

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

DATED 30th APRIL, 2010

Petition No. 157(C) of 2009

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M/s. Nirman Associates Pvt. Ltd. Petitioner

Vs.

STAR DEN Media Services Pvt. Ltd. Respondent

BEFORE :

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

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

For Petitioner : Mr. Navin Chawla, Advocate
Mr. Yoginder Handoo, Advocate

For Respondent : Mr. Gopal Jain, Advocate
Mr. Prateek Kumar, Advocate
Mr. Gaurav Juneja, Advocate

ORDER

Mr. G.D. Gaiha, Member

- 1.** The present petition has been filed by M/S. Nirman and Associates who is having its operations in Greater Guwahati, Assam.

The petitioner on the premise that it is a new Multi System Operator and has been seeking signals from the respondent for more than 60 days, has filed this petition. Initially the respondent did not respond to the request of the petitioner and in its belated response, the respondent has categorically made it clear vide its letter dated 17.11.2008, that the petitioner is not entitled to get signals from it.

- 2.** The petitioner would state that it has a subscriber base of 1800 and has been supplying the signals of some of the broadcasters in the area of Greater Guwahati. Postal Registration Certificate, Certificate of Registration for Service Tax, list of affiliated cable operators along with the number of subscribers being fed by them have been annexed with the petition.

- 3.** The petitioner would contend, that since it was to open a new head-end in Guwahati city, it required signals of the 'Star' Channels at a minimum subscriber base. The petitioner took up the case with the respondent for the first time on 20th of October 2008. The petitioner did not get any response from the respondent and, therefore, it took up the case again by his letter dated 10th November 2008. The respondent vide its letter dated 28.11. 2008 asked for various details like Subscriber Line Report of the petitioner, Postal Registration Certificate, details of direct connections, details of subscribers, list of cable operators, the latest monthly invoice, showing outstanding if any, from the presently affiliated multi system operators or from any agent/any other intermediary, just to ensure that the petitioner is not a defaulter. It also desired to get information about the exact area of operation, entertainment tax registration number, and returns filed with entertainment tax authorities. An application form was also enclosed to be filled up by the petitioner and after filling up the same, it was to be sent to the respondent. However, it was categorically mentioned in this letter by the respondent that the petitioner was not eligible and, thus not entitled to receive signals directly from the respondent. In this context it was also mentioned that in case

the petitioner wanted to have signals from any of the existing multi system operators, the same can be arranged by the respondent.

4. The petitioner replied to the aforesaid letter on 28th November 2008, inter-alia, furnishing the requisite details sought for by the respondent and also making it clear that as on the said date since the control room was totally new, there was no SLR, that could be provided to the respondent. Another reason which has been cited by the petitioner was, that one Mr. Sanjiv Narain is the distributor of the respondent and had also been running the business as a multi system operator and, therefore, if the list of cable operators is disclosed, the same would come to the knowledge of the competing Multi System Operator who was having a monopoly in the city of Guwahati.
5. The learned counsel for the petitioner would contend that petitioner received the letter of 18th November 2008 on 28th November 2008 and sent the filled up form on 29th of November 2008 itself along with all the relevant information as desired. Once again on 22nd of January 2009 the petitioner received the affiliation application form sent by the respondent. The petitioner immediately replied thereto on 29th of January 2009 stating that the application form/affiliation form duly filled up along with all the required papers had already been posted on 29th of November 2009.

The learned counsel for the petitioner would contend that the petitioner did not get any response from the respondent till the date of filing of the present petition.

6. The learned counsel would further contend that, when the Regulations prescribed by TRAI casts an obligation on the part of the distributor of TV channel to continue to pay the broadcaster as per the prescribed rates, it will be improper to ask a distributor to take signals from another distributor who is a competitor in the same area of operation. The learned counsel for the petitioner would further submit that appointing a multi system operator as

sole distributor is totally contrary and in violation to the judgment of this tribunal approved by the Honourable Supreme Court in the matter of Star India versus Sea TV Network Private Limited(2007) 4 SCC 656.

7. The learned counsel for the respondent would submit that the documents as requested by the respondent vide its letter dated 17th November 2008 and also in the application form have not been furnished so far. He would further like to submit that the application form annexed with the petition has never been received as filled up by the respondent, until as an annexure to the present petition. The learned counsel for the respondent would further contend that till date the following documents inter-alia have not been furnished so far by the petitioner.

