

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

Dated 10th December, 2009

Petition No.262(C) of 2009

Shree Communications & Anr.

...Petitioners

Versus

Star Den Media Services Pvt.ltd.

....Respondent

BEFORE:

HON'BLE MR. JUSTICE S.B.SINHA, CHAIRPERSON

HON'BLE MR. G. D. GAIHA, MEMBER

For Petitioners : Mr.Navin Chawla, Advocate

For Respondent : Mr.Ramji Srinivasan, Sr. Advocate

ORDER

By our order dated 03.12.2009, we, while refusing to grant interim prayer in favour of the petitioners, directed as under:

“Having heard the learned counsel for both the parties, we are not inclined to pass any injunction order at this stage. The reasons will follow.

However, this order would not preclude the parties from entering into any agreement having regard to the facts and circumstances of the case.

Reply be filed within three weeks. Rejoinder thereto, be filed within two weeks thereafter.

Let the matter appear for further directions on 08.01.2010. However, it is directed that Petitioner No.1 would confine to the town of Ongole only.”

Reasons in support thereof are being assigned now.

The petitioners are Multi-service Operators (MSOs). The petitioner No.1 entered into an agreement on or about 16.02.2009 with the respondent herein for transmission of its signals in the district headquarter of Prakasham, commonly known as Ongole, the relevant clauses whereof are as under:

“IV. AREA

‘Area’ shall mean the areas within which the Affiliate is authorized in terms of this Agreement, to distribute the Subscribed Channels to the Subscribers through the Distribution System as detailed in Applicable Annexure B:

The Affiliate cannot extend the Area beyond to that agreed hereof in writing between the Parties. Violation of this clause will be a material breach of this Agreement and the Affiliate shall be deemed to have unauthorized access to the signals of the Subscribed Channels and STAR DEN shall have the right to terminate the Agreement and disconnect the signals of the Subscribed Channels to the Distribution System of the Affiliate, in addition to any other legal or equitable remedies available to it.

V. TERM:

This Agreement is valid from 10.02.09 to December 31, 2009, unless earlier terminated by either Party in terms of this Agreement. However, if the Parties agree to extend the Term, a new agreement shall be executed upon such mutually agreeable terms and conditions.

In case the Affiliate intends to extend the Term of this Agreement, it shall give STAR DEN a written notice two(2) months prior to the expiration of the Term, conveying its intention of such extension, upon which the Parties shall negotiate the terms and conditions and thereafter execute fresh Subscription Agreement, which shall apply to the term mentioned therein.

Provided that the new commercial terms shall become applicable from the date of expiry of the Term of this Agreement. Provided further that if the parties are not able to arrive at a mutually acceptable new Agreement then either Party may disconnect retransmission of the signals of the Subscribed Channels at any time after the expiry of this Agreement after giving notice in pursuance to the applicable Law. Provided however that in case of such disconnection, the Affiliate shall be required to pay the Subscription Fee till the date of declaration.

VI. SUBSCRIPTION FEE:

Subject to General Terms And Conditions, the Affiliate shall pay STAR DEN ('Subscription Fee') on a monthly or other agreed basis, equal to the rate per Subscriber (the 'Rate') multiplied by the Subscriber Base set forth in Annexure C hereto. STAR DEN reserves the right to revise the Rate for the Channels charged by STAR DEN to the Affiliate subject to the applicable Law. Any change in the Rate communicated to Affiliate by STAR DEN shall automatically be deemed to be an amendment to Annexure without the need for an executed amendment to this Agreement.

In the event of any revision in the Rate brought about by any statutory authority including but not limited to the Telecom Regulatory Authority of India ('TRAI') or any other quasi judicial or judicial authority, the revised rate shall apply from the date such revision is notified by such authority, and shall automatically be deemed to be an amendment to Annexure C without the need for an executed amendment to this Agreement."

The petitioner No.2, however, requested the respondent to grant signals in one of the towns of the said district of Prakasham known as Chirala. He was a new entrant. One M/s Venkatasai Media Network Pvt. Ltd. is said to be a competitor MSO operating in that area. The petitioner No.2 requested for supply of signals in July/August 2009 whereupon one Mr.Arvind said to be the Area Sales Manager of the respondent of the Vijayawada region, allegedly upon negotiation, asked him to pay three months' advance for the said purpose. It is stated that he had signed an agreement which was collected by Shri Arvind promising him to supply a copy thereof at a later date. However, as in the meantime, the said M/s Venkatasai Media Network Pvt. Ltd. took over the network of the competitive MSO who is stated to be the distributor of respondent for its south region, no formal agreement could be entered into.

