

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

DATED 14th DECEMBER, 2010

Petition No. 265(C) of 2009

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Harika Cable Vision
Vs.

..... Petitioner

Tenali Communications Networks 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

For Petitioner : Mr. Yoginder Handoo, Advocate

For Respondent : Mr. Jayant K. Mehta, Advocate

ORDER

G.D. Gaiha, Member

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1. This petition has been filed by M/s. Harika Cable Vision Tenali, Distt. Guntur for setting aside the notice dated 9th November, 2009 followed by a Public Notice dated 14th November, 2009 issued by the respondent M/s. Tenali

Communications Private Limited, claiming that the petitioner was, inter-alia, retransmitting the signals of the respondent without permission in unauthorized/new areas.

2. The dispute in this petition arises out of a Public Notice issued by the respondent herein purported to have been issued *inter-alia* on the plea that the petitioner has not only transgressed the area for which the agreement has been entered into by and between the parties but also on the ground of non-payment of the due subscription amount.
3. The admitted facts by both the sides are as follows.
 - i) There is a verbal agreement between the parties since 2006.
 - ii) The agreed amount between the parties since 2008 is Rs. 60,000/- per month and the same has been paid by the petitioner to the respondent since 2008 on regular basis.
4. The following issues have been framed for determination by this Tribunal:-
 - i) Whether the notice dated 9th November 2009 and the Public Notice dated 14th November 2009 are illegal, arbitrary and contrary to the Telecom Regulatory Authority of India (Interconnect) Regulations and otherwise malafide?
 - ii) Whether the petitioner is authorised to transmit signals in the areas mentioned in the notice dated 9th November, 2009?
 - iii) Whether the petition is maintainable?
 - iv) Whether the petitioner is cable operator as defined in Section 4 of the Cable Television Networks (Regulation) Act, 1995?

- v) If the answer to the above-mentioned issue is in the affirmative, what is the area as quoted for our order dated 28.04.2010 for which the petitioner is entitled to seek signals and at what subscriber base?
- vi) Whether the petitioner is entitled to supply of signals to the entire Tenali town and surrounding villages?
- vii) Whether any amount is due from the petitioner to the respondent towards arrears of subscription charges from the period April, 2006 till April 2010? If so, how much?
- viii) To what relief, if any, the petitioner is entitled to?

5. Mr. Yoginder Handoo, the learned counsel appearing on behalf of the petitioner urged:-

i) The petitioner had to file a petition being petition No. 227(C)/2008 Harika Cable Vision Vs. ETV and Anr. before this Tribunal, where the respondent (being respondent No.2 in that case) vehemently opposed the grant of direct decoders to the petitioner on one or the other flimsy, impermissible ground. This Tribunal vide its final order dated 5.11.2009 directed ETV to apply for decoders directly to the petitioner.

ii) During the pendency of petition No.227(C)/2008, a public notice dated 22.11.2008 which was the subject matter of petition No. 257(C)/2008 was issued by the respondent for disconnection of signals of various channel to the petitioner indicating the main reason as non-payment of outstanding subscription charges after availing cable signals from the respondent for retransmission to various households/subscribers in the following areas:-

(A)Chenupet (B)Salipet (C)Ithanagar (D)Nandulapet (E)Gandhinagar (F)Islampet (G)Kothapeta (H)Garganampet (I)Lectures Colony (J)RL Pet (K)Balajiraopet (L)Morisspet; and surrounding rural villages. (“quoted from the public notice of 22.11.2008.”)

iii) The notice dated 22.11.2008 has been withdrawn by the respondent of its own, which has been recorded in this Tribunal's Order dated 15th December, 2008 in Petition No. 257 (C) of 2008. This order has also been placed in present petition filed by the petitioner.

iv) The mention of the above areas which also includes the surrounding rural villages is a clear admission of the knowledge of the fact by respondent that the petitioner is providing signals in these areas since 2008 itself and, therefore, these areas cannot be treated to be outside the area of operation of the petitioner, herein, when the impugned notice has been issued in the present petition indicating, the main reason as piracy of signals in the same very areas.

v) Another order has been passed by this Tribunal on 19th November, 2009 in the case of Harika Cable Vision Vs. MAA TV in Petition No. 104 (C) of 2009 directing the respondent in that case to supply the decoders to the petitioner. The respondent in that case. i.e, MAA TV has taken a stand that it was ready to supply its signals to the petitioner through the respondent herein, i.e. Tenali Communications.

vi) The area as impugned by the respondent to be unauthorized same areas which were the subject matter of the public notice dated 22.11.2008 which has been withdrawn by the respondent herein, in the earlier petition, therefore, cannot be again agitated in the present petition.

