

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

DATED 16TH DECEMBER, 2010

**Petition No.229 (C) of 2009
(M.A.No.89 OF 2010)**

Nirman & Associates Pvt. Ltd.

...Petitioner

Vs.

ESPN Software India Pvt. Ltd.

...Respondent

BEFORE:

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

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

HON'BLE MR. P.K.RASTOGI, MEMBER

For Petitioner

: Mr. Yoginder Handoo, Advocate

For Respondent

: Mr. N Ganpathy, Advocate

J U D G E M E N T

S. B. Sinha

The petitioner is a Multi Service Operator. The respondent is a broadcaster of a channel known as ESPN Sports Channel.

Admittedly, the petitioner since 2008 had been requesting the respondent for supply of signal of its channel. However, the same was not granted. The petitioner sought for intervention of the Telecom Regulatory Authority of India (TRAI) asking it to call for an explanation from the respondent as to whether it had unjustly been denied supply of signal to the petitioner. On the intervention of the TRAI, the respondent became ready and willing to provide signals to the petitioner, whereupon a subscription agreement was entered into by and between the parties hereto on or about 19.6.2009 on a total subscription fee of Rs.16,31,520/-.

According to the petitioner a copy of the subscription agreement was not provided to it and, thus, it by a letter dated 1.7.2009 requested to the respondent therefor.

A reminder thereto was also sent on 20th August, 2009, stating :-

“With reference to the subject cited above and in continuation of our earlier letter dated 1.7.09, I on behalf of our company am taking the liberty of writing to you this letter instead of interrupting you by phone. Earlier we had requested you both verbally and through our aforementioned letter to send us the copy of the “Affiliation Agreement” mutually signed by both the parties but till now we have not received the said copy.

Hence we request you again to kindly send us our copy of the “Affiliation Agreement” signed by either of the parties as soon as possible.”

2. According to the petitioner the said agreement had been given effect to but the problems started after the respondent appointed one M/s. Poorvanchal Communication Pvt. Ltd. represented by one Mr. Sanjeeb Narayan as its distributor w.e.f. 16.9.2009.

The said distribution agreement is said to have been entered into by the parties thereto with effect 16.9.2009.

3. The said M/s Poorvanchal Communications Pvt Ltd. is said to have been appointed as a distributor for the District of Kamrup and adjoining areas, which, according to the petitioner, includes the town of Guwahati, in which the petitioner had been operating.

On or about 23.9.2009, the petitioner received a 'fax message' from the respondent, whereby and whereunder, it was asked to pay the subscription fee on the basis of the list of cable operators which was said to be with it, failing which, it was threatened that supply of signal would be discontinued.

The said fax message reads as under:-

“The list of operators whom you have connected is given below for your ready reference:

Network Name	Subs	Area	Joining Date
Unique Cable	820	Lakhtokia	14.6.09
Sat Cab	360	Panbazar	14.6.09
World View	600	Fancy Bazar	1.7.09
Mithu Vision	600	Kumarpara	1.7.09
Rhino Cable	300	Satgaon	1.7.09
New Guwahati Cable	150	Noonmati	14.6.09

Global Nw	50	Noonmati	25.6.09
W&R Cable Nw	150	Athgaon	1.12.08
Z.R. Vision	150	Athgaon	1.12.08
Raju Ali	150	Garigaon	24.6.09
Rattan Das	75	Goshala	1.6.09
Zakir Hussain	100	Engg College	1.6.09
Pradip Choubey	100	Ambari Tinali	1.7.09
Parag Vision	300	Fatasil	1.7.09
Munna	200	A.T. Road / Tokobari	1.7.09
Bhaskar	75	Kharguli	15.6.09
Total	4180		

Through this letter, we call upon you to make payments on behalf of these operators from the date they have joined your network immediately without any further delay.”

By its letter dated 23.9.2009, the petitioner responded thereto, stating :-

“With reference to the subject cited above, the correspondence is to express our deepest shock at your allegation about the joining of the listed operators to our network, and providing signals to all of them, in this regard kindly allow us to clarify that except Z.R. Vision of Athgaon, none of the listed operators have joined our network till date. We ourselves have been allowed to have your ESPN signals as per the instruction of the TRAI since 9th June '09, therefore another issue which we would like to point out here is your self-contradictory statement. How is it possible that on one hand you allege we have been providing signal to ZR Vision since 1.12.08 on the other hand it is only since 9.6.09 that we have been allowed to have your ESPN signals.