(a) It's certificate of incorporation

(b) Memorandum of Association and Articles of Association

(c) Copies of income tax returns filed for the preceding three years

(d) Printed map clearly marking area covered by petitioner and link operators/sub operators.

(e) SLR/list of operators or subscribers

8. The learned counsel of the respondent would argue that no cause of action is to said to have accrued to the petitioner prior to 23 July 2009 since no disclosure had been made by it as per Regulations 3, Regulation 9 and Regulation 10. The learned counsel for the respondent would contend that the period of limitation of 60 days as contemplated in the regulation to approach the respondent shall start running only from 24 July 2009. The learned counsel for the respondent would further argue that to approach the tribunal before the expiry of 60 days as prescribed under regulation 3.5 implies that there is no cause of action and, therefore, the petition is not maintainable. The learned counsel for the respondent would quote that there are catena of judgments in which this tribunal has laid down that the request in terms of regulation is necessarily to be accompanied in a non CAS-area

with verifiable information/details regarding the area of operation, subscriber base, the details of local cable operators affiliated with the signal seeker etc. The learned counsel for the respondent would further argue that by merely mentioning Greater Guwahati and neighbouring areas rural/urban cannot be the basis for negotiations between the parties. The area of operation has to be clearly defined and accompanied with a detailed map thereof clearly demarcating the areas covered by the multisystem operator and its affiliates.

9. The learned counsel for the respondent would contend that as regards the ancillary documents like entertainment tax registration and returns, the petitioner has responded that the same have been applied for and will be submitted in due course of time.

It is the respondent's contention that in terms of the TRAI's Regulations, Telecommunication(Broadcasting and Cable Services) Interconnection (Third Amendment) Regulation,2006, the petitioner has to first establish that it is a similar based distributor of TV channels while approaching the broadcasters for seeking signals directly, we may observe that there is no such mandate.

10. In the context of these rival contentions, we would like to analyse the regulations to arrive at a conclusion in regard to the relevant documents, which are mandated to be given at the time of seeking signals for the first time from broadcasters.

The relevant clauses as per the Regulations are as follows:-

“Regulation 3.2--- Every broadcasters shall provide on request signals of its TV channels on non-discriminatory basis 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 operator shall also on request re-transmit signals received from the broadcaster, on a non-discriminatory basis to cable operator.

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.

Explanation ----The applicant distributors of TV channels intending to get signal feed from any multi system operator other than the presently affiliated multi system operator, or from any agent/any other intermediary of the broadcaster/multisystem operator, or directly from broadcasters shall produce along with their request for services, a copy of the latest monthly invoice showing the dues, if any, from the presently affiliated multi system operator, or from any agent/any other intermediary of the broadcaster/multi system operator who collects the payment of providing TV channel signals.”

From the above regulation, it is the main requirement for getting signals is that the signal seeker should not have any outstanding dues to the presently affiliated multi system operator or broadcasters as the case may be. In this context the provision makes it very clear that before seeking signals the last invoice of the previously affiliated multi system operator or broadcaster should be produced, which will indicate if there is any outstanding to be paid by the signal seeker to ascertain as to whether the signal seeker is a defaulter or not.

- 11.** The other regulation which is relevant for providing signals for the first time is Regulation 9.1 which is as follows:

Regulation 9.1----- In a non-addressable system, while executing an interconnection agreements for the first time between a multi system operator and a cable operator, the parties to the agreement shall take into account the subscriber base of the cable operator on the basis of the subscriber line report, where such subscriber line report exists. Where such subscriber line report does not exist, this shall be negotiated on the basis of the evidence

provided by the two parties on the subscriber base, including the subscriber base of similarly placed cable operators and local survey..

Explanation--- The subscriber line report is only an indicative basis for arriving at the subscriber base and the subscriber base as mutually agreed by the two parties could be more than or less than the number indicated by the subscriber line report.

In this context it is worthwhile to examine the application of the petitioner. The learned counsel for the petitioner would submit that the petitioner has submitted a letter dated 28th November 2008 in which the issue of subscriber base by direct connection as well through the cable operators has been dealt with. The relevant portion of the reply by petitioner is as follows:

(b) Details of direct connection/details of subscribers, subscriber line report and in case there is no subscriber line report then please provide evidence to corroborate your subscriber base(including local survey):-

The petitioner has answered this question by saying that as on date Clause 9 of the Regulation is not applicable because it has established a totally new control room.

