

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

**Dated 3<sup>rd</sup> December, 2007**

**Petition No.91(C) of 2006**

ESPN Software India Pvt. Ltd.  
Building No.22  
Pushp Vihar Community Centre  
New Delhi – 110 062

...Petitioner

Versus

Intermedia Cable Communication Pvt. Ltd.  
1018, New Nana Peth  
Padamjee Path  
Pune – 411 002  
Maharashtra

...Respondent

**BEFORE:**

**HON'BLE MR. JUSTICE ARUN KUMAR, CHAIRPERSON**

For Petitioner : Mr.N.Ganpathy, Advocate

For Respondent : Mr.Makarand D. Adkar,  
Mr.Vijay Kumar, Advocates

**ORDER**

By this petition the petitioner has sought a direction to the respondent to pay a sum of Rs.77,25,319/- (Rupees Seventy Seven Lakhs Twenty Five Thousand Three Hundred Nineteen Only) along with the interest rate of 12% per annum. The background of the case is that the petitioner is the sole and exclusive distributor of International ESPN Network Programming Service (for short "ESPN Service") and International Star Sports Programming Services (for short "Star Sports Service in India"). The petitioner distributes ESPN and Star Sports Channel in India having

obtained exclusive rights for the same. The respondent is a Multi-System Operator (MSO) and carries on the business of distributing cable TV services in the entire city of Pune. The parties had entered into an agreement dated 5<sup>th</sup> December, 2003 under which the petitioner was to supply its signals to respondent for further distribution in the entire city of Pune. The duration of the agreement was for a period of 12 months. As per the agreement the respondent had to pay a subscription fee of Rs.15,78,075/- per month for a subscriber base of 39750 at the rate of Rs.39.70 per subscriber. The relevant term regarding payment in the contract runs as under:

“FEES

Affiliate Subscription Fees:

Immediately upon execution of the Agreement based on the subscriber base as represented by the Affiliate, the Affiliate shall pay to the licensor a sum of Rs.15,78,075/- towards the Subscription Fee for the term of the contract in respect of 39750 subs @ 39/70 (new rate). Subject to recovery from ground.”

The case of the petitioner is that the respondent made only some ad hoc payments and it failed to make payments as per the term of the agreement. Hence, this petition for recovery of the balance amount. The main defence set up by the respondent against the claim made by the claimant in the petition is that the words “subject to recovery from ground” are of utmost importance and have to be given effect to and, therefore, respondent was liable to pay to the petitioner only whatever it realized from its subscribers and such realization according to the respondent have been accounted for and forwarded to the petitioner. The learned counsel appearing for the respondent submitted that when the agreement was entered into, the petitioner's channel was a new channel being introduced in India and the petitioner

wanted to popularize the same. The respondent admittedly is the biggest MSO in the city of Pune and, therefore, in order to ensure that its channel gets maximum coverage, the petitioner agreed to the term that payment of subscription fee be linked to the recovery from the ground. According to respondent whatever was recovered has been paid to Petitioner. It is submitted that nothing is due from respondent to the petitioner.

From the above positions taken by the learned counsel appearing for the parties it is apparent that the case turns on the interpretation of the words “subject to recovery from ground” admittedly contained in the agreement dated 5<sup>th</sup> December, 2003. The learned counsel for the petitioner tried to argue that the words “subject to recovery from ground” only relate to the new rate i.e. Rs.39.70 per subscriber per month. The old rate of Rs.32/- per subscriber per month in any case continued to be applicable and the Petitioner was liable to pay on that basis. The words “subject to recovery from ground” do not qualify the liability of payment at the old rate. Unfortunately, this is not the case set up in the pleadings. I have gone through the entire petition as well as the rejoinder filed by petitioner and I find that the respondent is correct in saying that this is not the case set up by the petitioner in the pleadings. In this connection following part of cross-examination of petitioner's witness clinches the issue:

Suggestion made to the witness by counsel for respondent, “I suggest that the clause subject to ground recovery being subject to the hike of Rs.7.70 is being stated for the first time in the evidence and it does not find place in the pleadings”. Answer of the witness, “the figure of Rs.7.70 has been referred to for the first time now”.