In order to prove our point we are enclosing herein a copy of the Service Contract Requisition Form, signed by the undersigned on 6.6.09 and received by your distributor M/s United Corporation on 8.6.09, and made payment through

the Pay Order of Rs. One lac Fifty Thousand, vide No. 895405 dated 8.6.09 of United Bank of India, GS Road Branch.

Sir, we are also yet to receive the either party signed "Affiliation Agreement" for which we had sent our request vide our letters dated 1.7.09 and 20.8.09. Hence, we request you to kindly send us our copy of the same signed by either of the parties as soon as possible."

4. It, on the same date, also made a payment of Rs.1.50 lakhs towards subscription fee for the months of August and September, 2009, which, the respondent acknowledged.

On the next date, namely, 24.9.2009, a public notice was issued by the respondent, which was published in two newspapers, wherein the grounds for taking the aforementioned action on its part was said to be:-

- (i) Non-payment of the subscription amount; and
- (ii) Non-submission of the monthly SLR.

On the same date, the petitioner replied to the said public notice, stating :-

"Further about non-submission of monthly, SLRs, please allow us to clarify that even though your company's Senior Executive Mr. Dipujai Sharma has visited our office several times, nothing had been mentioned to us about the submission of SLRs. So we are completely unaware that we are supposed to furnish the same."

5. In response to the said letter of the petitioner, the respondent communicated that it has a subscriber base of 6,240, to which also, the petitioner replied stating that it had been making prompt payments on the basis of amount as agreed to by and between the parties upon holding negotiations therefo. According to the petitioner, it received a copy of the subscription agreement only on 30.9.2009. On the same day, it received another letter from the respondent stating that no payment was being made to it.

Yet again, the petitioner replied thereto on the same date, stating:-

“Further regarding the non-submission of the monthly SLR, kindly allow to clarify that we have not been intimated by you about the same. The SLR list which we had submitted to your Senior Executive Mr. Diputjai Sharma in presence of your Distributor on 8.6.09 is the final one and till date we estimate there has been 5% to 7% enhancement in the same.”

6. The respondent, however, stated that its assertion with regard to the subscriber base of the petitioner was genuine and it was in possession of some affidavits in support thereof.

Yet again, the petitioner made payment of Rs.1.50 lakhs towards subscription charges for the month of September-October, 2009. The petitioner by a letter dated 3.10.2009 stated that no other cable operator had joined his network except for ZR Vision.

The said letter reads as under:-

*“Also your allegation about the joining of the listed Operators to our network and providing signals to all of them is unjustified. In this regard please allow us to clarify that **except Z.R. Vision of Athgaon**, none of the listed operators have joined our network till date. Hence there is no point of us making payment on behalf of those who have NOT JOINED our network.”*

7. The petitioner, however, received a communication only on or about 6.10.2009 that M/s Poorvanchal Communications Pvt Ltd had been appointed as the distributor of the respondent in relation to the said area.

Yet again, on 8.10.2009, the petitioner paid a sum of Rs.1.49 lakhs to the respondent. Indisputably, the signals of the petitioner were disconnected.

8. This petition was filed on 12.10.2009.

By an Order dated 15.10.2009, this Tribunal directed the respondent to reconnect the signals. It was also directed that a joint survey be conducted by a local commissioner. Pursuant thereto and/or in furtherance thereof, a survey was conducted and the local commissioner filed an interim report.

Indisputably, by an Order dated 8.10.2009, the respondent was directed to disclose as to on what basis the respondent had been supplying signals to the other MSOs in the town of Guwahati.

A survey report was filed by the learned commissioner on or about 20.1.2010.

