

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

DATED 16th AUGUST, 2010

Petition No. 256(C) OF 2009

Ganpati Cable Network ...Petitioner
Vs.
MSM Discovery Pvt. Ltd. ...Respondent

BEFORE:

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HON'BLE MR. JUSTICE S.B.SINHA, CHAIRPERSON
HON'BLE MR. G. D. GAIHA, MEMBER
HON'BLE MR. P.K.RASTOGI, MEMBER

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For Petitioner : Mr. Vineet Bhagat, Advocate
Ms. Neha Jain, Advocate

For Respondent : Mr. A.C. Mishra, Advocate

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JUDGEMENT

Application of Clause 3.2 of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations 2004 (Regulation 13 of 2004), as amended from time to time, is in question in this petition.

The petitioner is a Multi Service Operator. It had 3 or 4 sub-operators working under it. It transmits Free to Air channel.

With a view to obtain supply of signals of the pay channels aired by the respondent herein, the petitioner filed a petition before this Tribunal which was marked as Petition No. 42 (C) of 2009.

This Tribunal by an order dated 30th March 2009 directed as under :-

“Respondents have produced a copy of the agreement between the parties, according to which, the term of the agreement expires on 31.3.2009. Whatever arrangement, that existed between the petitioner and the Respondent No. 2, has come to an end. If so desired, the petitioner may approach Respondent No. 1 who now has the rights to distribute the signals of channel ‘COLORS’. This petition is disposed of.”

Be it mentioned at this stage that at the relevant time the ‘Colors Channels’, although was a pay channel but no charges were being collected by it. The right to transmit signals of the said channel along with others was taken over by the first respondent herein.

Pursuant to or in furtherance of the observations made in the said order dated 30th March, 2009, the petitioner approached the respondent by its letter dated 17.4.2009. However, in the said letter the petitioner not only asked for supply of signal of 'Colors channels' but all the SONY channels. The relevant part of the said letter reads as under :-

"We once again request you to kindly enter into a Subscription Agreement with us for the year 2009-2010 for 'SONY CHANNELS' on reasonable terms and conditions only and for that we are ready to pay and comply with the rules and regulations.

It is, therefore, requested to tell us the date, time and venue so that we can come and a Subscription Agreement can be entered for the year 2009-10."

There exists a dispute as to whether the respondent replied to the said letter of the petitioner. According to the respondent it did so on or about 24.04.2009 but the petitioner denied and disputed the receipt of the said letter. The petitioner by another letter dated 30th June, 2009 sent a reminder to the respondent.

The respondent by its letter dated 22nd July 2009 while annexing a form for being filled up by the petitioner and sent back to it, stated as under :-

“While we proceed to consider your request, we wish to bring to your notice that there has been no response to our letter dated 24.04.2009, sent against your said request letter. However, without prejudice, we once again, request you to furnish the details requested in the Application for Application attached herewith.

Kindly note that the details sought are vital for us to analyse whether you are similarly based with the other MSOs in the region and to decide the most viable option for providing signals of the TOA Channels to you as per clause 3.6 of “The Telecommunication (Broadcasting and Cable Services) Interconnection (Third Amendment) Regulation, 2006” (10 of 2006). (The Regulation). Additionally, in line with TRAI’s Interconnection Regulations dated 4.9.2006 we would also request you to please let us have your :-

1. Postal Registration Certificate.
2. Details of direct connections/details of subscribers, Subscriber Line Report (SLR) and in case there is no SLR then please provide evidence to corroborate your subscriber base (including local survey).
3. List of Cable Operators, if any, who are/ will be getting signals from your network along with their subscriber base.
4. Copy of the latest monthly invoice showing the dues, if any, from the presently affiliated Multi System Operator (MSO) or from any agent/any other intermediary to show that no payments are due.
5. Such other/further documents etc. on which you may seek to rely in terms of Clause 3 and 9 of TRAI’s Regulations dated 10.12.2004 (as amended on 4.9.2006).