However, according to the petitioners the said Shri Arvind, having regard to the fact that petitioner No.1 had already made the request for expansion in the town of Chirala asking the respondent to provide signals therein, the respondent returned the demand drafts to the petitioner No.2 and asked it to obtain and supply signals to the petitioner No.1. On such representation the

petitioner No.1 stated to have spent a huge amount for laying the optic fibre cable from Ongole to Chirala for supply of signals to the local cable operators as desired by the petitioner No.2.

The respondent, however, issued a notice purported to be in terms of clause 4.1 of the Regulation as also published a public notice threatening disconnection in the supply of signals, inter alia, on the premise that the petitioner No.1 has transgressed the area of operation.

The petitioners have filed this petition claiming, inter alia, the following reliefs:

- a) pass order(s) setting aside the notice dated 19/10/2009 and the public notice dated 7/11/2009 issued by the respondent threatened to disconnect the signals provided to Petitioner No.1.
- b) pass an order setting aside the public notice dated 7/11/2009 in so far as it seeks to disconnect the signals of the respondent, which are being received by petitioner No.2 without giving any notice or public notice in the name of petitioner No.2.
- c) in the alternative pass an order directing the respondent to provide the signals to petitioner No.2 in terms of the regulations of the TRAI.”

The respondent having served notice, inter alia, filed documents, copies of the same had been handed over in advance to Mr.Navin Chawla, learned counsel appearing for the petitioners.

In support of the prayer for interim relief, Mr.Chawla would submit that the action on the part of the respondent must be held to be malafide as it issued the said public notice only at the behest of the said M/s Venkatasai Media Network Pvt. Ltd. It was submitted that the Regulations prohibited exercise of monopoly by any private MSO, working as a distributor of a broadcaster. It was pointed out that Shri Arvind who is an authorized representative of the respondent has the requisite authority to negotiate on behalf of the respondent and/or extend assurances that the requests of the petitioners would be acceded to. It was urged that the petitioners have acted on the basis of the said representation which would not only be evident

from the deposit of three months' advance by the petitioner No.2 but also from laying down of optic fibre cable by the petitioner No.1 from Ongole to Chirala which covers a distance of about 52 kilometers. The petitioner No.1, it was submitted having regard to the provisions contained in the Telecommunication (Cable & Broadcasting Services) Regulation 2004, was entitled to expand from one area to the other and even if it be held that such expansion was illegal, the respondent may at best ask the petitioner No.1 to pay a higher fees on the basis of the subscriber base.

Our attention in this behalf has been drawn to an undated letter addressed to the respondent the relevant portion of which is in the following terms:

“Minutes of Meeting

The following persons have attended the meeting held on 5th Aug 09

1. Mr.Aravind TM Starden Media Services.
2. Mr.Subbarao and Mr.Vishwasen Naidu of Sree Communications Ongole.

Both the parties have agreed to the following terms and conditions pertaining to Ongole town.

1. Sree Communications agreed to make a payment of Rs.172546 (Incl.Taxes) with effect from 1st Aug 09.
2. Sree Communications agreed to increase the monthly subscription from January 1st 2010 onwards the increased subscription would be Rs.1,90,000 (Incl Taxes) per month.
3. In case the channels are activated to any other network in Ongole town, Sree communications agreed to pay the old billing of Rs.150040/- only.
4. Sree communications shall make the payment thru DD only.”

It was furthermore contended that the petitioner had also provided the number of subscribers to the respondent in terms of its letter dated 19th October, 2009.

Mr.Navin Chawla, learned counsel for the petitioners would contend:

- (i) That a copy of the agreement had not been supplied by the respondent to the petitioner and thus, the question of filing the same did not arise.
- (ii) The petitioners themselves have raised a contention in the petition that one of the letters of the respondent may be treated to be under Regulation 4.1 of the Regulations and thus, the question of any suppression did not arise.
- (iii) Having regard to the provisions contained in the Regulations, the terms and conditions of the agreement would be sub-servient thereto.

Mr.Ramji Srinivasan, learned senior counsel appearing on behalf of the respondent, on the other hand, urged:

- (i) Two different causes of action having been clubbed together, this petition is not maintainable;
- (ii) The petitioners are guilty of suppression of material facts as neither a copy of the agreement nor a copy of the notice issued by the respondent in terms of Regulation clause 4.1 has been disclosed in the petition;
- (iii) The agreement in question has disclosed the area of operation on the part of the petitioner No.1.

Before advertng to the rival contentions of the parties, we may notice the relevant provisions of "The Telecommunication (Broadcasting and Cable Services) Interconnection Regulation 2004" (hereinafter referred to as the 'Regulation') as also the Explanatory Memorandum attached thereto:

- 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.

