

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

DATED 7th JANUARY 2009

PETITION NO.215(C) of 2008

**Wire and Wireless (India) Ltd.
Essel House, B-10
Lawrence Road Industrial Area
New Delhi-110 035**

.....

Petitioner

Versus

**M/s MSM Discovery Pvt. Ltd
9/1B Secular House, IInd Floor,
Qutab Institutional Area
Arun Asaf Ali Road
New Delhi-110 035**

.....

Respondent

BEFORE:

**HON'BLE MR.JUSTICE ARUN KUMAR,CHAIRPERSON
HON'BLE DR.J.S. SARMA, MEMBER
HON'BLE MR.G.D. GAIHA,MEMBER**

For Petitioner

**: Mr Maninder Singh
Mr Yoginder Handoo
Mr. Kunal Sood
Mr.Mansimran Singh, Advocates**

For Respondent

**: Mr. Gopal Jain
Mr. Kaushik Mishra, Advocates**

ORDER

By this petition M/s Wire and Wirelss (India) Ltd.,(WWIL) a public limited company (successor in interest of M/s Siti Cable Network Limited, as a Multi System Operator (MSO) has pleaded its claim of carrying on the business in Varanasi and its adjoining areas of distributing signals of various Free To Air channels and pay channels to the subscribers through its affiliate cable operators by seeking decoders/signals of various channels being distributed by the respondent. The respondent is an agent of various broadcasters and is a company incorporated under the Companies Act, having its registered office at New Delhi. The petitioner has pleaded that it has requested the supply of signals of various channels since April 2006 for retransmission of the same in the city of Varanasi and its adjoining area under Regulation 3.2 of the Interconnect Regulations of Telecom Regulatory Authority of India (TRAI) dated 10.12.2004 as amended on 04.9.2006.

2. It has been pleaded that since April 2006 talks/negotiations in furtherance of the request of the petitioner have continued and during negotiations, the respondent herein, *inter alia*, contrary to the provisions of the statutory regulations, demanded a minimum guarantee from the petitioner and offered other terms which were completely illegal, arbitrary and contrary to the TRAI regulations. A draft Memorandum of Understanding for discussions, which is an admitted document, submitted with the petition vide communication dated 5th May 2008 (through E-mail) clearly indicate that in case the respondent deactivates either of the two MSOs i.e. M/s Shrinathji Distributors (P) Ltd., or M/s Multi Channel Network or if M/s Shrinathji Distributors (P) Ltd. or these MSOs discontinue the respondent's channels of their own, then the petitioner shall be additionally liable to enhance the monthly subscription fee to Rs.8.8 lakhs (excluding taxes) vis-a-vis Rs.3 lakhs, immediately from the date of deactivation/discontinuation of its channels to either of the two MSOs. It is also mentioned in the said agreement that, in case at the time of deactivation the petitioner is paying higher than the minimum guarantee subscription of 3 lakhs, then the same shall be enhanced by an additional amount of Rs.5.01 lakhs (excluding taxes). The amount of Rs.3 lakhs has been specified in the said agreement as a minimum guarantee fees on a monthly basis. This minimum guarantee fees has been in lieu of the fact that since the petitioner is a upcoming MSO and, therefore, it is not in a position to furnish information/documents as stipulated in the TRAI's Interconnect Regulations and this minimum guarantee amount shall be payable whether the petitioner is able to recover or is not able to recover as subscription or other amounts from its system/subscribers.

3. It is also mentioned in the same draft Memorandum of Understanding (MOU) that in the event, the signals for both the networks i.e. M/s Multi Channel Network and M/s Shrinathji Distributors (P) Ltd is discontinued, the monthly subscription by the petitioner shall increase unconditionally to Rs.12 lakhs (excluding taxes) effective from the date of deactivation of signals to the network of these two MSOs. It is also mentioned in the said draft agreement that the petitioner undertakes to pay in addition, the complete outstanding of M/s Shrinathji Distributors (P) Ltd. and M/s Multi Channel Network if any, as on date of deactivation/discontinuation.