You are requested to kindly provide us with the aforementioned at the earliest which might not be later than 7 days from the receipt of this letter so as to enable us to abide by the time frame stipulated by the Regulation.

Please note that neither this letter nor your submission of the Application for Affiliation or for that matter furnishing of information detailed above purports to admit your eligibility or entitlement to receive the TOA Channels from us.”

The petitioner filled up the said form and sent it to the respondent. There, however, again exists a dispute as to the date of dispatch of the said letter as also the receipt thereof by the respondent. Along with the said form the petitioner had also annexed the details of the customers who have been supplied signals by its three sub-operators namely :-

- i) Sachdeva Cable Work
- ii) Rinku Cable Network and
- iii) Harpeet Singh.

The petitioner also named its employees as also the instruments which had been installed for re-transmission of the signals of the broadcaster.

We have noticed heretobefore that there exists a small dispute with regard to the dispatch and receipt of the filled up application form sent by the petitioner but actual receipt thereof is not in dispute as the witness examined on behalf of the respondent Shri Arun Arora in his cross examination stated as under :-

“The application form on page 27 has been sent to regional office but a copy was sent to me later by the regional office.”

As for some time the petitioner did not receive any response from the respondent, it sent a reminder in the following terms on or about 24.10.2009, stating :-

“I, Jyoti Swarup, Proprietor of Ganpati Cable Network having its office at Mubarakpur Camp, Dera Bassi, Mohali, Punjab-140201 make the following Reminder Request/Representation which Reminder Request/Representation bears reference to your Request/Representation dated 17th September, 2009.

1. That on 17th September 2009 we sent you Request/Representation dated 17th September 2009 vide our duly filled Affiliation Form for entering into Subscription Agreement for year 2009-10 and for supply of signals to our Cable TV Network. But till date we have not received any response of any kind from your side.
2. For your kind information and quick action we would like to bring to your kind notice that as per TRAI Regulation dated 4th September 2008 you should either provide the signals on mutually agreed terms to the distributor of TV Channels who is seeking signals, or specify the terms and conditions on which they are willing to provide TV Channel signals, **in a reasonable time period ...**. From the date of our request it has already been more than 50 days and still we

have not received any response from your side. Therefore, we again request you to kindly process our Request/Representation in terms of the above Regulation and provide signals of TV channels being broadcasted by you, to our Cable TV Network, on reasonable terms and conditions, within the specified time of 60 days as fixed by law.

3. We hope and trust that you would give an expeditious and favourable consideration to our representation/request and will revert back at the earliest and will also intimate the date and time, as fixed by you, for entering into the Subscription Agreement with us.

We, therefore, request you to kindly process our application/request/representation at the earliest and enter into the Subscription Agreement with us on mutually agreed and reasonable terms and conditions and supply the signals of your channels to our Cable TV Network.”

This petition was thereafter filed on 23.11.2009.

The respondent in its reply denied or disputed that the petitioner had only 163 subscribers which was later on increased to 213. The respondent is said to have carried out an unilateral survey, the details whereof have been annexed with the reply showing that the petitioner has a large number of subscribers.

It is furthermore not in dispute that the respondent during pendency of this petition has issued a letter to the respondent on or about 16.11.2009 whereby and whereunder it had sought for the petitioner's response in regard to the various queries raised therein. The petitioner furthermore, contends that the said letter was processed mechanically and only with a view to delay grant of connection to the respondent.

The question, apart from the subscriber base, which arises for our consideration is as to whether the details sought for by the respondent herein meet the statutory requirements contained in the regulations.

Mr. Vineet Bhagat, the learned counsel appearing on behalf of the petitioner in support of this petition would submit :-

- (1) The right of an MSO to re-transmit signals supplied by the broadcaster is a valuable statutory right which cannot be denied by the respondent by asking it to furnish unnecessary and irrelevant informations.
- (2) The respondent being a broadcaster and keeping in view the earlier round of litigation should have completed the formalities to grant supply of signals of its channels; if not earlier, at least within the statutory period of 60 days from the date of filing of the application.
- (3) The respondent committed a serious illegality, in so far as it undertook an unilateral survey, whereupon no reliance can be placed as would appear from the list of the names of the alleged subscribers without their parentage or address and in fact in most of the cases, even the telephone numbers have not been mentioned.
- (4) The contention of the respondent that the petitioner does not have any valid registration certificate is not correct as from the cross examination of its witness, it would appear that an

application for renewal of its earlier postal registration has been filed, which has since been granted.