(c) list of cable operators who are/will be getting signals from your network along with their subscriber base:--

The petitioner has responded by saying that as on date we don't want to disclose the name of the cable operators who are/will be getting signals but we can assure that after commercial discussions with you, we will start with a minimum subscriber base from our control room.

12. The petitioner in its petition has made it clear, that the respondent has appointed Mr. Sanjiv Narain as its distributor who is also working as a multi system operator having monopoly in Guwahati and some of the cable operators who are at present taking signals from his network. It was stated by the petitioner that it would not like

their names to be disclosed at this stage, when they are not sure that they will continue to get signals from another multi system operator.

- 13.** The petitioner, from the records evidently has provided all the relevant informations as desired by the respondent vide its letter dated 28th November 2008 and has also submitted the duly filled up application form.
- 14.** The petitioner upon completing all the formalities, finally wrote a comprehensive letter on 30th January 2009 and requested the respondent for an urgent ,prompt and positive response for providing signals.

On 18 September 2009 this Tribunal heard the learned counsel for the parties at length. The following orders were passed.

"..... however, both the counsels agreed that a local commissioner may be appointed for conducting the joint survey. Council for both parties agreed that Mr. Vibhav Srivastava, advocate, who is present in the court, may be appointed as local commissioner for conducting the joint survey.....The joint survey report will be submitted in three weeks time. Both the parties will fully cooperate with the local commissioner and will supply the necessary documents for conducting the joint survey in a time bound manner. Let the survey be conducted for the entire city of Guwahati.

The petitioner will make a deposit of Rs. 12 lakhs by a demand draft as a lump sum amount, by 22nd of September 2009 with the respondent. This amount of deposit will be reviewed after subscriber base is determined on the basis of joint survey. The signals will be provided to the petitioner within 48 hours, after the petitioner deposits the above amount with the respondent.

On 8 December 2009 the following orders were passed by this Tribunal.

“The learned advocate commissioner has submitted an interim report. A statement has been made before this tribunal by learned advocate commissioner that survey operation starts from on or about 11 AM to 11:30 AM and having regard to the ground realities in Guwahati, the survey can be conducted only up to 4 PM. The respondent, advocate commissioner. states that, had insisted on door to door survey and not on the basis of estimated, thus it will take two or three weeks time more for completion of the survey. The learned counsel appearing on the behalf of the respondent submits that it is not necessary to carry on survey in the entire city of Guwahati and the same may be confined to 25 operators named in the pleadings of the parties.”

- 15.** The petitioner has named nine operators. The learned counsel appearing on behalf of the respondent would state before us that petitioner is guilty of under declaration and in fact 16 more operators other than the said nine operators, that is a total of 25 operators have been taking signals from the petitioner. The learned counsel for the petitioner would submit that besides the nine operators eight cable operators have also joined the network of the petitioner for taking signals recently.
- 16.** Keeping in view that conflicting claims on behalf of the parties, this tribunal passed the following directions on 8th December, 2009.

(1) That the joint survey must be completed on or before 5th of January 2010.

(2) The learned advocate commissioner shall go to the office of the operators who had been named by the respondent and not disclosed by the petitioner to ascertain as to whether they had been getting signals from the petitioner or not.

(3) The rest of the survey may be conducted by the learned advocate commissioner. However, the number of subscribers may be arrived at on the basis of estimation made by him and not on an actual basis, as it appears that door to door survey in the entire city of Guwahati would be impossible task

(4) The respondent shall disclose before this tribunal as to on what basis it had been supplying signals to other MSO's in the town of Guwahati. The copies of the said agreements will be filed by the respondent before this tribunal in a fixed sealed cover.

(5) The petitioner is hereby directed to disclose to the learned advocate commissioners the number of subscribers disclosed by it to the authorities for the purpose of payment of entertainment tax.

17. The learned advocate commissioner submitted his report on 8th February, 2010 that the respondent has not supplied the documents asked for by him as per para 5 of the Order dated 5th Jan, 2010 of this Tribunal and, therefore, the interim report may be treated to be the final one. The learned counsel for the respondent would contend that the learned advocate commissioner has already come to a conclusion that the subscriber base as far as the petitioner is concerned, is 4306.

