

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**NEW DELHI****DATED 27th NOVEMBER, 2009****Petition No. 149(C) of 2009**

M/s Vijay Communications

D.No.9-309, 3rd Floor

R.K. Complex

Eluru Road, Gudivada

Krishna District

Andhra Pradesh

....Petitioner

Vs.

M/s Ushodaya Enterprises Pvt. Ltd.

(ETV Net Work)

Television Division

Ramoji Film City

Hyderabad – 502 512

Andhra Pradesh

...Respondent

BEFORE:**HON'BLE MR. JUSTICE S.B.SINHA, CHAIRPERSON****HON'BLE MR. G. D. GAIHA, MEMBER**

For Petitioner : Mr. B.S. Sai , Advocate

For Respondent : Mr. Balaji Srinivasan, Advocate
with Mr. Prabhat Ranjan, Asst.
Manager (Legal)**JUDGEMENT****S.B. Sinha**

The petitioner is a multi system operator (MSO). The respondent is a broadcaster. The petitioner approached this Tribunal earlier for a direction upon the respondent for granting signals of various channels through its cable network.

One of the questions raised in the said proceeding was the correctness of the registration certificate of its link operators. It was also contended that the petitioner is not an MSO.

The aforementioned contentions of the respondent were rejected. This Tribunal directed as under:-

“Accordingly, we find no merit in any of the objections taken on behalf of the respondent. The respondent is directed to supply IRD boxes/decoders along with the SIM Cards for ETV and ETV-2 Telugu Satellite channels to the petitioner within one week of the passing of this order and further four weeks’ time is allowed to the parties negotiate and finalise commercial terms and execute a subscription agreement. For determining the subscriber base petitioner has agreed for a joint survey. Let the parties complete the joint survey within two weeks so that payment for supply of signals can be made by petitioner to respondent on the basis of figures arrived at as per joint survey.”

2. The petitioner contends that although it had supplied the list of its subscribers being 1115 in number as also a list of channels which were being operated by it, the respondent for reasons best known to it, did not hold a joint survey and there is no denial that the respondent had acted upon the said direction of this Tribunal dated 21.10.2008 by providing the respondent with requisite signals.

3. The further contention of the petitioner is that although the respondent granted signals, it obtained a blank signed form of the agreement from it and had unilaterally shown the number of subscribers as 2300 for the period 18.12.2008 to 17.1.2009, 2700 for the period 18.1.2009 to 17.2.2009 and 3000 for the period 18.2.2009 to 17.12.2009.

According to the petitioner, it had, on all occasions, been contending that its subscriber base had increased by 15 only from 1100 and it had been paying the subscription fees only on that basis.

4. Before us, the petitioner has filed a chart showing that it had made payments on the basis of 1100 subscribers from December, 2008 to February, 2009 and on 1115 subscribers from March, 2009 to October, 2009. According to it, it has made total payment of Rs. 1,33,418/-.

The respondent, on the other hand, claims that the petitioner was liable to pay a total sum of Rs. 71,281.17 over and above what has been paid by the petitioner, the break-ups whereof is as under:-

Debit Note	Period	Amount
(i) 14579	18-12-2008 to 17-01-2009	Rs. 26,876.41 Ps
(ii) 14580	18-01-2009 to 17-02-2009	Rs. 31,550.68 Ps
(iii) 14581	18-02-2009 to 28-02-2009	<u>Rs. 12,853.98 Ps</u>
	Total	<u>Rs. 71,281.17 Ps</u>

A demand of the said amount was made by the respondent by its letter dated 5.3.2009.

5. According to the petitioner, despite order of this Tribunal and despite the petitioner's approaching it on several occasions, the respondent had refused and/or neglected to undertake a joint survey. The petitioner stated that even he had sent his son with all the required informations to the office of the respondent on or about 16.2.2009 with a view to assist the respondent to undertake the joint survey. Our attention in this behalf has also been drawn to its letters dated 16.2.2009 and 23.3.2009 wherein the petitioner stated that it had only 1100 connections.

6. It is on the aforementioned premise that the petitioner has filed this petition with the following prayers:-

“(1) Direct the Respondent to provide uninterrupted good quality signals of its ETV and ETV2 channels to the Petitioner network through Decoders and SIM Cards to the entire Gudivada (Town and Rural) area,

(2) Direct the Respondent to immediately invite the Petitioner for a meeting in order to work out further modalities and conduct a joint survey as per Hon'ble Tribunal's Order dated 21.10.2008 in Petition No. 217(C) of 2007 and entering into a fresh agreement with the Petitioner.

