

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

Dated 20th April, 2006

Petition No.23(C) of 2005

M/s. Malda Satellite Link
Through its Secretary
Shri Malay Sarkar
Shibram Bhawan,
4th Floor, P.O. Makdumpur,
District Malda, West Bengal

... Petitioner

Versus

1. M/s. Zee Turner Limited
Through the Regional Manager,
11, Harington Mansion,
8, Ho Chi Minh Sarani
Kolkata, West Bengal – 700 071

2. M/s. Pioneer Traders
P-164/1 VIP Road,
Scheme – VII (M),
Kolkata,
West Bengal – 700 054

... Respondents

BEFORE:

**HON'BLE MR. JUSTICE N. SANTOSH HEGDE
CHAIRPERSON**

MR. VINOD VAISH, MEMBER

LT. GEN. D.P. SEHGAL, MEMBER

For Petitioner : Mr. Anil Kumar Mishra, Advocate

For Respondent No.1 : Mr. Maninder Singh with
(Zee Turner Ltd.) Mr. Yoginder Handoo,
Mr. Tejveer Singh Bhatia, Advocates

ORDER

The Petitioner in this petition is a provider of cable services in District Malda, West Bengal. It contends that it had set up the network on 24th September, 2002 after registering itself as a cable operator in the said District. It is stated that Respondent No.1 is a broadcaster

and Respondent No.2 is an authorized distributor of Respondent No.1. It is further stated that the Petitioner entered into a subscription agreement with Respondent No.1 for receiving various channels of Respondent No.1 for redistribution to its subscribers. It is further stated that when the agreement signed by the Petitioner with the Respondent No.1 on 24th September, 2002 came to an end, Petitioner had entered into a fresh agreement on 26th December, 2004 for receiving the signals of the 1st Respondent. The allegation of the Petitioner in this petition is that the Respondents contrary to the terms and conditions of the agreement and the Interconnection Regulations framed by the TRAI, disconnected the signals of the 1st Respondent's channels w.e.f. 19th February, 2005. The Petitioner, however, admits that before the disconnection, the 1st Respondent had effected a publication on 18th February, 2005 by which it was intimated in the local news paper that the signals are being disconnected because the Petitioner has failed to enter into the new agreement after the expiry of the old one. In this petition the Petitioner submits that the said allegation is totally false since it had already entered into an agreement on 25th / 26th December, 2004. The Petitioner also contends that when it entered into an agreement in November, 2002, it had agreed on a subscriber base of 1200 consumers and at a rate of Rs.42.50 per subscriber per bouquet of signals. It also contends that during the currency of the said agreement because Petitioner did not do well in business, the subscriber base was reduced to 900 and Petitioner was paying subscription on the basis of 900 amounting to Rs.49,500/- per month. The Petitioner has produced certain deposit slips in support of the payment of the above-mentioned sum. The Petitioner also contends that Respondent started pressurizing the Petitioner to increase the subscriber base. It is also alleged that the 1st Respondent unilaterally tried to increase the agreed amount payable for the bouquet of channels on the basis of the TRAI's "The Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order 2004" against which the Petitioner represented to the Respondent not to increase the subscriber base or the subscription payable. In spite of the same, the Petitioner complains that the Respondents have discontinued the supply of signals. It is in this factual background the Petitioner has filed this Petition seeking appropriate orders for quashing and declaring the public notice dated 18th February, 2005 published by the Respondents as being illegal and for further directions for restoration of the signals of the 1st Respondent as also for a direction to Respondent No.1 to

charge appropriate rate of subscription in accordance with the Tariff Orders of TRAI dated 15.04.2004 and 01.12.2004.