9. Mr. Handoo, the learned counsel appearing on behalf of the petitioner, in support of the petition, inter alia, would contend:-

- (i) The petitioner having been making payments in terms of the agreement entered into by and between the parties herein being dated 19.6.2009, the notices issued under Regulation 4.1 of the Telecommunications (Broadcasting and Cable Services) Interconnection Regulations, 2004, as amended from time to time (The Regulations) as also the public notice issued under Regulation 4.3 thereof must be held to be wholly illegal and without jurisdiction.

- (ii) In view of the fact that the petitioner had been making regular payments to the respondent, the question as to whether the petitioner in terms of the Regulation 9.1 of the Regulations had been filing SLR or not became irrelevant.
- (iii) The petitioner, in any event, was entitled to continued supply of signals by the respondent, on a non-discriminatory basis and in that view of the matter, the subscriber base disclosed by the petitioner should have been acted upon and not the subscriber base as claimed by the respondent, namely, 6240.

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

- (i) In terms of the agreement, the petitioner was to make payments in advance on 8th of each month for the month in question, as for example, for the month of September, on or about 8th September and for the month of October, on or about 8th October and so on and so forth and in view of the fact that the petitioner had not been making the said payments, it was a defaulter as on the date of the notice dated 23.9.2009.
- (ii) The receipt of payment of a sum of Rs. 1,50,000/- by way of a cheque by the petitioner to its earlier distributor, namely, M/s United Corporations, was obtained in collusion with the respondent.
- (iii) Keeping in view the interim report submitted by the learned advocate commissioner as the subscriber base of the petitioner must be more than 4800, the petitioner is not entitled to any relief in this petition.

11. The agreement by and between the parties herein has expired. For the year 2010-11, admittedly, the parties herein had not entered into any agreement. The petitioner has, therefore, filed a fresh petition before this Tribunal which has been marked as Petition No. 187(C) of 2010.

12. The core question, which, therefore, arises for consideration herein is as to whether the notices issued by the respondent in terms of clauses 4.1 and 4.3 of the agreement are legal and valid. The question as to whether the said notice dated 23.9.2009 and public notice dated 24.9.2009 are valid or not must be judged on the basis of the factual situation obtaining at that point of time.

The date on which the petitioner received a copy of the said agreement is in controversy. According to the petitioner, it had received a copy of the said agreement only on 30.9.2009 and thus it is not correct to contend, as has been stated by the learned counsel for the respondent that the petitioner was bound to make payment of the subscription amount in advance on 8.9.2009.

13. In this case, the parties herein had entered into an agreement in view of the fact that the petitioner had made complaints against the respondent before the TRAI earlier. It is stated that the petitioner was not aware of the contents of the said agreement. It is, therefore, likely that the petitioner was not aware that it was to make payment for the month of September by 8.9.2009.

In any view of the matter, the petitioner may be held to be a defaulter only technically. In this case, the petitioner had made prompt payments. It is said to have sent a copy of the cheque for a sum of Rs.1,50,000/- to the distributor of the respondent. The fact that the cheque was received by the distributor of the respondent on 23.9.2009, as would appear from the receipt of the cheque in question as also the validation form signed by the said distributor itself.

However, the respondent must have arrived at the conclusion that the petitioner was a defaulter, at least a few days prior to 23.9.2009. It, on the date of the taking of the said decision, was not aware of the payment which was made and/or was likely to be made by the petitioner to its distributor. It must have handed over the draft entries for publication in the newspaper at least prior to 23.9.2009. As a matter of fact, the distributor of the respondent must have forwarded the cheque in question to the respondent only after 24.9.2009. According to the respondent, it received the said cheque in the first week of October, 2009.

14. Be that as it may, although in commercial parlance, the payment of an amount due may be held to be an accepted norm, for the purpose of judging as to whether the respondent acted bonafide or not in issuing the public notice, it must be considered that the payment in question did not reach the hands of the respondent on 23.9.2009 and, therefore, it had not acted malafide. It for the said reasons cannot be said to have made payments on or before the due date. The distributor must, on the other hand, have sent the said cheque to the respondent at a later date, and thus, the same must have been deposited in the bank and the actual collection might also have taken some time.

15. We would assume that the petitioner was not aware of the terms of the agreement as it had not received a copy thereof before 30.9.2009 that the due date of payment is 8th of each month.