(3) Direct the Respondent to conduct a joint survey of the connections of the Petitioner without any further delay and enter into a proper agreement as required by law without any discriminating terms as per the present subsisting connectivity.

(4) Direct the Respondent to provide the proper and legal Written Agreement duly signed by both parties.”

7. The respondent issued notices to the petitioner in terms of Regulations 4.1 of the Telecommunication (Broadcasting and Cable Services) Interconnection (3rd Amendment) Regulation (10 of 2006), inter alia, on the premise that the petitioner is in arrears of the amount of subscription payable to it. A public notice was also published in terms of Regulation 4.3 of the Regulation.

This Tribunal, by an Order dated 7.7.2009 directed the petitioner to deposit a sum of Rs. 35000. It was furthermore directed:-

“Let the petitioner supply the details with regard to its subscribers to the respondent within two weeks from today. This will include the number of subscribers who have allegedly left the petitioner. Thereafter the parties will join in a joint survey to determine the present subscriber base of the petitioner.”

We may also place on record the relevant portion of the Order passed in the present proceeding on 25.8.2009 which reads as under:-

“Counsel for respondent submits that petitioner has not supplied information regarding LCOs who have left the petitioner since the signing of agreement. In reply to this, counsel for petitioner submits that the petitioner was made to sign a blank agreement and no LCO has left the petitioner since the signing of the agreement. Counsel for respondent denies that the petitioner was made to sign a blank agreement. Be that as it may, let the joint survey be completed within 10 days basing on the SLR report furnished by the petitioner.

Counsel for respondent submits that the petitioner has not been paying even the monthly subscription. Let the petitioner pay the entire amount towards monthly subscription up-to-date within two weeks from today. It shall continue to pay monthly subscription amount.”

8. According to the respondent, as the number of subscribers of the petitioner stood admitted, the question of undertaking any joint survey did not arise.

9. The respondent, would, however, contend that after the passing of the above Order, a meeting was held by and between the representatives of the petitioner and the respondent on 5.9.2009, at the end whereof the following minutes of the meeting were drawn up:-

“The petitioners have confirmed that they are paying Channel Plus for 3,000 subscriber base, but however they refused to provide us the copy of the invoice and list of Subscriber base of 3000 connectivity. They have provide only 1115 subscriber base and failed to provide the migrated list of 1885. They said that they are having 11 (eleven) Cable Operators but refused to provide area wise Cable Operators list and stated that their advocate advised them not to share any list. As they have not cooperating in providing the required information and in the absence of the entire list, we have conveyed that we are unable to proceed with the Joint Verification. We asked them to sign on the Minutes of the Meeting but they refused, stating that their advocate advised them not to sign any document.”

10. The petitioner admits that such a meeting was held. The petitioner, however, in its rejoinder stated:-

“It is not correct Minutes were recorded, as per Petitioner is concerned there was no Minutes were recorded. The petitioner is denying the contention that the authorized representative of the petitioner refused to sign the minutes on the ground that he has been advised so. The petitioner humbly submits that on 05.09.2009 the representatives of the respondent visit the petitioner office and demanded the list of who have left from the Petitioner network, i.e., 1885 subscribers. The Petitioner denied the same because there was no down gradation from the petitioner network from December 2008.”

11. Mr. Sai, learned counsel appearing on behalf of the petitioner, urged that the respondent has acted unreasonably besides contravening the Orders of this Tribunal in refusing to undertake a joint survey. It was submitted that the respondent could not have obtained the signature of the petitioner in a blank agreement and convert the same for its own use.

12. Mr. Balaji Srinivasan, the learned counsel appearing on behalf of the respondent, on the other hand, contended that the petitioner was all along aware that the agreement was drawn up

on the basis that the petitioner had about 3000 subscribers.

13. The respondent, in its statement of objections, has brought on record a letter written by the proprietor of the petitioner concern in Telugu language, the translated copy whereof reads as under:-

“We have filed petition for ETV & ETV2 Decoders before TDSAT Court. At the time of filing petition we did not have Decoders of any broadcasters. At present we have Channel Plus, i.e., Gemini package Decoders. Presently we are paying 3,000 connections. For Non-regional we have B4-U Decoders. For which we have paying 500 connections. Hence we request you provide us ETV & ETV2 Decoders to us. For ETV Decoders we shall pay for 3,000 connections. If Gemini connection is increased accordingly we will increase your payment also.”