2. In response to the allegations made in this Petition the 1st Respondent who is the contesting respondent has filed its reply and has specifically denied that after the first subscription agreement which expired in the year 2003 there has been any fresh agreement between the parties. It contends that after the said agreement expired, Petitioner was receiving signals of 1st Respondent's bouquet from 1.4.2004 at Rs.55/- per month, which was subsequently enhanced w.e.f. 1.4.2005 to Rs.58.85 per bouquet per subscriber per month because of the permitted enhancement of 7% by the TRAI. The Respondent submits in its reply that though in the subscription agreement entered into in the year 2002 the Petitioner had disclosed a subscriber base of 1200, the same was wholly incorrect. As a matter of fact, it had a much larger subscriber base, which fact was not disclosed by the Petitioner and the 1st Respondent came to know of the same only in September, 2004 that the Petitioner had a subscriber base of more than 3550 which figure was determined by the competent authority of the State of West Bengal for the purpose of levy of entertainment tax. In support of this contention, the 1st Respondent has also relied upon a letter dated 23rd September, 2004, a copy of which is found in the Petition papers wherein it is stated as follows:-

"That in connection with the running of our cable network as well as the Cable Network of MCN an enquiry and audit was held by the competent authority with respect to number of consumers of the stated two Network namely, MCN & MSL. After the audit as well enquiry it has been revealed from the report of Agricultural Income Tax officer (Amusement Tax Section), Malda Range, Malda vide Memo No.440 dtd. 16.09.2004 that the total number of consumers of MCN is 39338 (thirty nine thousand three hundred thirty eight) only **on the other hand the total consumers of the MSL is only 3550 (three thousand five hundred fifty) which is very low and far difference from and other than the MCN...."**

3. The Respondent has also affirmed that this figure which the Petitioner has admitted in the above mentioned letter has been confirmed by the competent authority in its reply made in September, 2004. The Respondent further asserts that without knowing the true facts, for the year 2002-03 the Respondent was led to believe that the subscriber base was only 1200. Hence the amount payable was on a subscriber base of 1200 for the said period which came to an end in the year 2002-03.

4. In regard to the above alleged admission made to the tax authorities of the State, the petitioner contends that it was not an admission and it was only a narration of fact and subsequently higher authorities revised the said order on a petition filed by the petitioner and accepted the plea of the petitioner that its subscriber base had come down to 933 as per Memo No.174 dated 06.05.2005 of the Agricultural Income Tax Officer, Malda Range, Malda, a copy of which has been produced in the additional documents filed by the petitioner.
5. In response to the same the respondent has pointed out from the very same Memo that the petitioner had admitted before the said tax authority that it had a subscriber base of 3550.
6. The Respondent also contends that Petitioner had agreed before the said Authority that he is willing to pay entertainment tax at Rs.7,500/- per month which, when calculated would indicate the subscriber base would be more than 3550.
7. The learned counsel for the respondent also drew our attention to the list of subscribers found as an Annexure to the Government Memo dated 06.05.2005 (supra) which shows a subscriber base of 4569.
8. On 4th March, 2005 this petition came for preliminary hearing when notice was issued by this Tribunal. At that point of time, the 1st respondent, who was represented through its advocate, took notice. After hearing the parties, an interim order was made by this Tribunal directing the respondent to restore the connections subject to the condition that the petitioner deposits Rs.1 lakh on account. It was also noted in the said order that all of the contentious issues will be decided at the stage of final hearing. On 18th March, 2005, on behalf of the respondents it was recorded, if any loss is occasioned to the respondent on account of the direction to reconnect the signals, the same shall be compensated at the final stage. On 19th April, 2005, the petitioner was directed to furnish a bank guarantee for Rs.10 lakhs in favour of the 1st respondent and further directed to pay to the respondent a subscription at the rate of Rs.58.85p per subscriber per month on a subscriber base of 1200. During the pendency of the petition, the respondent has filed an application seeking a direction to pay the arrears amounting to Rs.12,66,661/- with interest at 18% per annum. Subsequently, this prayer for payment of amount due has been increased by a separate application to Rs.45,76,044/- on the

basis of updated statement of account upto 31st January, 2006. These claims have been denied by the petitioner who in reply to the said claim has stated that it is not owe any sum of money to the respondent. On the contrary, the Petitioner has stated that it is entitled for compensation for loss of consumers because of the illegal disconnection as also for the litigation costs.

