best evidence must be produced and that one with which the phrase "best evidence" is now exclusively associated is the rule that when the contents of a writing are to be proved, the writing itself must be produced before the Court or its absence accounted for before testimony to its contents is admitted.

17. It is likewise a general and most inflexible rule that wherever written instruments are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher degree of credit than parol evidence. It is of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence. (See Starkie on Evidence p. 648)

18. In Section 92 the legislature has prevented oral evidence being adduced for the purpose of varying the contract as between the parties to the contract; but, no such limitations are imposed under Section 91. Having regard to the jural position of Sections 91 and 92 and the deliberation omission from Section 91 of such words of limitation, it must be taken note of that even a third party if he wants to establish a particular contract between certain others, either when such contract has been reduced to in a document or where under the law such contract has to be in writing, can only prove such contract by the production of such writing.

19. Sections 91 and 92 apply only when the document on the face of it contains or appears to contain all the terms of the contract. Section 91 is concerned solely with the mode of proof of a document which limitation improved by Section 92 relates only to the parties to the document. If after the document has been produced to prove its terms under Section 91, provisions of Section 92 come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradicting, varying, adding or subtracting from its terms. Sections 91 and 92 in effect supplement each other. Section 91 would be inoperative without the aid of Section 92, and similarly Section 92 would be inoperative without the aid of Section 91.

20. The two sections are, however, differ in some material particulars. Section 91 applies to all documents, whether they purport to dispose of rights or not, whereas Section 92 applies to documents which can be described as dispositive. Section 91 applies to documents which are both bilateral and unilateral, unlike Section 92 the

application of which is confined to only to bilateral documents. (See: Bai Hira Devi and Ors. vs. Official Assignee of Bombay AIR 1958 SC 448). Both these provisions are based on "best evidence rule". In Bacon's Maxim Regulation 23, Lord Bacon said "The law will not couple and mingle matters of speciality, which is of the higher account, with matter of averment which is of inferior account in law". It would be inconvenient that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory.

21. The grounds of exclusion of extrinsic evidence are (i) to admit inferior evidence when law requires superior would amount to nullifying the law, (ii) when parties have deliberately put their agreement into writing, it is conclusively presumed, between themselves and their privies, that they intended the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith and treacherous memory."

11. Meaning thereby, the document itself is to be taken in evidence. Learned Counsel for Respondent, in its written submission, has vehemently pressed with regard to no authorization to file the present Petition. Whereas, the Hon'ble Apex Court in United Bank of India vs. Naresh Kumar & Ors (1996) 6 SCC 660, has held that as far as possible, a substantive right

should not be allowed to be defeated on account of a procedural irregularity, which is curable, in a suit instituted or defended, on behalf of public corporation, public interest should not be permitted to be defeated on a mere technicality. Procedural defects, which do not go to the root of the matter, should not be permitted to defeat a just cause. A person may be expressly authorized to sign the pleadings on behalf of the company, for example, by the Board of Directors passing a resolution to that effect or by a power of attorney being executed in favour of any individual. In absence thereof and in cases where pleadings have been signed by one of its officers, a corporation can ratify the said action of its officer in signing the pleadings. Such ratification can be express or implied.

12. In the present case the Petition itself reveals that it was very well said in Para 1, that the Petitioner, Prasar Bharati, is a statutory corporation established under the Prasar Bharati (Broadcasting Corporation of India) Act, 1990. The Petition is being filed through its General Manager (Commercial) i.e. the Officer, who has filed this Petition is General Manager (Commercial) and this very objection was not raised in written statement or at any previous stage. Whereas, the original file of the department concern, showed before Court, in presence of Counsel for Respondent, by standing

Counsel for Petitioner, at the time of argument, that it was with the document of authorization, executed by Petitioner Prasar Bharati. Hence, on the score of this technical intricacy, Respondent is not going to have any benefit.

13. The judgment of Punjab and Haryana High Court, In Hans Raj & Anr Vs. Union of India, (2014) SCC Online P & H 11497, wherein a suit filed by Chief Engineer on behalf of Union of India, was dismissed on the ground that the suit was not filed by a duly authorized person, is not of any avail to Respondent, in view of present fact and circumstances of case in hand, as well as law of Apex Court given in United Bank of India, supra. The lack of an authorization letter, though it is very well there in the file of department, shown before this Tribunal, is merely procedural defect, which doesn't go to the root of matter. A substantive right is not allowed to be defeated on account of procedural irregularity.

14. The very contention of Respondent that Petitioner had not allowed the Respondent to remove its equipment from its premises, since the termination of agreement on 10.03.2011, by instructing the local authorities to ensure that the equipment of the Respondent is not removed from the

Petitioner's premises, is not of any avail, because, the intermediate situation was with regard to termination of agreement, in case of default of payment of License Fee, which was subsequently revived, after making deposit of license fee. Hence, the contention, being raised by Respondent, is baseless. Rather seems to be, of prior period of matter in dispute, i.e. period from when GOPA was terminated by Union of India/ Government of India. And as a result of which, automatic termination of agreement in between, of year 2006, i.e. the question of removing of equipment and vacating the site came in existence. Hence, any happening or factual situation prior to that, is of no avail. After the termination of GOPA and automated termination of agreement, in between, the removal and vacation of the site, was condition mandated and duty to be performed in view of Clause 7.7 of agreement, which was not complied with. Any financial scarcity or financial inability to remove the same, of respondent is of no avail or help to Respondent.

15. The law laid down by Hon'ble Apex Court in BSNL v. Reliance Communication, 2010 SCC Online SC 1358 Para 48, which is being pressed by learned Counsel for Respondent, is of different fact. The specific pleading of damages and the loss suffered by Petitioner, is to be pleaded and proved. No doubt, for damages under Contract law, for a Breach of Contract, once it is

not determined, the same is to be performed. But where specific damages, with a specific quantum, has been given in the terms of agreement, in case of breach and the breach is there, then that terms are to be complied with. No doubt, specific damage hasn't been pleaded or proved, but the terms had quantified the damages. But the law cited by Counsel for Petitioner itself in M/s Construction & Design Services Vs. Delhi Development Authority (Civil Appeal Nos. 1440 – 1441 of 2015) of Apex Court, it has been held that "*In a given case, when highest limit is stipulated instead of a fixed sum, in absence of evidence of loss, part of it can be held to be reasonable compensation and the remaining by way of penalty. The party complaining of breach can certainly be allowed* ***reasonable compensation out of the said amount if not the entire amount****. If the entire amount stipulated is genuine pre-estimate of loss, the actual loss need not be proved.*"

15. In present case, the actual loss has neither been pleaded nor proved. But a penalty of five times of License Fee, in case of failure to remove equipment, has been given in terms of agreement, but the damages are to be reasonable and fair. Hon'ble Apex Court had awarded half of the claimed damage, as reasonable one, in case of no specific loss. In present case, Rs.

30,000,00/- (Rupees Thirty Lakhs only) amount claimed as damages, appears to be just a reasonable damage to be awarded to the Petitioner.

Accordingly, this Petition merits to be allowed for damages of Rs. 30,000,00/- (Rupees Thirty Lakhs only) from Respondent to Petitioner.

ORDER

The Petition is being allowed. The Respondent is being directed to make deposit of Rs. 30,000,00/- (Rupees Thirty Lakhs only) in the Tribunal, within two months of date of Judgment, for making payment to Petitioner. In case of failure, 9% Simple interest will be payable for the period of failure of making above payment.

Formal order / decree be got prepared by office, accordingly.

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(Justice Ram Krishna Gautam)
Member

13.04.2023
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