Provided further that any imposition of terms which are unreasonable shall be deemed to constitute a denial of request.

- 3.3 A broadcaster or his/her authorised distribution agency would be free to provide signals of TV channels either directly or through a particular designated agent or any other intermediary. A broadcaster shall not be held to be in violation of clauses 3.1 and 3.2 if it is ensured that the signals are provided through a particular designated agent or any other intermediary and not directly. Similarly a multi system operator shall not be held to be in violation of clause 3.1 and 3.2 if it is ensured that signals are provided through a particular designated agent or any other intermediary and not directly.

Provided that where the signals are provided through an agent or intermediary the broadcaster/multi system operator should ensure that the agent/intermediary acts in a manner that is (a) consistent with the obligations placed under this regulation and (b) not prejudicial to competition.

Between Multi System Operator and Broadcaster

- 10.2 In non-addressable systems, the subscriber base agreed upon by the parties at the time of execution of the interconnection agreement between a multi system operator and a broadcaster shall remain fixed during the course of the agreement except in exceptional circumstances that warrant an increase or decrease in the subscriber base. In such an eventuality, it is for the service provider seeking a change in the subscriber base to provide reasons and accompanying evidence including localsurvey for the proposed change.

Provided that this sub-clause shall not apply to changes in the subscriber base of a multi system operator on account of any cable operator joining or leaving the multi system operator.

Provided further that any change in the subscriber base of a multi system operator, which is the basis of payment to a broadcaster, on account of any cable operator joining or leaving the network of the multi system operator shall be equal to the subscriber base of the cable operator, joining or leaving the network.

Explanatory Note

11. The primary reason for disputes arising on account of expansion of area is that without addressability, it is impossible to know the actual subscriber base and area is the basis on which a subscriber base is arrived at. Any change in area of operation has direct bearing on the negotiations with respect to subscriber base. However, the expansion of area by a multi system operator on account of giving feed to a cable operator operating outside the existing area of operation of the multi system operator can be taken care of by negotiations based on the Subscriber Line Report (SLR). Similarly, the expansion of area of operation by a cable operator will also get reflected through the Subscriber Line Report (SLR).

Recourse to clause 3.2 as a 'must provide' clause by a new entrant and expansion of an area by an existing MSO, in our opinion, stand on different footings.

The principal contention of the petitioners is that the action on the part of the respondent is malafide in so far as it sought to advance the interest of its distributor who is also an MSO. It is for the aforementioned purpose, our attention has been drawn to the decision of the Supreme Court of India in *Star TV Vs. Sea* - 2007(4) SCC 510 wherein the Apex Court held as under-

“15.3 The difficulty arises when the broadcaster as in the present case appoints or enters into an agreement with a distributor, who in turn is an MSO and who in turn has his own business because in such a case such an agent-cum-distributor is also a competitor of the MSO who seeks signals from the broadcaster. We are living in a competitive world today. If under the Interconnection Regulations an MSO is entitled to receive signals directly from a broadcaster, if directed to approach his competitor MSO then, discrimination comes in. The reason is obvious. The exclusive agent of a broadcaster has his own subscriber base. His base is different from another MSO in the same territory. If that another MSO has to depend on the Feed to be provided by the exclusive agent of the broadcaster then the very object of the Interconnection Regulation stands defeated.”;

However, M/s Venkatasai Media Network Pvt. Ltd. who is said to be competing MSO has not been impleaded as a party in this petition. It was in our opinion, a necessary party as any finding on the allegation of malafide should gravely prejudice it.

It may or may not be true that some steps had been taken by the petitioners pursuant to or in furtherance to some representation made by Shri Arvind who is merely a Regional Sales Manager of the respondent. It has, however, not been shown that the said Shri Arvind had any authority to make that representation on behalf of the respondent.

Be that as it may, it is beyond any controversy at this stage that the parties would be bound by the terms of the agreement. They clearly show that transgression from the area of operation is not permissible.

The area of operation of the petitioner was Ongole. We would assume for the sake of argument (although we have serious reservations on the submissions made by Mr.Navin Chawla that Regulations permit such expansion of area even without any authority from the broadcaster) is permissible under the Regulations. Expansion of area of operation, however, would not mean operating in two different areas situated 52 kilometers away from each other. Each area of operation by and large should be a separate compact area.

We, therefore, are of the opinion that the petitioners have failed to make out a prima facie case. The petitioners are, therefore, not entitled to an order of injunction for carrying out its operation at Chirala. It may, however, carry out its operation at Ongole.

.....**J**
(S.B. Sinha)
Chairperson

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(G.D. Gaiha)
Member