14. The petitioner dispute the genuineness of the said letter dated 16.5.2008 in its rejoinder, in the following terms:-

“With reference to para 6 of the Objections filed by the Respondent are denied and respectfully submitted that the Petitioner never admitted that he has having 3000 connections. That the Petitioner is denied the letter dated 16.05.2008 and say that he never writes a letter to the Respondent on that date, the letter itself own creation of the Respondent. The Respondent failed to conduct a joint survey till today, even after the Hon’ble Tribunal direct to do so. It clearly indicates the Respondent adamant attitude to not to obey the Tribunal’s orders.”

15. What is, however, striking about the said purported letter dated 16.5.2008, is that even the translated copy of the said original document has been produced before us in the letter-head of the petitioner concern. We fail to understand as to how blank copies of the letter-head of the petitioner could be with the respondent. It furthermore appears that the original letter-head, on which the said letter was issued, bore the cell number 9302318449, was corrected to 9392229123. Admittedly, the last mobile number is the correct number of the petitioner, which appears in all its letters.

16. Secondly, it is beyond anybody's comprehension as to why the said plea had not been raised in P. No. 217(C)/2007. Had the said letter been in possession of the respondent, it could have pointed out that there was no need for joint survey as the subscriber base at 3000 stood admitted.

The purported agreement was entered into on or about 18.12.2008. Even in the said agreement, it is beyond anybody's comprehension, as to why three different subscriber bases, the first two being valid for one month each only was found necessary to be mentioned. A bare perusal of the said agreement would furthermore show that items number 4 and 5 occurring at page 80 of the paper-book are not written by the same person. There had been certain additions, namely, the words, "taxes which are applicable for the same", but no initials have been put by anybody which is the normal practice. Even otherwise, it was not necessary to be written as the subscription fee was calculated, "without taxes". It is also of some significance to notice that although, the petitioner had been paying the subscription fee on the premise that number of subscribers was 1100 from 18.12.2008 to February, 2009 and 1115 from March, 2003, the respondent had been accepting the said payments, without any demur whatsoever. Only on 5.3.2009, it raised the aforementioned contention that the payments made by the petitioner were in part satisfaction of its dues.

We may also notice that the petitioner in its letter dated 23.2.2009 stated as under:-

"We request you to send us invoices as we have not received the invoices for the last three months.

We have already sent a demand draft of Rs. 11,000/-. We have not received the receipts and invoices.

We are enclosing a demand drafts bearing No. 387625 and Draft No. 387626 and each of Rs. 13,200/- respectively for the subscription for three months. You know that it is equivalent to approximately 1100 connections (One thousand one hundred connections).

Please acknowledge receipt of the drafts and request you to send us the invoices at an early date."

Prior thereto, by a letter dated 16.2.2009, it contended that the connectivity stands at 1115 in support thereto a list of subscribers was submitted.

16. Mr. Balaji Srinivasan, however, would contend that the petitioner, in its letter dated 25.3.2009, admitted that he knew that the agreement was drawn on the basis of 3000 connections. The said letter reads as under:-

“I am in receipt of your letter dt. 19-03-2009 and inform you as under:

From the beginning of taking DECODOR from you I am having only 1100 connections but the agreement you taken from me is 3000 connections. I request you to depute an official from your office and inspect the connections which I am having and I am ready to pay the amount of the actual connections which I am having.

Hope you will definitely understand my point and do the needful at your end to enable me to pay the actual connections for which act of kindness I shall be grateful to you.”

17. Mr. Sai , in reply urged, for which there may be some justification, that the petitioner calculated the number of subscribers from the debit notes annexed with the said letter dated 5.3.2009. The language used in the said letter dated 5.3.2009 may not be happy, but keeping in view the prevailing circumstances, as also the conduct of the respondent, we are of the opinion that it is difficult to arrive at a firm conclusion that the petitioner was aware of the contents of the agreement.

18. For the reasons aforementioned, the petition is allowed. The respondent is directed to provide uninterrupted good quality signals of its ETV and ETV2 channels to the petitioner's network through decoders and SIM cards in the towns and rural areas of Gudivada and undertake a joint survey immediately. Such joint survey must be carried out within a period of three weeks from date. The petitioner would also render all cooperation in the matter of conduct

of the said joint survey. The subscription fee payable by the petitioner would be determined on the basis of the number of subscribers of the petitioner found in the said joint survey.

19. The respondent shall pay and bear the actual costs of this petition to the petitioner.

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

.....
(G. D. Gaiha)
Member