Mr. Mishra, the learned counsel appearing on behalf of the respondent, on the other hand, urged :-

1. The conduct of the respondent is such which does not entitle him to obtain any equitable relief from this Tribunal.
2. The petitioner has deliberately suppressed the fact in its petition that it had been airing only free to air channel but as would appear from the admissions made by its witness that it had also been airing some pay channels.
3. The filled up application form which was received by the respondent was responded to on 16.11.2009 which must have reached the petitioner within 2 - 3 days. But although a period of 7 months has elapsed the petitioner had failed to supply the requisite informations, some of the essential requirements being:-

1. Map of the Cable Network to know the territory within which it intended to operate.
2. To mark the area of the operation in the said map.
3. The details of the LCOs, so as to enable the respondent to know the subscriber base.
4. The number of direct subscribers as it appear that although the petitioner has purported to furnish the list of subscribers of the 3 sub-operators. It had not given the details of the

subscribers to whom had been supplying signals directly.

5. The SLR which is required to be given even under the Regulations as well as the agreements which have not been produced despite an assurance given by the petitioner to produce the same before this Tribunal.

The parties hereto in support of their respective cases examined witnesses.

The petitioner has examined its proprietor Shri Jyoti Swarup. The respondent has examined one Shri Arun Arora. The said witnesses in their affidavits annexed the relevant documents which formed part of the petition and/or reply filed by the parties hereto respectively.

We would advert to their depositions and/or cross examination, a little later.

At the outset, we may notice certain provisions of the statutes operating in the field.

The Parliament enacted the Telecom Regulatory Authority of India Act 1997. By reason of Section 2 (k) of 'the said Act', 'telecommunication service' has been defined as under :-

“ 'telecommunication service' means service of any description (including electronic mail, voice mail, data services, audio text services, video text services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electro-magnetic means but shall not include broadcasting services;

Provided that the Central Government may notify other service to be telecommunication service including broadcasting services.

The Central Government in January 2000 issued a notification in terms whereof the 'Broadcasting Services' were also brought within the purview of the Telecommunication Services.

The Telecom Regulatory Authority of India (TRAI) is vested with the powers and functions as specified in Chapter III of the Act. Clause (b) of sub-section 1 of section 11 of the said Act mandates the authority to discharge the functions specified therein, Clauses ii, iii and iv whereof read as under :-

- “ii) notwithstanding anything contained in the terms and conditions of the license granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, fix the terms and conditions of inter-connectivity between the service providers;
- iii) Ensure technical compatibility and effective inter-connection between different service providers;
- iv) Regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services.”

The TRAI in exercise of its aforementioned power as also Section 36 of the said Act which confers on it a regulation making power made the aforementioned Regulations.

Broadcasting and Cable Services are ordinarily run in two systems :-

- i) Addressable; and
- ii) Non-addressable

Whereas an addressable system has been defined in Section 2 (a), non-addressable system has not been defined in the said Regulations.

We may notice the definition of 'pay channel' which reads as under :-

“(i) **“pay channel”**, means a channel for which fees is to be paid to the broadcaster for its retransmission through electromagnetic waves through cable or through space intended to be received by the general public either directly or indirectly.”

Admittedly, the channels which are broadcast by the respondent herein are pay channels. In departure from the normal provisions of the Common Law of Contract, wherein agreement can be entered into under a consensus of the contracting parties, the TRAI by reason of clause 3.2 of the said 'Regulations' introduced a 'must provide' clause.

It reads 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 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.”