4. The above clauses have been pleaded to be impermissible terms and conditions contrary to TRAI Regulation. The petitioner vide its letter dated 22-7-2008 has offered connectivity of 500 to 800 subscribers to start with. The petitioner has also indicated that after starting services and getting affiliated with more cable operators, it will furnish changes in subscriber base to respondent on monthly basis through SLR, and the subscription fee shall be revised accordingly as per the declared connectivity of the affiliated cable operators. The respondent has, however, demanded a minimum guarantee amount of Rs.3 lakhs per month, as per the proposed and admitted Memorandum of Understanding dated 01-5-2008 forwarded vide E-mail dated 5-5-2008. The MoU also envisages an increase as mentioned in paras 2 & 3 above.

On 18-8-2008 the respondent had asked the petitioner to furnish the details of the postal registration certificate, details of direct connections/subscribers SLR (in case there is no SLR, to provide evidence to corroborate the evidence of the subscriber base along with filling up of an application form asking for more or less the similar details in a prescribed format. The petitioner has submitted the filled up application form along with the

registration certificate on 19-9-2009 to the respondent. On 22-9-2008 the petitioner has also clarified that the revised draft Memorandum of Understanding has been sent by them to respondent on 11-6-2008 in which unreasonable conditions like asking for a guaranteed sum from the petitioner, in case of discontinuation/deactivation of their channels to the other MSOs were deleted while the sum of Rs.3 lakhs as a minimum guaranteed sum for starting the business with a minimum guaranteed declared subscriber base of 2729. It has also been pleaded in its letter dated 22-9-08 that the delay in execution of agreement is uncalled for and is a clear breach of Interconnect Regulations dated 10-12-2004 since the negotiations have continued for the last six months. The petitioners have also expressed that in case the agreement is not signed it will be compelled to approach the TDSAT for redressal of its grievances.

5. As per the Regulation 3.1 the distributor of the TV channel is prevented to engage in any practice or activity or understanding or arrangement to give exclusivity in its contracts with any distributor of TV channels which prevents any other distributor to obtain such channels for distribution. Exclusivity has not been permitted as a feature of India's fragmented cable TV market by regulation. Exclusivity creates an inherent defect of being an agent of the broadcaster as an MSO who will not permit any other MSO to compete with it, thereby eliminating the competition at all. The learned counsel has quoted the Apex Court Case No.(2007) 4 SCC 656 **Star India Private Limited vs Sea TV Network Ltd.** The Apex court has approved the principle which has been enshrined in Clause 3.1 of the Interconnect Regulations.

6. Taking cognizance of this regulation and from the proceedings between the petitioner and the respondent, it is evident that imposing a minimum guaranteed sum on the petitioner by the respondent in the event of deactivation/discontinuation of signals to other MSOs exactly from the date of the event, is as good as giving exclusivity of the contract and eliminate the process of competition amongst various other TV channel distributors if any, as MSOs/LCOs in the impugned area.

7. The respondent has tried to rely upon the fact that complete information has been received only on 19-9-2008 and therefore, the petitioners approach to this Hon'ble Tribunal on 30-9-2008 is uncalled for and it violates regulation 3.2 which gives 60 days time to comply with the "must provide" clause. The learned counsel for the petitioner has pleaded that the draft agreement dated 01-5-2008 has been sent by the respondent to the petitioner via E-mail dated 11-6-2008 is pursuant to the request of the petitioner for signals made in April 2008. The respondent in reply affidavit has confirmed in its submissions, that upon mutual deliberations and discussions between the parties, the draft MOU dated 01-5-08 was sent by respondent from their side to the petitioner on the terms on the basis of which the commercial arrangement shall be concluded between the parties. This submission contradicts the contention of respondent that the request of the petitioner under Clause 3.2 was made for the first time on 19-9-2008 and, therefore, the petition is premature. The petitioner has further relied upon the provisions in the Clauses 3.2 to 3.5. Clause 3.5 mandated that, pursuant to the receipt of request for signals under clause 3.2, the broadcaster is either required to accept the request for signals or, *inter alia*, give a counter offer specifying the terms and conditions on its behalf conforming to the regulations. The petitioner has pleaded that the 5th May 2008 E-mail is just a response under clause 3.5 in response to request made under clause 3.2 in April 2008. The cause of dispute in the present

