

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

DATED 3rd July, 2007

PETITION No.229(C) OF 2006

Indusind Media and Communications Limited
49/50 MIDC, In Centre, Marol,
Andheri(East)
Mumbai-400093

... Petitioner

Versus

Zee Turner Limited
5th Floor, Radisson Plaza
NH-8, New Delhi-110037

... Respondent

BEFORE:

**HON'BLE MR.JUSTICE ARUN KUMAR, CHAIRPERSON
LT.GEN. D.P.SHEGAL (RETD.), MEMBER**

For : Mr.Arun Kathpalia,
Petitioner Ms.Payal Kakra,,Advocates for
Bajpai & Co.

For : Mr.Maninder Singh with
Respondent Mr.Yoginder Handoo,
Mr.Nitin Aggarwal, Advocates

ORDER

The Petitioner, Indusind Media Communications Ltd., in this Petition has challenged the action of the respondent, Zee Turner, in disconnecting Zee Sports Channel to its network without any prior notice either to the petitioner or to its consumers. The brief facts of the case are as under.

2. The petitioner is an MSO engaged in the business of cable and television services. Vide an agreement dated 20.5.2005 between the respondent and the petitioner, the respondent was to provide its channels for Package-I and Package-II for a consideration as mentioned in the said agreement. The agreement also contemplated the placement of the respondent's channels in certain specified frequencies. These packages did not include Zee Sports Channel which was a satellite-based free-to-air (FTA) encrypted service. According to the petitioner, the respondent provided a free decoder on 16.7.2005 with an oral request for placement and telecast of Zee Sports Channel on the petitioner's network in Mumbai. This was done by the respondent to promote its Zee Sports Channel and the petitioner was requested to place this channel on a particular frequency, i.e., UHF-60. For placement of this channel in particular frequency, the respondent and the petitioner entered into an agreement whereby the respondent was to pay Rs. 8 lacs per month to the petitioner for a period of three months commencing 1.10.2005 until 31.12.2005. This arrangement between the parties continued even after 31.12.2005 and the petitioner continued to transmit this channel on its network. On 8.9.2006, however, Zee Turner disconnected this Zee Sports Channel to the petitioner all over the country without any notice and hence the petition, which was filed on 14.9.2006, with following prayers:-

- (a) Direct the respondent, i.e., Zee Turner to forthwith reactivate / reconnect the Zee Sports signals to IMCL's Network at all locations of IMCL's Network.
- (b) Pass exparte / adinterim / interim orders / directions in respect of the above prayers pending final disposal of the present petition; and
- (c) Pass such other and further orders as this Hon'ble Tribunal may deem fit and proper in the facts circumstances of the case.

3. On 19.9.2006, when the case came up for directions, we ordered the respondent to restore the signals of Zee Sports Channel to the petitioner subject to the petitioner depositing an amount

of Rs. 20 lacs with the Registrar, TDSAT by 20.9.2006. We also directed the parties to negotiate in the mean while for an agreement. Since negotiations to enter into an agreement failed, we have heard the matter finally.

4. Mr. Kathpalia, learned counsel for the petitioner, while arguing his case, stated that it was a very peculiar case where Zee Sports Channel was being transmitted by the petitioner on its network based on a request from the respondent and not only that, the respondent had paid an amount of Rs. 8 lacs p.m. for a period of three months from October to December, 2005. There was no agreement whatsoever, for payment of consideration to the respondent for transmitting this channel and therefore as per the Regulation, the petitioner is not a seeker of signals and thus under no obligation to pay to the respondent as is otherwise done by the signal seekers to pay consideration to the provider of signals. On the contrary, there was an agreement between the parties wherein the respondent had requested for carriage of this channel on payment of an amount to the petitioner for promotion of this channel of the respondent. This channel was free-to-air and the petitioner continued with the arrangement which was not linked to the subscription agreements for the other two packages of the respondent for which regular payment was being made to the respondent. Zee Sports was included as part of the other two packages. According to him, therefore, this was distinct separate channel and was treated by the parties under separate arrangements and agreement. After the carriage agreement of this channel expired on 31.12.2005, the same channel continued to be carried based on oral arrangement as a promotion facility given to the respondent by the petitioner as per respondent's request. Mr. Kathpalia quoted Clause 4 of the Regulation which prohibits the broadcaster from disconnecting the channel without proper notice. Its disconnection on 8.9.2006 was therefore an act in contravention to Regulation. Mr. Maninder Singh, learned counsel for the respondent, however, said that Clause 4 of the Regulation is applicable in a case where there is a subscription agreement between the parties. According to him, there was no subscription agreement for Zee

Sports Chanel and therefore no notice was warranted and the respondent was at liberty to disconnect this channel without notice. In fact his submission was that in the nature of arrangement between the parties, the Regulations were not attracted. The Regulations do not apply to arrangements of the present type. We were made to go through the relevant part (Clause 4) of the Regulation, which is reproduced below:-

“4. Disconnection of TV channel signals.

