

For Respondent No.2 : Mr. Meet Malhotra with
(Datt Enterprises) Mr. Raghvinder Singh, Advocates

ORDER

1. This is a petition filed under Section 16 read with Section 19 of the Telecom Regulatory Authority of India Act, 1999 (TRAI Act) for execution of the Order of this Tribunal dated 29th March, 2006 made in Petition No.77(C) of 2005 to which the parties are the same as in this Petition.

2. Petition No.77(C) of 2005 was filed by the present Petitioner alleging that it had a Subscription Agreement dated 5th October, 2004 for the supply of signals of the 1st Respondent/Broadcaster. It is also alleged in the said Petition that at that point of time the 1st Respondent had the 2nd Respondent as its distributor and local agent at Jabalpur with whom the Petitioner had some dispute, particulars of which were given in the said Petition. It was further stated in that Petition that the Petitioner herein had complained to the 1st Respondent against the 2nd Respondent and requested the 1st Respondent to stop the illegal acts of the 2nd Respondent. A copy of the letter in this regard dated 13.10.2004 was annexed to that Petition as Annexure 'G'. In that Petition there was also allegation as to various disputes the Petitioner had with the 2nd Respondent, which the Petitioner had contended that it had brought to the notice of the 1st Respondent. There was also an allegation against the 1st Respondent that it was discriminating between the Petitioner and the 2nd Respondent. It has further alleged that in the background of these complaints the 1st Respondent to favour the 2nd Respondent had disconnected the signals to the Petitioner without affording any opportunity and without assigning any reasons. It was also alleged that after the disconnection on 05.11.2004 the Petitioner received a notice on 12.11.2004 and the said notice was dated

3. 11.2004 wherein it was alleged that the Petitioner was illegally transmitting 1st Respondent's signals beyond the areas specified in the Agreement which the Petitioner had contended as wholly false and is only a rouse to disconnect the signals to it so that the 2nd Respondent can take over the business of the Petitioner.

3. In the said Petition the 1st Respondent had denied the fact that no notice was given to the Petitioner before disconnection of signals and has asserted that the notice dated 03.01.2004 was issued to the Petitioner and the signals were disconnected on 05.11.2004 pursuant to the said notice for

unauthorized transmission of signals. The 2nd Respondent had filed a separate reply in the said Petition and denied the allegations made against it by the Petitioner.

4. In our order dated 29.03.2006 we after noticing the allegations made against each other, did not go into the same because it was not necessary for us to decide those issues more so because other proceedings were pending between the parties. Hence, we framed two issues for consideration in that Petition which are as follows:-

- “(a) was the 1st Respondent justified in disconnecting the signals of the Petitioner on the ground of unauthorized transmission beyond the territory allotted to the Petitioner in the Agreement?; and
- (b) if the same is not justified, what is the relief the Petitioner is entitled to in this Petition?”

5. While discussing the 1st issue we had noticed that the Agreement between the Petitioner and the 1st Respondent was entered into hardly one month prior to the disconnection of signals. We had also noticed that the Petitioner had alleged that no notice was given prior to the disconnection on 5. 11.2004 while the 1st Respondent had contended that it had sent the notice of disconnection on the ground of unauthorized transmission on 03.11.2004 and disconnection was effected only on 05.11.2004. In the above factual background of assertion and denial, we examined the contents of the notice of disconnection, relevant portion of which reads as follows:-

“You have retransmitted/distributed the subscribed channels outside the area contained in the subscription agreement, without prior written permission of Star India.”

6. Considering the above basis of disconnection, we noticed that since the notice in question did not contain particulars of the areas of unauthorized retransmission and the fact that the said notice though dated 03.11.2004 was received only on 12.11.2004 by the Petitioner, we held that the ground of disconnection mentioned in the notice of 03.11.2004 was unacceptable.