petition is the presence of unreasonable conditions which have been prayed to be deleted. It has been strongly pleaded that the respondents claim of the petition being premature is, therefore, not sustainable.

8. It has been contended by the respondent that the petitioner has tried to pose as a fresh player in the market and is attempting to take a back door entry by bringing to our notice the letters dated 01-6-2006 and 12-6-2006 regarding the change of name of Shrinathji Cable Private Limited to Shrinathji Distributor (P) Ltd. The operator's code has also been brought to our notice as N-12587 in the request form for up-gradation dated 19-7-2006 and the validation form dated 01-6-2006, which also include the IRD and Viewing Card details as submitted by M/s Shrinathji Distributor Pvt. Ltd. The petitioner has clarified these points during arguments and also in its pleadings at the time of submission of the rejoinder. The petitioner has pleaded that for the purpose of providing cable TV service in the city of Varanasi the erstwhile Siti Cable Network Limited (predecessor in interest of WWIL the petitioner) along with one Shri Alok Parikh of Varanasi incorporated a company, namely, M/s Shrinathji Cable (P) Ltd. The petitioner had 51% share in this company at the time of incorporation i.e. on 28-12-1995 and the relevant proof of certificate of incorporation have been submitted along with the rejoinder.

9. The petitioner claims to have invested a large amount of money for creating the network of this company. The company suffered huge losses and, therefore, the petitioner had to discontinue this joint venture business in Varanasi in 2005. Mr Alok Parikh, who was a 49% stake holder in this company and his certain other associates expressed their desire to the petitioner for incorporating a new company of their own to provide Cable TV service in the city of Varanasi. For this purpose they had desired to take the infrastructure set up with the investment of petitioner at Varanasi on "right to use" basis after making a monthly payment of Rs.4.5 lakhs by executing an agreement. M/s Srinathji Distributor (P) Ltd. has been pleaded to be a creation of this activity and was incorporated on 28-10-2005. The petitioner has pleaded that it had no share holding whatsoever in the new company while the other partner Mr Alok Parikh along with his associates formed a new company. The petitioner has pleaded that it is, therefore, entirely incorrect on the part of the respondent to claim that M/s Shrinathji Distributor (P) Ltd is only a new name of M/s Shrinathji Cable Private Ltd. It has also been pleaded that the certificate of incorporation for incorporating new companies is issued under Section 34 of the Companies Act while the change of name of an already incorporated company is permissible under Section 21 of the Companies Act. Since M/s Shrinathji Cable Private Limited has never made any application under Section 21 of the Companies Act (petitioner being a partner of this company having 51% share holding), the question of change of name does not arise at all.

10. The pleadings by the learned counsel on behalf of the petitioner has brought out the following arguments to prove that petitioner has no relationship with M/s Shrinathji Distributors Pvt. Ltd. as well as in regard to other objections raised by the respondent.

(a) On receipt of the request in April 2008 by the respondent, the request was not returned back by taking a stand that this request cannot be entertained since petitioner and M/s Shrinathji Distributors Pvt. Ltd are the same and, therefore, the decoders to respondent cannot be given on this ground. The draft Memorandum of Understanding of 01-5-08 sent on 05-5-08 through E-mail by

respondent is sufficient proof to eliminate the stand taken by respondent about there being any relationship between petitioner and M/s Shrinathji Distributors Pvt. Ltd.