It is settled law that in the absence of pleadings no amount of evidence can be looked into. Therefore, the case now being argued that “subject to recovery from ground” was only qua new rate is an afterthought and cannot be considered.

In para 3 of the petition the petitioner has stated that the respondent clarified that the payment by them would be “subject to recovery from ground”. Further it is stated in para 4 of the petition that respondent did not pay as per the agreement but made on account payments for the period 5<sup>th</sup> December, 2003 till 4<sup>th</sup> July, 2004. Thus, right from the beginning the petitioner was aware about the stand of the respondent according to which the payments envisaged under the agreement were subject to recovery from ground. The petitioner did not controvert this stand of the respondent. Rather as admitted by petitioner in para 4 it accepted on account payment from the respondent. The respondent has stated in his reply to these paras of the petition that it was stated in categorical words in the Agreement dated 05.12.2003 that the subscription shall be paid subject to recovery from the ground. The respondent goes on to say that it made payments to the petitioner regularly despite non-collection from the ground for maintaining cordial relations and to avoid inconvenience of its subscribers. Here also the petitioner does not say in clear terms that the interpretation of the respondent put on the words “subject to the recovery from the ground” is not correct and it should be according to what the petitioner wanted to suggest for the first time in its evidence. On the other hand the respondent is categorical in its reply that the subscription was subject to recovery from the ground. Thus the petitioner itself never believed in what it is canvassing now. It is difficult to rely on the stand now taken by the petitioner.

Further, if words “subject to recovery from ground” were to qualify only the new rate, something more could have been added. The words “subject to recovery from ground” have been added in hand in the otherwise printed agreement. It

appears that these words were added in the agreement in view of the fact that it was a new channel and parties were not sure about the response it would generate. In fact this position is admitted by petitioner's witness when a suggestion had been made to him in his cross-examination by the counsel for respondent. The suggestion was – “in the agreement the clause subject to ground recovery was added because both the parties knew as regards the possible bad debts”. The answer of the witness to this suggestion was “that is correct”. It is also significant to note that petitioner has admitted in Para 3 of the petition that right from the beginning the respondent had clarified that the payments by them would be subject to recovery from ground. The petitioner knowing fully well about this interpretation of the agreement by the respondent and the stand of the respondent on the payment aspect, continued with the relationship as per the agreement which shows that they accepted the same.

The respondent has pointed out how at various occasions whenever some important sports event was due for telecast the petitioner used to indulge in arm-twisting activities by threatening to disconnect the signals. Rather, at times the petitioner actually disconnected the signals in order to extract payments. The respondent had no option but to pay amounts demanded by the petitioner in order to ensure that its subscribers were not prejudiced and they continued to get signals to watch important sports events. The petitioner had admitted even in the rejoinder that the respondent made on account payments on monthly basis. This is stated at running page No.65 of the paper-book or 2<sup>nd</sup> page of the rejoinder filed by the petitioner. Therefore, it is clear that the petitioner admits that respondent had been making on account payments upto 4<sup>th</sup> July, 2004. On account payments would further show that the payments were based on realizations and were not linked to the number of subscribers mentioned in the agreement at the old rate of Rs.32/- per

subscriber per month. If petitioner's contention has any force, it would have insisted on payments as per its interpretation of the agreement and would not have accepted on account payments. The petitioner states in its rejoinder as under:-

“The facts would disclose that the Respondent clearly indicated that they would pay at the new rate of Rs.39.70 subject to recovery from ground, however, they cannot shy away from their admitted liability of paying at the old rate of Rs.32/- per subscriber per month.”

In view of the relevant clause of the agreement quoted herein before, I fail to understand how the petitioner can say that “respondent cannot shy away from their admitted liability of paying at the old rate of Rs.32/- per subscriber per month”. There is no admission to pay as suggested by petitioner.

I am inclined to accept the case of the respondent that in view of the payment clause contained in the agreement the liability of the respondent is based on recovery from ground. The respondent says that whatever it has recovered from the ground, it has accounted for and paid to the petitioner. I, therefore, find no merit in the claim made by the petitioner in the present petition. The petition is accordingly dismissed with no order as to cost.

.....**J**  
**(Arun Kumar)**  
**Chairperson**