vii) The petitioner is paying Rs. 60,000/- per month to the respondent for all the signals of the channels (pay as well as free to air) which included the signals of ETV and ETV 2 for which the petitioner is paying Rs. 30,000/- per month. For the remaining channels the petitioner is paying Rs. 30,000/- to the respondent. The bank statement goes to show that the payment of Rs.60000/- per month has been made regularly and there is no default at any stage in the payment of this agreed amount.

viii) The non-production of the registration under Cable Television Network (Regulation) Act 1995 under Section 4 is a hypothetical objection and shows malafide on the part of the respondent and in the rejoinder by petitioner a Registration Certificate issued by the Postal Department has been annexed, which is valid.

ix) The conduct of the respondent for issuing notices under clause 4.1 on 9.11.2009 and clause 4.3 on 14.11.2009 of the Regulation, while accepting payments, regularly is not tenable.

x) The petitioner had all along been interested in formalising the oral understanding between the parties into a written agreement while the respondent never shown any interest in it.

6. The learned counsel for the petitioner would contend that there was no serious attempt on the part of the respondent for signing the agreement and the respondent only paid a lip service to the signing of the agreement.

The respondents contend:-

i) The petitioner being bound by the agreement could not have transgressed the areas in question and thus cover a small area of its operation into a huge area.

ii) Originally although the petitioner was to confine its operation within the term laid down, admittedly it had gone out of its area and also transgressed into the rural areas.

7. The petitioner in its rejoinder having denied that its operational area was Ganganamma Peta, a factual finding has to be arrived at as to what was the area of operation of the petitioner.

8. The respondent had also annexed a large number of affidavits affirmed by various persons show that they have been paying a huge amount to the petitioner at the rate of Rs. 10 per subscriber although on the basis of its connectivity of 15000 only and its subscription fees being 60000/- it has been paying a sum of Rs. 4 per subscriber.

9. Mr. Jayant K. Mehta, the learned counsel appearing on behalf of the respondent on the other hand, supporting the contentions raised by the respondent in its reply urged:-

- i) The petitioner has concealed the material facts, *inter-alia*, regarding absence of any privity between the petitioner and the respondent. Since 2006, the respondent has been providing signals to an entity, M/s. Excite Home Media Limited. It is also submitted by the learned Counsel for the respondent that the mandatory payment of Rs. 60,000/- per month has been received from the said entity and on 26th March, 2007, the said entity informed the respondent that it had sold out its connectivity of 669 subscribers to the petitioner.
- ii) The respondent has sent several telegrams and letters commencing from 12th November, 2008 till 17th July, 2009 to furnish its documents including the correct subscriber base and execute a formal agreement as required under Interconnect Regulations 2006. Petitioner had only replied to the telegram dated 5th December, 2008 stating that the matter is subjudice and since all the relevant material regarding connectivity and list of cable operators are sent to ETV and, therefore, it would not participate in any joint survey.
- iii) The respondent has come to learn about the actual connectivity of the petitioner in the entire township of Tenali as well as its rural areas. The petitioner has acquired a part connection/subscriber base from various cable operators in Tenali Town, who have sworn affidavits to this effect. The sworn affidavits of the various cable operators are annexed with the reply by the respondent.
- iv) The respondent has received notice under Section 4.1 of Interconnect Regulations from MAA TV and Ushodaya Enterprises Pvt. Ltd. dated 11.12.2009 and 19.2.2010 indicating that signals of the respondents are being pirated to Pedapudi, Amruthalur, Gajulanka, Pedalanka, Pesarlanka, Ravikampadu, Tadikalapadu, Pedalanka, Chavali, Pedalanka and Pervalli villages and Kolluru Village and Avulavaripalem, Kollur Mandal of

Guntur District respectively. The learned counsel would contend that these notices have been issued because of the encroachment made by the petitioner as a franchisee of respondent in these villages. The public notice to the petitioner has been issued on 14.11.2009, while 4.1 notice to the respondent from the two broadcasters is dated 11.12.2009 and 19.2.2010 and have been fled with its reply on 27.4.2010.