18. We have gone through the survey report. The concluding part of the survey report, which has summarized the total number of subscribers with 17 operators, having been partially surveyed to be 4664. Since this survey has been carried out partially in the respect of 17 cable operators, we cannot arrive at any firm opinion about the subscriber base on the basis thereof. We had been provided by the petitioner, its own subscriber base in respect of 17 cable operators being 4306. This is an admitted figure. However, this is not a negotiated figure which should be in respect of a non-CAS area. The learned counsel for the petitioner would contend that this is the total connectivity at almost 100% declaration as per the survey carried out on door to door basis.

- 19.** The learned counsel for the petitioner would further contend that admittedly the subscriber base for the purpose of a subscription agreement between a multi system operator and a broadcaster is on a negotiated basis and can not be on the basis of actual subscriber base. The learned counsel for the petitioner would firmly oppose the suggestion of the respondent, to execute the subscription agreement on 4306 subscriber base, since it goes contrary to the very regulation of the Telecom Regulatory Authority of India. The learned counsel for the petitioner would further argue that the regulations mandate that the broadcaster is to provide signals to the distributor of TV channels on non-discriminatory basis. It is for these reasons that this tribunal had directed the respondent to file the copies of the agreement with the other multi-system operators in the town of Guwahati which shall disclose the basis on which the broadcaster/respondent is supplying signals to the other multi-system operators in the town of Guwahati. The main contention of the learned counsel for the petitioner is that, since the respondent has an agreement with other operators, not on the basis of actual number of subscriber; it can not demand to sign subscription agreement on the actual subscriber base of the petitioner which it discriminates. In this context the learned counsel for petitioner would contend that the subscriber base of Assam Cable Communications is 1,32,430 as per the list submitted by the petitioner to the learned advocate commissioner, and, therefore, the actual number of subscribers base mentioned in the agreement shall be of relevance.
- 20.** We have gone through the documents which have been provided to us in a sealed cover by the respondent and we find that the highest subscriber base mentioned for bouquet one in one of the three agreements is not exceeding 30,000 subscribers. In the other two agreements the subscriber base for bouquet one is not exceeding 3100 subscribers. It, therefore, appears to be consistent with the regulation to adopt a subscriber base which is not based upon the actual count, but is based upon the negotiated figure arrived at between the parties.
- 21.** In our interim order we have kept the provision of deposit of three months subscription fee for 1800 subscribers. This provision has been made, keeping in mind that in case the subscriber base determined after the joint survey,

is higher than 1800, an adjustment is required to be made out of this deposit, for meeting the shortfall of the subscription fee for the months in which the subscription amount has been paid for on the basis of 1800 subscribers. Once we determine the number of subscribers, we think that it will be good enough to keep one month's deposit with the respondent and petitioner would continue to pay monthly subscription fee as per the subscriber base determined, as per the agreement between the parties, before a predetermined date on a monthly basis based upon the invoice raised by the respondent.

- 22.** We have noticed heretofore that the number of subscribers found in the survey was 4664 but indisputably the same had been carried out only in respect of 17 operators.

The petitioner has accepted that it has about 4606 subscribers. Having regard to the fact that originally the subscriber base is determined on a negotiated basis, we as at present advised, are of the opinion that interest of justice shall be subserved if the subscriber base is kept at 3000.

- 23.** We have arrived at the aforementioned figure as it is not possible for us to do so with mathematical exactitude. The interim order passed by us was provisional in nature. It would, in our opinion would meet the ends of justice if we direct that the interim order should be made absolute subject to the condition that the number of subscribers shall stand substituted by 3000 subscribers. This order, however, shall be of course subject to any other or further negotiated figure that the parties may arrive at on mutual basis and /or if an agreement is entered into by and between parties, and /or if any occasion arises subsequently.

Clause 3.2 of the Regulations stipulate a 'must provide' clause. In terms of the said Regulations, the broadcasters and/or their distributors are obligated to provide signals and/or cause the same to be provided on a non-discriminatory basis. The terms and conditions must, therefore, also be reasonable. Keeping in view the

reasonableness aspect of the matter, we were required to determine the number of subscribers and we have resorted to the aforementioned exercise only with that end in view.

- 24.** The earlier payments made by the petitioner for 1800 subscribers shall stand revised to 3000 subscribers and the additional payment as arrears, shall be made out of the deposit for three months already available with the respondent as per our orders dated 18.9.2009. Both the parties are directed to sign an agreement on the basis of subscriber base of 3000 and on other reasonable terms and conditions.
- 25.** The petition is disposed of accordingly. In the facts and present circumstances of the case, there shall be no order as to costs.

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

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