The regulator while enjoining upon the broadcasters to provide such channels on a non-discriminatory basis and on reasonable terms and conditions made certain exceptions thereto, one of them being where the distributor is a defaulter. Clause 3.3 of the 'Regulations' for the aforementioned purpose enjoins upon the broadcasters or the Multi System Operator to issue monthly invoices to the distributors of TV Channels specifying the arrears and current dues along with the due date for payment of the same. The 'Explanation' appended to clause 3.3 provides that any claim for arrears should be accompanied by group of services of invoices for the period to which the arrears pertain.

Clause 3.4 is not relevant for the purpose of this case.

Clause 3.5 reads as under :-

“Any broadcaster/multi system operator or any agent/any other intermediary of the broadcaster/multi system operator to whom a request for providing TV channel signals is made, should either provide the signals on mutually agreed terms to the distributor of TV channels who is seeking signals, or specify the terms and conditions on which they are willing to provide TV channel signals, in a reasonable time period but not exceeding sixty days from the date of the request. In case, the broadcaster/multi system operator or any agent/any other intermediary of the broadcaster/multi system operator to whom a request for providing TV channel signals, the reasons for such refusal must also be conveyed within sixty days from the date of the request for providing TV channel signals so as to enable the distributor of TV channels to agitate the matter at the appropriate forum.”

Clause 9 of the said agreement provides for subscriber base. Clause 9.2 relates to the first agreement between Multi System Operator and Broadcaster. It reads as under :-

“In non-addressable systems, while executing an interconnection agreement for the first time between a multi system operator and a broadcaster, the multi system operator shall furnish a list of the cable operators who will be getting signals from its network along with their subscriber base. The parties to the agreement shall take into account the subscriber base of cable operators connected to the multi system operator

while negotiating the subscriber base of the multi system operator. For the consumers proposed to be directly served by the multi system operator, the procedure as laid down in sub-clause 9.1 of this regulation shall be followed.

After an agreement is entered into, any variation in subscriber base is governed by clause 10 of the agreement. Clause 10.2 may be noticed which reads as under :-

“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 local survey 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.”

Clause 12 enjoins upon a Multi System Operator in a Multi Cable System to furnish an updated list of Cable Operators along with their subscriber based broadcasters on a monthly basis.

The petition has been filed on 23rd November 2009. The respondent is said to have sent a letter to the petitioner on or about 16.11.2009. According to the petitioner, the said letter was received by him after filing of the petition. We have noticed heretofore the requirements sought for by the respondent. The Regulations stricto-sensu provide for two basic informations, which are required to be furnished by an applicant for supply of signals for the channels from a broadcaster, one of them being that the applicant should not be a defaulter even if he was not the LCO/MSO of the broadcaster concerned and before the supply of signal commences, the broadcaster and/or MSO may demand the last invoice issued by the outgoing broadcaster/MSO. Another statutory requirement for obtaining supply of signal for the channels of the broadcaster/MSO is contained in clause 9, set in 'Regulations'.

The said provision mandates the applicant to furnish a Subscriber Line Report which would indicate the subscriber base of the cable operator. If, however, such SLR does not exist, the parties may negotiate on the basis of evidence in their possession or power. The broadcaster is otherwise also bound to supply the signal on reasonable terms and on a non-discriminatory basis.

It is in the aforementioned context, the informations sought for by the respondents are required to be taken into consideration so as to arrive at a decision in a matter of this nature.

Basically, the broadcaster should be interested in knowing the subscriber base. In that view of the matter, the details sought for by the respondent and in particular the number of the direct subscriber SLR submitted to the petitioner by its link/sub-operators, the declaration before entertainment/service tax authorities monthly subscriber statement, the details of equipments at control room and insurance details, monthly invoice if any cannot be said to be wholly irrelevant for the purpose of determination of the subscriber base and/or for the purpose of showing the reasonableness or otherwise of the terms of the agreement.

Although an issue was raised with regard to the registration certificate, in view of the document filed before us by Mr. Bhagat at the time of hearing, the same was not placed.

We may notice that in Nirman Associates Pvt. Ltd. Vs. Star Den Media Services Pvt. Ltd. Petition No. 157 (C) of 2009. Therein this Tribunal has held that the requirements are mentioned in the regulation itself.