- v) The total connectivity of the petitioner in the entire township of Tenali town is 4597 and in the surrounding villages are 12,035 as per a survey conducted by the respondent and a sum of Rs.60,000/- is a very unrealistic amount for supplying signals to 15,000 subscribers. The subscription amount paid by the petitioner per subscriber is, therefore, only Rs. 4/- per subscriber (Rs. 60000 /15000) and in this amount the petitioner is able to provide free to air and pay channels to all its subscriber. This amount of Rs.4/- per subscriber is a meagre sum, while the petitioner would collect approximately a sum of Rs. 170/- from each subscriber for showing the free to air channels as well as some of the pay channels. The respondent has however not submitted any evidence to this effect.
- vi) The petitioner has been paying for a subscriber base of approximately 15,000/- @ of Rs.60,000/- per month for a complete package of free to air channels and some of the pay channels. The whole universe of the petitioner is being fed by the respondent and the same should be considered for the purpose of charging and not a certain percentage of the total because this case does not envisage showing of a particular pay channel only. The 10% to 15% of the total subscriber on negotiated basis as per viewership for the pay channels, is therefore, not the case in the present petition.
- vii) The Registration Certificate which shows the address of the headend of the petitioner as Ganganamma Peta has been used along with the address of the petitioner's headend. The petitioner is supposed to be confined its operation to the place of Ganganamma Peta only in the township of Tenali.

10. During the rejoinder to the reply, the learned counsel for the petitioner would submit that :-

- (i) The petitioner has placed a duplicate copy of the certificate issued by Head Post Master, Tenali on 25.6.2010 with its affidavit by way of evidence which covers the areas of Tenali urban and rural Guntur, Chebrol mandals for a period of 12 months with effect from the 1st February, 2010 till 31st January, 2011. The word rural Guntur has been used because Tenali township is a Teluka Head quarter is itself a part of Guntur district and the surrounding villages can be classified along with either Tenali township rural or part of the Guntur rural.
- (ii) A joint survey may be ordered to be carried out within 15 days time with the full cooperation of both the parties to arrive at the proper figure at the negotiated subscriber base.

11. Analysis:-

(a) The relationship between the parties is thus not in dispute. The respondent therefore was obligated to establish as to whether the reasons assigned in the public notice dated 22.11.20087 is correct. It is of some significance to notice that RW2, Mr. Srinivas Prashad, in his cross examination, with reference to the surrounding village areas of Tennali stated as under:-

“Ques: Which are those surrounding rural villages referred by you mentioned in public notice dated 22.11.2008?”

Ans: I do not remember. I stay 13 Kms away from Tenali but I am aware of the area.”

(b) We may notice the stand of the respondent in this behalf being:

“Initially the Petitioner has represented to supply the signals of the respondent in the operational area of “Ganganamma Peta” and orally confirmed to the respondent that it should be restrict signals of the respondent to

this area only, but in the name of oral understanding, it has started providing signals of the respondent to the surrounding areas of “Ganganamma Peta” and later in the entire Tenali town areas besides surrounding rural villages areas without providing any details of areas and number connections/subscriber base to the respondent.”

(c) RW1, in his evidence, stated:

The attention of the witness is drawn towards page 220, where a telegram has been placed which reads as follows.

" Today we received your letter, dated 16 July 2009 regarding signing of agreement with us. We are generally following Telecom regulatory authority of India agreement format only. Hence you please refer to the same and come forward for signing agreement immediately. The time given to you as per our previous letter has already been lapsed. Hence we are constrained to follow according to our policy. Let us execute the same agreement with some modifications which are mutually agreed. Sender –G.S.Prasd."

Question -- Was the telegram sent by you?

Answers -- Yes.

Question -- Do you have a copy of the model TRAI agreement?

Answers -- Yes we have.

Question -- Have you sent any model Telecom Regulatory Authority of India agreement to the petitioner?

Answers -- No.

Question -- Do you have a copy of the letter dated 16th July 2009 referred in this telegram?

Answers -- I do not remember.

Question -- Would it be correct to suggest that vide letter dated 16th July 2009 the petitioner had asked for a copy of the agreement ?

Answers -- I do not remember.”

The said witness, in his affidavit contended that it had been requesting the petitioner to come for a joint survey of its subscriber base and as it allegedly did not respond thereto, a random survey was conducted.

(d) The accountant of the respondents *Sri. Venkateswara Rao*, in his evidence admitted that the petitioner had been paying a sum of Rs. 60,000/- per month towards subscription charges. He also in his cross examination stated:

“Ques: Have you placed anything on record to show that M/s Excite Home Media Ltd. have made payment of Rs.60,000/-?”

Ans: We have received acknowledge of Xerox copy of the cheques showing payment and the same has been placed on record.”

(e) The areas mentioned in public notice appear to have been in existence even when the first public notice was issued on 22.11.2008, which has been unilaterally withdrawn by the respondent and the Petition No. 257(C) of 2008 was disposed of with directions to the respondent to ensure supply of all channels to continue uninterrupted.