7. In the normal course, the above finding of ours would have ipso facto given rise to a direction to the 1st Respondent to reconnect the signals. But in the meantime, because of the passage of time and intervention of “The Telecommunication (Broadcasting and Cable Services) Interconnection Regulation 2004” we thought it appropriate that in stead of directing the Respondent to give the signals, the Petitioner should be directed to approach the 1st Respondent to enter into a fresh subscription agreement for the year 2006 since the earlier agreement had come to an end.

8. In the said Petition, though the Petitioner had asked for damages of Rs.50 lacs for the loss of business because of the illegal disconnection, we refused that prayer of the Petitioner on the ground that the Petitioner had not substantiated the quantum of damage claimed by it. However, since we had come to the conclusion that the 1st Respondent had illegally retained a sum of Rs.9,67,290.48 belonging to the Petitioner even during the period of disconnection without any authority, we directed the repayment of the said amount with interest at the rate of 12% per annum from the date of the disconnection i.e. 05.11.2004 till the date of return as per the order of this Tribunal dated 06.10.2005.

9. It is in the above background, the Petitioner in this Execution Petition contends that it approached the 1st Respondent for entering into an agreement for supply of its signals. This request was made as per the Petitioner’s letters dated 31.03.2006. The Petitioner alleges that it had given a list of its franchisee operators along with their respective areas of operations and number of subscribers, as also power of attorney and other documents which are generally required to be submitted by a signal seeker to a signal provider while entering into a subscription agreement. The Petitioner alleges in this Petition that it did not receive any response to the above letter dated 31.03.2006, therefore, on 19.03.2006 it again requested the Respondent to comply with the orders of this Tribunal, copies of these letters have been annexed to this Petition as Annexure ‘P-2’ and ‘P-3’ respectively. It is further averred in this Petition that in response to the above letter of 18.04.2006, the 1st Respondent replied calling upon the Petitioner to provide true and complete details of the subscribers catered by the Petitioner. In the said letter it was also mentioned that they have an existing network in the area by the name of M/s. Bhasker Network (Respondent No.2). Therefore, the Petitioner was directed to get in touch with the said M/s. Bhasker Network for taking the matter forward. A copy of the said letter is annexed to this Petition as Annexure ‘P-4’. It is against the above stipulation of directing the Petitioner to approach the 2nd Respondent, the Petitioner has approached this Tribunal alleging violation of the Order of this Tribunal.

10. It is the contention of the Petitioner in this Petition that in the first instance it entered into an agreement with the 1st Respondent on 05.10.2004 as an MSO and knowing well the status of the Petitioner and the existence of Respondent No.2 in the field, the 1st Respondent had accepted the proposal and executed a subscription agreement with the Petitioner as an MSO. It is further contended that at that time the Petitioner's signals were not disconnected on the ground that there was another MSO in the field, hence it wrongly entered into a contract with the Petitioner or that the law prohibited more than one MSO in an area. On the contrary, at that point of time, the signals were disconnected on an erroneous and motivated ground of illegal transmission, which was not accepted by this Tribunal. Therefore, having suffered an order of this Tribunal it is not open to the Respondent now to deny direct signals on a totally new issue to defeat the directions of this Tribunal.

11. 1st Respondent in his reply to this Petition has alleged that it has by its letter dated 18.04.2006 informed the Petitioner that it can take signals from its authorized distributor/the 2nd Respondent herein, consequently the order of this Tribunal stood complied with. It is also stated that in view of Regulation 3.3, a broadcaster can offer its signals through its authorized distributor and consequently the communication of the Respondent was based on the said Regulation and order of the Hon'ble Supreme Court dated 02.03.2006. The 1st Respondent in his reply has further stated that by its letter dated 29.04.2006 it again called upon the Petitioner to approach its authorized distributor and offered further assistance in case of any difficulty. But since the Petitioner has not approached the distributor, the Petitioner cannot make a grievance that it has not received the signals. The 1st Respondent has further stated that the Judgment of this Tribunal dated 28.08.2005 in Sea TV Versus Union of India is a subject matter in the appeal before Hon'ble Supreme Court of India and in that appeal the thrust of the Respondent's case was based on Regulation 3.3 of Interconnection Regulation and the Supreme Court by its letter dated 02.03.2006 has directed that no final orders will be passed by this Tribunal on the basis of that Judgment. Consequently, the Petitioner cannot seek signals directly from the Respondent. It is also stated that in the present application for receipt of signals, the Petitioner has sought to serve more areas than it was serving under the old agreement, the same cannot be done. The above-referred letters from 1st and 2nd Respondents have also been annexed to the Petition. The 1st Respondent, though termed its reply as Preliminary Objections, in our opinion, has substantially expressed his defence. Therefore, we do not think that we have any difficulty in dealing with this Petition finally.

