

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

DATED 16TH DECEMBER, 2010

PETITION No.29(C) OF 2010

Wire & Wireless (India) Ltd.

...Petitioner

Vs.

MSM Discovery Pvt. Ltd.& Anr

...Respondent

BEFORE:

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

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

For Petitioner

: Mr. Maninder Singh, Senior Advocate
With Mrs.Prathiba M. Singh, Advocate
Ms. Nitya Thakur, Advocate
Mr.Arjun Natarajan, Advocate

For Respondent No. 1

: Mr. Meet Malhotra, Advocate

J U D G E M E N T

S.B. Sinha

Introduction :

Effect of a person occupying the status of a distributor of the broadcaster as also the share holders and directors of various companies of a rival MSO as adumbrated by the Supreme Court of India in Sea Network Vs. Star 2007 (4) SCC page 656 is one of the questions which arises for consideration in this petition.

Background Facts :

The petitioner is a Multi Service Operator (MSO). It had been taking supply of signals of the channels of the respondent which is a content aggregator of various broadcasters and, thus, comes within definition of the purview of the 'broadcaster' as contained in Section 2(a) of the Telecom Regulatory Authority of India Act, 1997 (The Act). The petitioner is an MSO; its predecessor in interest being the Siti Cable and Him Mohini Cable.

Den Network is also admittedly a very big MSO having pan India operations. It has a large number of subsidiary companies.

The respondent No. 2 is a proprietary concern of Shri Sanjiv Dikshit. It admittedly is the distributor of the first respondent.

The petitioner contends that it's area of operation had all along been the entire city of Kanpur. According to it, unlike the other agreements entered into by and between the Broadcasters and MSOs it is not required to take previous permission for expansion of its area and nor the agreement being for a fixed term the renewal thereof is automatic.

According to the respondent another big MSO Hathway Cable which has also a pan India operation, so far as its Kanpur Network was concerned, had been taken-over by DEN Network in 2007-2008.

According to the petitioner a large number of operators had migrated from its network to DEN and/or its predecessor in interest. On or about 7th August 2009, seven of the local cable operators came back to it. In October, 2009, three more came back.

The petitioner offered to the first respondent an additional sum of subscription fee of Rs. 1,00000/- per month in respect of the said ten operators. The demand of the respondent No. 1, albeit an oral one, was said to be Rs. 2,00000/- per month which having not been agreed to, the dispute between the parties, despite long standing relationship started, said to be because of the intervention of respondent No. 2.

Indisputably, apart from the first respondent, the respondent No. 2 is also the distributor of other Broadcasters including 'Star'. Having regard to the fact that Sri Sanjiv Dikshit, the proprietor of the respondent No. 2 and its family members had stakes in various subsidiary networks of the DEN, the first respondent issued a notice purported to be under Regulation 4.1 of the Telecommunication (Broadcasting and Cable Services Interconnection Regulations 2004) (The Regulations) as amended from time to time on or about 20th December, 2009. It also issued a public notice on or about 23.1.2010 in term of clause 4.3 thereof.

The said purported notice dated 20th December, 2009, however, is said to have been despatched only on 21.01.2009 and it was received by the petitioner on 22.1.2010.

It reads as under :-

“It is reiterated that you have added a number of operators to your network without any prior intimation to us. You are aware that you are not authorized to distribute/retransmit the signals of the TOA Bouquet to these operators or to retransmit the signals of the TOA channels in areas outside the areas of operation declared by you.”

The petitioner replied to the said notices on or about 6.2.2010.

The petitioner filed this petition claiming inter alia the following reliefs :-

- “(a) Quashing the public notices issued by the respondent dated 23.01.2010;
- (b) Restrain the respondents from disconnecting signals and not to interfere in smooth and continuous distribution of signals to its affiliate cable operators/subscribers by the Petitioner in Kanpur city.
- (c) Pass any such other and further order(s) as this Hon’ble Tribunal may deem fit and proper in the facts and circumstances of this case.

The first respondent in its reply inter alia contended :-

- 1) The petitioner has transgressed its area of operation. On the ground of piracy and/or transgression of its network, it’s signals were disconnected on a number of occasions but restored on its verbal

assurances that it would confine its activities within the stipulated area.