(f) Admittedly, the parties have entered into an oral agreement in year 2006. The basic fact of the matter keeping in view the earlier round of litigation is not much in dispute as this tribunal in its Judgment and Order dated 5th November, 2009 passed in Petition No. 227 (c) of 2008 opined:

“The provisions of the Act and the Regulations framed by TRAI in the years 2004 and 2006 seek to achieve a specific purpose namely, that there shall not be any undue impediments on the MSOs for obtaining signals directly from the broadcaster. The Regulations also seek to provide for competition amongst the MSOs. It is only on the aforementioned premise a broadcaster is statutorily obligated to provide signals of its TV channels on non-discriminatory terms, on a request received from the distributor of the TV channels.”

Referring to certain decisions of the Supreme Court of India, it was observed:

“In the aforementioned backdrop we may also notice the pleadings of the parties filed before us. The petitioner herein has in categoric terms contended that the parties were yet to enter into negotiations with regard to fixation of monthly amount payable to respondent No.2. According to it a total sum of Rs.60000/- per month was payable by it to the respondent No.2 for providing signals of ETV and ETV-II. In respect of the other channels it is contended that a sum of Rs.30000/- only was payable towards the subscription amount. The aforementioned statements made in para-12 of the reply from a perusal whereof it appears, except making some evasive denial, the allegations made therein have not been controverted. The second respondent does not state as to what amount was payable by the petitioner for supply of signals in respect of channels of the first respondent and what amount was payable for the other channels.”

It was noticed that a public notice was issued during pendency of the said proceedings as also the fact that the public notice has been withdrawn.

(g) It however stands admitted that the notice dated 09.11.2009 was issued by the respondent by its letter dated 09.11.2009 on the premise that the petitioner has extended its area of operation. ON the same premise, a public notice was also issued. No case for non-payment of any dues has been made out. It is also not in dispute that the survey was conducted in 2007.

(h) The petitioner has been authorized to transmit signals right from the year 2008, when the impugned public notice dated 22.11.2008 was withdrawn by the respondent herein, in the petition No. 257(C) of 2008. To support its contention, the learned counsel for respondent has brought to our notice that it has received notice under Regulations 4.1 from two broadcasters on 11.12.2009 and 19.2.2020 for encroaching in unauthorized areas through the petitioner and the same have been fled with its reply dated 27.4.2010. Surprisingly we do not find the notice under Regulations 4.3 as a follow up

of notice under Regulation 4.1 in either of the cases and, therefore, to rely on these notices to prove the piracy on the part of petitioner is not sustainable.

(i) The relationship between the parties has been an admitted fact right from the year 2006 and, therefore, the event of the selling up of the network by M/s Excete Home Media Ltd. to the respondent in 2006 becomes wholly irrelevant for the purpose of the present petition.

(j) The Petitioner producing an update Postal Registration Certificate and its ongoing operations and relationship with other broadcaster directly, justify its being a cable operator.

(k) The area of operation of the petitioner has been confined to the areas mentioned in the petition No. 257(C) /2008, therefore, there is no doubt about it. The petitioner is therefore, entitled to supply of signals for the areas as mentioned in the notice. The suggestion made by the learned counsel for the petitioner for conducting a joint survey is a positive suggestion and the same should be carried out by the parties with 2 weeks time to arrive at a negotiated subscriber base.

(l) We are inclined to come to a conclusion that the public notice issued on 14.11.2009 is not based upon any grounds which can be proved by the pleadings and the arguments of the respondent.

12. We, therefore, direct the parties to sign another agreement as per the Interconnect Regulations issued on 17.3.2009 and for that matter a joint survey has taken place within 15 days as prayed for by the learned counsel for the petitioner and after negotiation on the basis of this joint survey, an agreement must be signed by and between the parties, thereafter on reasonable and non-discriminatory terms.

13. We, therefore, are of the opinion that in the peculiar facts and circumstances of this case keeping in view of the facts that it is necessary to fix the area of operation of the petitioner, a joint survey be conducted by appointment of an advocate commissioner who in turn may be appointed by the learned District Judge, Guntur. The learned Advocate Commissioner

may be appointed by the learned District Judge on such terms and conditions as he may specify. The costs of the learned Advocate Commissioner may be borne by the petitioner. The learned District Judge may fix the time limit for completion of the survey and submission of the report.

14. Indisputably, the new agreement which is required to be entered into shall take effect from the new financial year namely 1st April, 2010. We have no doubt that the parties shall hold negotiations on the subscriber base relying on or on the basis of the findings that may be arrived at by the learned Advocate Commissioner.

15. The impugned notices of 9.11.2009 and 14.11.2009 are set aside.

.....J

(S.B. Sinha)
Chairperson

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(G.D. Gaiha)
Member

.....

(P.K. Rastogi)
Member

HKC/