4.1 No broadcaster or multi system operator shall disconnect the TV channel signals to a distributor of TV channels without giving three weeks’ notice to the distributor clearly giving the reasons for the proposed action.

Provided that a notice would also be required before disconnection of signals to a distributor of TV channels if there was an agreement, written or oral, permitting the distribution of the broadcasting service, which has expired due to efflux of time.

Provided further that no notice would be required if there is no agreement, written or oral, permitting the distribution of the signals.

4.2 No distributor of TV channels shall disconnect the re-transmission of any TV channel without giving three weeks notice to the broadcaster or multi system operator clearly giving the reasons for the proposed action.

4.3 A broadcaster / multi system operator / distributor of TV channels shall inform the consumers about such dispute to enable them to protect their interests. Accordingly, the notice to disconnect signals shall also be given in two local newspapers out of which at least one notice shall be given in local language in a newspaper which published in the local language, in case the distributor of TV channels is operating in one district and in two national newspapers in case the distributor of TV channels is providing services in more than one district. The period of three weeks mentioned in sub-clauses 4.1 and 4.2 of this regulation shall start from the date of publication of the notice in the newspapers or the date of service of the notice on the service provider, whichever is later.”

5. There is no gain saying a fact that in case there is a written or oral agreement/understanding permitting the channel to be transmitted by the broadcaster, there is a need to give notice as per the Regulation before disconnecting the said channel. We agree that there was no subscription agreement but the carriage agreement itself is nothing but permission

of the broadcaster for carriage of this Channel. Since these signals were being transmitted by the petitioner based on the permission of the respondent as per an agreement entered into between the parties, notice was necessary to enable the petitioner to make alternate arrangements and also prepare the consumers for the same. Regulation 4 uses the word 'agreement' in the first Proviso to Regulation 4.1. Word 'agreement' will cover every agreement including the type of agreement entered into between the parties in the present case. We are, therefore, of the view that the petitioner should not have been disconnected the Zee Sports Channel without notice.

6. Mr. Maninder Singh, learned counsel for the Respondent submitted that the channel was carried by the petitioner on promotion basis initially for which this carriage agreement was entered into but it expired in December, 2005 itself. The channel was converted into pay channel and the petitioner being a large MSO, was in the know of the same. According to him, therefore, the petitioner was to pay for the same subsequently. However, petitioner's contention is that no invoice was ever raised by the respondent for Zee Sports Channel on the petitioner and therefore it was very clear to both the parties that the channel carried by the petitioner continued to be free-to-air in accordance with the original carriage agreement.

7. Mr. Maninder Singh also stated that the fact that the decoder was given to the petitioner implied that the channel was a pay channel. However, as per the petitioner there are many free-to-air channels which are encrypted and therefore this point does not support the contention of the respondent that mere issue of decoder made it a pay channel. Mr. Kathpalia further said that even the decoder was given free of cost. To substantiate his stand he further said that neither any invoice or bill was raised, nor any outstanding amount on account of Zee Sports Channel was ever raised, nor a subscription agreement for this channel was signed; and nor was this channel included in the other two packages for which subscription agreement was entered into

and also renewed subsequently. Mr. Kathpalia said that it was only when the respondent bought the rights for transmission of Malaysian Triangular Series that it started arm-twisting the MSOs to get payment for this channel.

8. Mr. Maninder Singh, learned counsel for respondent argued that there was no agreement after 31.12.2005, and therefore, no notice was required before disconnection of supply of the signals. He also referred to the agreement dated 01.10.2005 to show that there was a requirement for a subsequent agreement. We are unable to accept this argument. Admittedly, signals continued to be supplied to the petitioner after 31.12.2005 there is no complaint or notice from the respondent to the petitioner for stopping the supply of signals nor the respondent ever demanded any payment for the continued supply of signals. No invoices were raised by the respondent against the petitioner. Therefore, the supply of signals by the respondent to petitioner cannot be said to be unauthorized. In fact, the inference is that this was being done in pursuance of an oral agreement between the parties. Nothing prevented the respondent from stopping supply of signals to the petitioner or at least giving a notice in this behalf. The permission was never withdrawn, although respondent was free to do so if it wanted to.