12. The principal question for our determination in this case is, does the Order of the Hon'ble Supreme Court dated 02.03.2006 prohibit this Tribunal

from entertaining an Execution Petition and passing suitable orders in the same when its principal order which is sought to be executed has become final? If the above question is answered in the negative, then the other question for consideration is what is the relief the Petitioner is entitled to?

13. We have heard the learned counsel for the parties extensively. As noted above, the only defence taken for non-compliance of the directions of this Tribunal is that under Regulation 3.3 of the Interconnection Regulation, the 1st Respondent has the authority to provide signals to a signal seeker through an intermediary of its choice and it is only when the intermediary fails to comply with the request of a signal seeker within 30 days, the broadcaster like the 1st Respondent has an obligation to see that the signal seeker gets signals.

14. This Tribunal in its order dated 24.08.2005 in Sea TV versus Star India (1st Respondent) had while discussing the various provisions of the Regulations held that under the Regulations there is an obligation on the signal provider to provide signals to the signal seeker on demand on 'must provide' basis and on reasonable and non-discriminatory terms. This Order of the Tribunal is now in appeal before the Hon'ble Supreme Court of India which on 02.03.2006 has directed this Tribunal that no final orders should be passed on the basis of the order of this Tribunal in the case of Sea TV (supra). The 1st Respondent contends that that order prohibits this Tribunal from proceeding to hear and consider any petition in which the signal provider takes a defence under Regulation 3.3.

15. We do not think the direction of the Hon'ble Supreme Court was intended to foreclose the jurisdiction of this Tribunal in deciding disputes between two service providers merely because one of the contending parties raises an issue referable to Regulation 3.3.

16. In the original Petition this Tribunal did not go into the question of rights of the parties with reference to the Regulations. The one and the only issue, which was decided by this Tribunal, was the correctness of the disconnection of signals to the Petitioner on an alleged ground of unauthorized transmission. That issue did not require this Tribunal to go into the question of interpretation or application of any of the Regulations because no defence under Regulation 3.3 was ever raised by the Respondent No.1 nor any reliance placed on the order of this Tribunal in Sea TV Vs. Star India (Supra). On the contrary, what this Tribunal considered in that case was the conduct of the 1st Respondent in disconnecting the signals. The finding was also based on that conduct of the 1st Respondent wherein this Tribunal held that the allegation of unauthorized transmission was not acceptable. In that petition, signals of the Petitioner were not disconnected because Petitioner was an MSO. Consequently,

when the Act of disconnection was held to be illegal, the Petitioner was entitled to a status quo ante. If the agreement between the parties had not come to an end, the natural relief would have been to direct the erring respondent to reconnect the signals on the basis of the terms of the existing agreement which treated the Petitioner as MSO.

17. Being an MSO has its own commercial advantages and under the agreement a right is created on the MSO, that right is now sought to be denied by the Respondent by taking plea of application of Regulation 3.3 and the order of the Supreme Court dated 02.03.2006. At the cost of repetition we record that in the original petition the issue of application of Regulation 3.3 did not arise and we have not decided the same. If the 1st Respondent's contention is to be accepted then issues which have not been decided in the original petition can be raised in the execution petition then the same would prevent this Tribunal from giving relief to the parties who have obtained directions from this Tribunal after contest.