(b) The para-2 of draft agreement sent by respondent reflects as if the petitioner has agreed to pay a minimum guaranteed amount in the absence of any information/supporting data for projecting a subscriber base. When this para is compared with the draft agreement suggested by petitioner and forwarded on 11-6-08 through an E-mail, it becomes evident that petitioner has never suggested/agreed for guaranteed amount.

(c) The third party letters as mentioned in para 8 above are of June 2006 while there is no reflection of these letters when the draft Memorandum of Understanding was sent in May 2008 and, therefore, to draw inference based upon these letters is not appropriate.

(d) In para 6 (i), (ii) and (iii) of draft agreement the respondent has admitted that M/s Shrinathji Distributors Pvt. Ltd is another existing MSO whose burden of the subscription has been proposed to be borne by petitioner from the date of its default or, from the date, signals are not distributed by it.

(e) The Rs.38 lakhs approximate outstanding amount on the part of petitioner is also not sustainable because petitioner was getting signals for the first time.

(f) It was pleaded that M/s Shrinathji Cable was incorporated in 1995 and closed its business in 2005. The statement of account presented by respondent is from January 2007 and goes upto September 2008 and does not involve any amount from 1995 to 2005 when M/s Shrinathji Cable were conducting business in Varanasi. During the period of impugned outstanding, the respondent have entered into a subscription agreement with M/s Shrinathji Distributors Pvt. Ltd. on 01-6-2006 and 01-9-2007.

We are inclined to believe that on the basis of the documents submitted along with facts mentioned in the rejoinder of the petition and the arguments as mentioned above, that there is no ground on which the relationship between petitioner and M/s Shrinathji Distributors Pvt. Ltd. can be established and the approximate outstanding amount of Rs.38 lakhs does not become liability of the petitioner.

11. It is a fact, that the petitioner and M/s Shrinathji Distributors (P) Ltd has signed an agreement for “right to use” the network on 01-11-2005. The petitioners have brought to our notice clauses 7 and 11 of the right to use in the agreement which makes it abundantly clear that all obligations to make the payments for the pay channels including Zee Pay Channel is the sole liability of the newly incorporated company M/s Shrinathji Distributors (P) Limited. In the above context, the petitioners have pleaded that the allegation of the respondent for paying the approximate outstanding amount of Rs.38 lakhs of the respondent supported by alleged account statement annexed with the proposed Memorandum of Understanding between the petitioner

and the respondent submitted on 01-5-2008 has no relevance since any claim for any unpaid subscription amount lies only with M/s Shrinathji Distributor (P) Ltd.

12. We are inclined to agree that the issue raised by the respondent in regard to the amount outstanding against M/s Shrinathji Distributor (P) Ltd., using the garb of synonymy of this company with M/s Shrinathji Cable (P) Ltd. of which petitioner was a partner, is not sustainable. The petitioner has agreed to pay a subscription amount to the respondent of Rs.3 lakhs per month for 2729 subscribers as per the terms and conditions incorporated by the respondent in his draft Memorandum of Understanding except the unreasonable and impermissible terms incorporated in Clause 6 (i), (ii) and (iii), The petitioner is also ready and willing to pay a monthly subscription amount on any increase beyond 2729 subscribers on account of the increase of its subscriber base by virtue of migration/addition in the affiliate cable operators. We are of the opinion that the conditions in para 6 (i), (ii) and (iii) do not conform to the clause 3.1 of the Regulation and, therefore, the same should be deleted from the MoU. The draft Memorandum of Understanding sent by the petitioner on 11-6-2008 may be considered by the respondent for agreeing mutually for the purpose of giving signals to the petitioner within a period of two weeks from the date of this order.

13. The petition is disposed of without costs.

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Aurn Kumar
Chairperson

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Dr.J.S. Sarma
Member

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G.D. Gaiha
Member