Secondly, it was argued by the learned counsel for the respondent that there was no statutory requirement for giving notice before stopping supply of signals to the petitioner, as there was no statutory agreement. In support of this argument the learned counsel relied on Clause 3.2 of the Regulations dated 10.12.2004. The said Clause is reproduced as under:-

“3.2 Every broadcaster shall provide on request signals of its TV channels on non-discriminatory terms to all distributors of TV channels, which may include, but be not limited to a cable operator, direct to home operator, multi system operator, head ends in the sky operator; Multi system operators shall also on request re-transmit signals received from a broadcaster, on a non-discriminatory basis to cable operators.

Provided that this provision shall not apply in the case of a distributor of TV channels having defaulted in payment.”

The requirement of notice is contained in Regulation 4 which has already been reproduced. The argument is that both the clauses of the Regulations have to be read together in order to find that the requirement of notice is confined to statutory subscription agreement. Again we are unable to accept this argument. Admittedly, there was an agreement between the parties and the signals were being supplied to the petitioner by the respondent under the said agreement. The supply of signals continued even after expiry of the agreement. This will be deemed to be in pursuance of oral agreement between the parties. The Regulation 4 quoted above covers an oral agreement also and lays down a requirement for notice. The arrangement which continued for nearly one year, having no time limit, cannot be terminated at the will and fancy of one of the parties unilaterally. The least that is required is a notice before termination. Interests of thousands of views are at stake. The spirit of the Regulation which provides for notice is to protect the interest of thousands of viewers. Clause 3.2 is a “must provide” clause and is meant for a different purpose.

9. Having gone through the pleadings and having heard the arguments, it is very clear that Zee Sports Channel was given to the petitioner by the respondent to be carried on promotional basis on no charge basis as per an agreement entered into between the parties. The execution of agreement is admitted. As already stated the arrangement as per the agreement continued even after expiry of the period under the agreement. Therefore, the petitioner was receiving Zee Sports channel signals in an authorized manner and was in turn relaying the same. The requirement of notice in Regulation 4 is not only to protect the receiver of signals like the petitioner, but also the consumers, i.e., the general viewership. Therefore, notice of termination ought to have been served on the petitioner by the respondent before disconnecting the supply of signals to it. In the interest of the consumers and in accordance with the Regulation, notice was

required to be given to the petitioner for disconnection of this channel which was not done by the respondent and therefore this action is clearly illegal.

However, since this re-connection of Zee Sports Channel was ordered by us and the petitioner enjoyed the signals, we feel that some consideration is due to the respondent. It is also a fact that after watching the Malaysian Triangular Series, the petitioner has disconnected the Zee Sports Channel voluntarily. It goes to prove that it was interested in the Channel during the Malaysian Triangular Series, when it was a pay channel and therefore the petitioner is under obligation to pay for that period to the respondent at the rate of Rs. 10/- per subscriber which is the rate declared by the respondent with the TRAI.

10. The respondent claims with reference to the negotiated agreements for Bouquet 1 and 2 between the parties that the subscriber base of the petitioner is more than 2 lakhs subscribers. However, at the time of granting interim stay in favour of the petitioner we had directed the petitioner to deposit a sum of Rs.20 lakhs. In the interest of justice and equity and in order to compensate the respondent for the signals provided by it to the petitioner under our orders, we direct that the amount of Rs.20 lakhs deposited in this Tribunal be paid to the respondent forthwith.

11. Here we would like to deal with an argument on behalf of the petitioner that if at this stage the petitioner is asked to compensate the respondent, it will not be able to recover the amount from the subscribers. In this behalf we would only like to say that the petitioner had approached this Tribunal seeking interim order for continued supply of signals. We passed a conditional interim order requiring the petitioner to deposit Rs.20 lakhs in this Tribunal before the supply of signals could be restored to the petitioner the petitioner complied with the said order which led to the supply of signals being restored to it. If the petitioner was not happy with the condition

under the interim order of this Tribunal, it need not have complied with the order. Obviously the petitioner complied with the order because it saw some benefit under the order. Having reaped the benefit of the order it does not lie in the mouth of the petitioner to raise an argument that it will not be able to recover the amount from the subscribers. Therefore, we see no merit in this argument.

12. The petition is disposed of with the above direction.

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

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(D.P. Sehgal)
Member

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