We would furthermore assume that the petitioner had been making payments in time and in any event, within a reasonable time. In that view of the matter we are of the opinion that the petitioner was not a defaulter.

16. Would that, however, mean that the respondent was not entitled to receive copies of the monthly SLRs from the petitioner?

In view of the legal position obtaining in this behalf namely, Regulation 9.2 of the Regulations, in our opinion, the petitioner was bound to send SLRs every month.

17. However, in terms of the agreement, the petitioner was to pay a fixed sum. Payment of the said amount, however, was subject to the changes in the subscriber base.

18. By reason of an interim order passed by this Tribunal, the petitioner had been receiving signals from the respondent. The said agreement has come to an end. The parties are required to enter into a fresh agreement. Before us, there are three figures pertaining to the subscriber base of the petitioner.

According to the petitioner, his original subscriber base was 2099, on the basis whereof, the agreement was entered into. The learned Advocate Commissioner, however, in his report found the subscriber base of the petitioner to be around 4000. However, according to him, some more local cable operators joined the network of the petitioner which could not be made a part of his survey. According to the learned Advocate Commissioner, the estimated number of subscribers would be 4036. Mr. Ganpathy, however, submitted that the subscriber base of the petitioner would be much more than 4,000.

We may also notice that in *M/s. Nirman and Associates Pvt. Ltd Guahati (Assam) v. Star Den Media Services Pvt. Ltd., New Delhi*, which was marked as Petition No. 157(C) of 2009, which has been disposed on 30.4.2010, the subscriber base has been found to be 4664. However, a review Petition has been filed wherein a contention has been raised that mistakenly the same had been recorded by us to be on the basis of an admission on its part. In fact, the same should be

3614 as per the report of the Advocate Commissioner in this case. The said Review Application has since been disposed of. Secondly, according to the petitioner, it had at least joined one cable operator.

19. We, at this stage, may also place on record that the Managing Director of the petitioner in his cross-examination stated that in the months of September and October, it had joined 18 cable operators. Mr. Ganpathy would submit that in view of the said admission, there cannot be any doubt or dispute that a large number of subscribers joined the network of the petitioner through the above local cable operators.

20. Mr. Handoo, however, would urge that the witness of the petitioner did not mean in his cross-examination that it had added 18 more cable operators in the months of September and October. He meant that in the month of October, 2009 it had 18 local cable operators.

21. Our attention in this behalf has been drawn to Annexure P-6 (Exhibit PW1/9), sent to the Petitioner on 23.9.2009 wherefrom, it would appear that the total number of LCOs of the petitioner was 18.

22. We do not agree. The Petitioner's witness in his cross-examination before the Tribunal categorically stated :-

“Apart from Z.R. Vision, two cable operators joined petitioner's network in the last week of September/first week of October 2009, namely, Furhaz Digital Network and New Fashion World.

Furhaz is having a connectivity of 35 and New Fashion World is 725.

(Volunteers – Apart from 35 connections, Furhaz and another 10 connections under HITS and as far as New Fashion World is concerned, they had 35 HITS connection included in the above mentioned figure of 725. This is the connectivity of March, 2010).

In September-October 2009, 16 cable operators joined the network of the petitioner company.

On the asking of Mr. Ganpathy, the witness produces a list of cable operators market as Ex.PW/R-1.”

23. The channel of the respondent is a sports channel. The petitioner itself has disclosed that there has been some increase in its number of subscribers. The respondent, therefore, was within its right to issue the notice under Regulation 4.1 of the Regulations and the public notice in terms of the Regulation 4.3 thereof.

24. We, therefore, are of the opinion that the interest of justice would be subserved if the parties are directed to enter into a fresh agreement with effect from the date it has expired on an increased subscriber base as on 31.3.2010.

25. This order shall, however, be subject to any negotiations which may be arrived at by and between the parties.

We have passed this order on the basis of the findings of the learned advocate commissioner and in view of the fact that no objection to this report has been filed by any of the parties.

This petition is dismissed with the aforementioned observations. However, in the facts and circumstances of the case, there shall be no order as to costs.

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

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

.....
(P.K. Rastogi)
Member

rkc