9. It is on the basis of the above pleadings, this Tribunal is now called upon to decide the following points:-

- (i) Is there a subsisting agreement between the parties?
- (ii) What is the subscriber base of the Petitioner on which the 1st Respondent is liable to collect the subscription?
- (iii) What is the rate at which the 1st Respondent is liable to collect the subscription?
- (iv) Is any amount payable, if so, by which party?
- (v) What is the interest payable on such amount due?
- (vi) What is the relief, if any?

10. It may be noted at the outset that though the parties have made monetary claims and counter claims, they have not chosen to lead any evidence apart from the documents produced along with their pleadings.

Re:- Is there a subsisting agreement between the parties?

11. This point arises for our consideration because of the contention of the petitioner that after the expiry of its written agreement dated 24th September, 2002 petitioner had entered into a fresh agreement on 26th December, 2004 on same terms and conditions. The respondent has denied this claim and has contended that after the expiry of the written agreement dated 24th September, 2002 there has been no written agreement between the parties and signals were being given to the petitioner on the basis of an oral understanding between the parties. Since the petitioner has asserted that it had entered into a fresh agreement on 26th December, 2004 in writing, the burden of proving the same rests with the petitioner. Petitioner in support of this contention has not produced any document signed by the respondent to establish this contention and the respondent having denied the execution of an agreement dated 26th December, 2004 or thereafter, we will have to reject the contention

of the petitioner that there was any written agreement between the parties after the expiry of the written agreement of 24th September, 2002. We may herein note that till 1st January, 2005 when "The Telecommunication (Broadcasting & Cable Service) Interconnection Regulations, 2004" came into force, there was no mandatory requirement that the agreement should be in writing. Therefore, even an oral agreement between the parties was permissible. Therefore, we are of the opinion that the petitioner has failed to prove that there was a fresh written agreement of 26th December, 2004 as contended by it.

Re:- What is the subscriber base of the Petitioner on which the 1st Respondent is liable to collect the subscription?

12. It is to be noted that it is an admitted fact that there was a written agreement dated 24th September, 2002 between the parties wherein the respondent had agreed to supply signals at the rate of Rs.42.50 per bouquet per subscriber on a subscriber base of 1200. The petitioner contends that soon after the agreement was signed since there was a reduction in the number of subscribers which fell down to 900, it represented to the 1st respondent who agreed to receive subscription at the reduced subscriber base of 900 which was to be Rs.49,500/- per month. Per contra, the 1st respondent contends that there was no such oral agreement contrary to the terms of the written agreement. It also contends that in reality the subscription base of the petitioner was much more than 1200 and the respondent was induced to sign that agreement on 24th September, 2002 on a subscriber base of 1200 because of the misrepresentation of the petitioner. Therefore, it is entitled to collect on a higher subscriber base of 3550 even during the period of the currency of the subscriber agreement. We are not inclined to accept either of the contentions of the parties. Admittedly, when there was a written agreement, parties are bound to act in accordance with the terms of the said agreement and the oral agreement pleaded by the petitioner to reduce the subscriber base of 900 has not been proved by the petitioner. At the same time, the alleged fraud or misrepresentation of the subscriber base pleaded by the respondents has also not been established. Therefore, for the period during which time the agreement dated 24th September, 2002 was in existence, the petitioner is liable to pay subscription on a subscriber base of 1200.