It may be noticed that in Friends Cables Vs. Starden Media Services Pvt. Ltd., Petition No. 129 (C) of 2009 disposed off on 24th December, 2009 was observed :-

“Indisputably, ordinarily Regulation 9 would be applicable in terms whereof an MSO is bound to provide informations to the broadcaster with regard to :-

- (i) exact area to prove franchises and linkage thereof with cable operator;
- (ii) the number of subscribers;
- (iii) SLR for the number of existing relationship or for local survey and (iv) for the purpose of direct payment.”

It was held :-

“We have noticed heretobefore that the respondent for one reason or the other had been asking for informations from the petitioner which are not only wholly irrelevant but also not germane for the purpose of entering into an agreement; even a fresh agreement. The respondent, therefore, in our considered opinion having accepted the entire amount which could have been a subject matter of suit at its instance and having entered into a detailed negotiation with the petitioner for the purpose of entering into an agreement with it, must be held to be estopped and precluded from raising a contention that petitioner cannot be granted any relief at this stage having regard to the circumstances which were existing on the date of filing this petition.”

An order by this Tribunal in terms of the regulations would also require its satisfaction to the effect that these statutory provisions are to be complied with. In the event it is found that the documents filed by the petitioner were not satisfactory and/or the SLR sent by the applicant is not in terms of the extant regulations, it is for the parties to negotiate on the basis of the evidences which are in their respective possession.

In *Shree Communications and Anr. Vs. Star Den Media Services Pvt. Ltd.* disposed of on 10.12.2009, it was held :-

'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."

In *M/s. Ramesh Cable Vs. M/s. Channel Plus* (Petition No. 162 (C) of 2009 disposed of on 19th May 2010, this Tribunal held :-

"The requirements in terms of the aforementioned provisions, therefore, would be satisfied, if a subscriber base has provided the requisite particulars furnished therein. We have noticed hereinbefore that according to the petitioner, such SLR had been furnished not only when it was

taking signals from M/s. Polymer Cable Network but also the current one. The respondent contends that the same has not been done.”

The respondent, as noticed heretofore, relies upon an unilateral survey. It is not a joint survey. Against the name of some of the persons phone Nos. are there, but in respect of others neither there is any telephone No. nor any address. So far as the names of the subscribers in Mubarakpur Camp is concerned, no details whatsoever have been furnished. Likewise for the subscribers of Mubarakpur even their telephone Nos. were not noted. It is a matter of which notice is required to be taken. In the survey report for Sundra similarly, the telephone Nos. and the addresses of the subscribers have not been mentioned. Similar is the position in respect of Khedi page 76 and Pandwala page 77.

If we, however, compare the same with the list furnished by the petitioner, we may notice that it had named 3 cable operators. The first cable operator namely Sachdeva Cable Network has disclosed the names of 102 operators, whereas another cable operator Rinku Cable Network, who supplies signals in village Pandwala, Sundran and Haibatpur area, the names of 32 customers have been supplied. Another Cable Operator, Harpreet Singh who supplies signals in Bhankharpur (Camp) once, have only 28 subscribers. This may also not be the true picture.

We, therefore, are of the opinion that the parties should hold negotiations on the basis of the evidences which are in their power or possession. It would be open to the petitioner to furnish such other or further informations, as may be found necessary for entering into an agreement on reasonable terms.

We are of the view that the respondent should consider such evidence which may be produced by the petitioner and arrive at a settlement at an early date.

However, for the time being and subject to any settlement and/or joint survey, which may take effect on and from the date of the original agreement, we are of the opinion that interest of justice would be subserved, if the respondent, subject to compliance of other regulatory requirements, supplies signals to the petitioner on a subscriber base of 500.

This petition is disposed off on the aforementioned terms.

In the facts and circumstances of this case, there will be no order as to costs.

(S.B. Sinha)
Chairperson

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(G. D. Gaiha)
Member

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(P.K. Rastogi)
Member