18. We may at this stage notice the fact that there are dozens of petitions in this Tribunal wherein after the Orders of the Hon'ble Supreme Court dated 2. 03.2006 the Respondents/Signal Providers had raised the defence under Regulation 3.3 in its reply and in those cases even without going into the question whether such a defence does in reality arise from the pleadings or not, we have with due deference to the Orders of the Hon'ble Supreme Court adjourned those cases sine die to await the final Judgment of the Hon'ble Supreme Court. In the instant case, we must record that the repeated reliance on the Order of the Supreme Court dated 02.03.2006 by way of objection in the execution petition for the first time makes us record that we cannot allow a respondent who is in his position as a Judgment debtor to defeat the fruits of the Order obtained by the Petitioner in the original petition by raising a defence on the basis of Regulation 3.3 for the first time and by asking us to keep the execution petition pending so that he can continue to disobey the orders of this Tribunal with impunity.

19. The status of the Petitioner as an MSO was not in dispute in the earlier Petition. When we directed the Petitioner to approach the Respondent and directed the 1st Respondent to enter into an agreement with the Petitioner it was implicit that Petitioner's status as it stood on the date of disconnection should be recognized. There were serious allegations made against the 2nd Respondent as to its efforts to take over the business of the Petitioner but we did not go into that issue since there were other proceedings pending between the parties. But the present attitude of the 1st Respondent gives an impression to us that the allegations of the Petitioner that 1st Respondent is taking undue

interest in the business of the 2nd Respondent and is prepared to violate the orders of this Tribunal to promote the business interests of the 2nd Respondent may be true. The object of the TRAI Act and Regulations framed thereunder provides a level playing field to all the players in the field. The same cannot be defeated by taking new and untenable defences in the Execution Petition to defeat the fruits of a hotly contested dispute.

20. If the contention of the 1st Respondent is to be accepted, then there can be no certainty in the business in cable sector. Interconnection Regulations require yearly subscription agreement to be entered into. In such circumstances, if the signal provider can change the status of an MSO into a cable operator then every time of renewal a signal seeker has to be at the mercy of a signal provider in which case the very object of the Act which controls the contract between the players in the cable sector will be defeated. At any rate application of Regulation 3.3 in the instant case would not arise because that was not an issue in the main case.

21. It should be borne in mind that the original petition was filed and notice was issued as bar back as on 4th August, 2005 and after a number of adjournments, it was finally disposed of on 29th March, 2006 with a direction that the Respondent shall supply signals on terms which are not unreasonable and without discriminating the Petitioner against similarly situated persons. Since the direction of this Tribunal has not been complied with and in the opinion of this Tribunal, for reasons which are untenable, we are constrained to issue a direction to the first Respondent to enter into a subscription agreement with the Petitioner for the year 2006 on a subscriber base of 525 which the Petitioner has pleaded as its present subscriber base and at a subscription rate per subscriber agreed in the year 2004 with an increase of 7% which is permissible under the tariff fixed by the TRAI and in the territory mentioned in the agreement of 2004. The Petitioner shall provide the 1st Respondent with all the necessary particulars of its subscribers. It is open to the Respondent either directly or through its distributor to give its signals to those subscribers whose names are not found in the list supplied by the Petitioner. However, if the Petitioner wants to add more subscribers in the territory allotted to it in the agreement then it shall give particulars of such additional subscribers to whom it is going to give signals and pay corresponding increase in the subscription fee.

22. In the ordinary course we would have, as directed in our earlier order, left the parties to settle the terms of the subscription. But since we have noticed that the attitude of the Respondent is to prevent the Petitioner from getting the signals hence we are constrained to pass this mandatory order keeping in mind

the interest of both sides to the extent possible. This direction, however, will not prevent the parties from entering into a subscription agreement on such terms as they would mutually agree upon.

23. This Petition is allowed with cost computed at Rs.10,000/-.

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(N. Santosh Hegde)

Chairperson

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(Vinod Vaish)

Member

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(D.P. Sehgal)

Member