13. In regard to the subsequent period when the agreement of 24th September, 2002 expired the petitioner contends that its subscriber base had come down to 598, therefore, it is liable to pay a subscription on a subscriber base of 598 only. While the 1st respondent contends that even according to the admission made by the petitioner as per its letter dated 23rd September, 2004 its subscriber base was 3550 at least. Therefore, after the expiry of the written agreement, petitioner is liable to pay subscription on a subscriber base of 3550. This submission of the respondent as to the admission is rebutted by the petitioner stating that it is not an admission made by the petitioner but it is a statement which was recorded by the tax authorities which was reflected in the said letter. Therefore, the same cannot be treated as an admission. In our opinion the contents of letter read as a whole may not amount to an admission by itself. But if we peruse the documents filed by the parties it is seen that when an assessment was made earlier by the tax authorities, the petitioner had admitted that it had a subscriber base of 3550 in August, 2004 but subsequently, the same came down to 933. Even then, it had prayed for relief to pay tax on a subscription base of 598 cable consumers amounting to Rs.7,500/- per month (See letter of the Agricultural Income Tax Officer-in-Charge, Malda Range, Malda dated 06.05.2005 found at page 71 of the additional document filed by the petitioner). This letter of the concerned office clearly shows that in the month of August, 2004 the petitioner had shown a subscriber base of 3550 but subsequently made a representation to reduce that number to 598 agreeing to pay an entertainment tax of Rs.7,500/- on that subscriber base. This apart, an Annexure R1-7 produced by the petitioner at page 73 of the additional documents which is titled as "Malda Satellite Link Survey Report" shows a total subscriber base of 4569 of the petitioner. In the absence of any other evidence or any other material to the contrary we have come to the conclusion that it is reasonable to hold that the petitioner has a subscriber base of 3550 at least after the expiry of the written agreement, on which the petitioner has to pay subscription to the 1st respondent at the rate to be determined hereinafter in this order.

Re: What is the rate at which the 1st Respondent is liable to collect the subscription?

14. In regard to the subscription payable by the petitioner for the period during the currency of the written agreement of 24th September, 2002 there could be no difficulty because it was

agreed in the said agreement that the petitioner would pay at the rate of Rs.45,50 per bouquet per subscriber. Therefore, petitioner is liable to pay the same on a subscriber base of 1200 as held hereinabove for the said period of existence of the written agreement.

15. For the period thereafter petitioner contends that it is not liable to pay anything more while the respondent contends that there was an oral agreement between the parties to pay at the rate of Rs.55/- per bouquet per subscriber per month which was enhanced by 7% , notice of which was given to the petitioner because the notification of TRAI permitted such increase. Hence, from 1st April, 2005 the petitioner had to pay a sum at the rate of Rs.58.85p which included the 7% increase. Taking judicial notice of the fact that there was a general increase in the subscription rate in the cable sector we think it is reasonable to come to the conclusion, in the absence of any other material that after the expiry of the written agreement dated 24th September, 2002 till 31st March, 2005 the petitioner is liable to pay to the 1st respondent at the rate of Rs.55/- per month per subscriber, while after 1st April, 2005 petitioner is liable to pay at the rate of Rs.58.85 per bouquet per subscriber per month upto date of due, the permitted increase of 7% by the TRAI .

Re:- What is the amount payable, if so by which party?

16. Since we have come to the conclusion that the petitioner is liable to pay subscription differently for the different period on a different subscriber base as found hereinabove, the parties will now reconcile there account. While doing so, the Petitioner shall be given credit for Rs.1 lac deposited by it by virtue of order of this Tribunal and on such reconciliation whichever party is liable to pay any sum due shall pay the same within 30 days of such reconciliation. The said reconciliation will be completed within 90 days from today.

Re:- What is the interest payable on such amount due?

17. We think it reasonable to grant an interest at the rate of 10% on the sum due to the party from the date of reconciliation till the date of payment.

Re:- What is the relief, if any?

18. Parties are entitled to the relief as decided hereinabove. In the event of reconciliation of accounts showing any payment due to the Respondent, the said Respondent is entitled to invoke the bank guarantee given by the Petitioner pursuant to the order of this Tribunal to the extent of amount due. Till the date of reconciliation and 30 days thereafter, the Petitioner shall keep the bank guarantee alive.

19. Ordered accordingly.

.....J
(N. Santosh Hegde)
Chairperson

.....
(Vinod Vaish)
Member

.....
(D.P. Sehgal)
Member