- 2) Although the network of all the 10 LCOs in question are located within a distance of 1.5 kilometers from Chamanganj, it could not have extended its activities beyond the stipulated area.
- 3) By a notice dated 5th November, 2009, therefore, the petitioner was called upon to refrain from carrying its channels illegally and unlawfully.
- 4) By another notice dated 7.09.2009 the petitioner was again called upon to refrain from carrying on TOA channels illegally. The said notice was also issued in terms of clause 4.1 of 'the Regulations'.
- 5) Public notices were also issued in two newspapers on or about 23.1.2010.

The respondent No. 2 in its reply inter alia contended:-

- i) It is not one of the directors of the first respondent.
- ii) It is not a share holder of DEN Ambey Cable Networks Pvt. Ltd. or any other subsidiary companies of DEN Network.
- iii) It was also a distributor of the group company of the petitioner namely ZEE TURNER Ltd.
- iv) The petitioner has indulged in unauthorized cable casting.

The respondent No. 2 along with its reply has filed one page of a Red Herring Prospectus to show that it was not a share holder or a director of DEN Ambey Cable.

Issues:

Having regard to the rival contentions of the parties this Tribunal by an order dated 12.05.2010 framed the following issues :-

- “(i) Whether the notice of disconnection dated 23.01.2010 issued by respondent is legally valid and justified?
- (ii) Whether the petitioner is entitled to operate in areas other than mentioned in the affiliation agreement?
- (iii) If issue No.2 is answered in the negative, the consequence thereof?
- (iv) Whether the petitioner has provided signals to migrated Cable Operators as per the TRAI Regulation? If yes, then what additional subscription amount to be payable to Respondent No.1 by the Petitioner for the Migrated Cable Operators?
- (v) Whether appointment of respondent No.2, who holds shareholding interest in and manages competing MSO Den Ambey as an exclusive distributor by Respondent No.1 is in violation of TRAI regulations?
- (vi) What is the additional subscription fee payable to the respondent No.1 for LCO’s who have joined with petitioner’s network?
- (vii) Whether the conduct of the Respondent No.1 in connivance with Respondent No.2 was merely to disrupt the Petitioner’s business interest in Kanpur and is hence illegal?
- (viii) Whether the public notice dated 23.01.2010 is contrary to law, malafide and is liable to be quashed?”

Witnesses :

The Petitioner in support of its case has examined Shri Subhash Grover; whereas the first respondent examined Shri Rucheer Mathur. The respondent No. 2 examined its proprietor Shri Sanjiv Dikshit.

Submissions :

Mr. Maninder Singh, the learned senior counsel appearing on behalf of the petitioner would urge :-

- a) In view of the agreement entered into by and between the parties, as would appear from the validation form so far as the town of Kanpur is concerned no 'previous permission' clause being existing and as in the event of joining of a new local cable operator, only the requisite amount therefor was required to be paid, it would be incorrect to suggest that the petitioner has indulged in piracy and/or unauthorized cable casting.
- b) The petitioner having no direct point subscriber, in the event of joining of a new local cable operators, what was payable to the broadcaster, would only be the amount which was being collected by the 1st Respondent from the erstwhile MSOs.
- c) The contention of the first respondent that the network was disconnected on 5th October, 2009 and reconnected on 8th October, 2009 and was again disconnected on 20th December, 2009 and

reconnected on 24th December, 2009, is wholly incorrect as the documents filed by it in support of the said plea, ex-facie are forged and fabricated ones.

- d) From the conduct of the first respondent as also the second respondent it is evident that purported notices issued under Clause 4.1 being dated 20th December, 2009 was dispatched only on 21st January, 2010 and the public notice was issued only on 22nd January, 2010, which would clearly indicate that the same were malafide and were been issued only at the instance of the respondent No. 2.
- e) The contention of the respondent No. 2, that he is not a share holder and/or his family members are not the director(s) of various subsidiaries of DEN Network, is belied by a large number of documentary evidence which would clearly go to show that for all intent and purport the respondent No. 2's family had been controlling all the subsidiary companies of DEN Network which are operating in Kanpur.
- f) The evidence of the respondent's witness Mr. Rucheer Mathur cannot be relied upon as he has admitted that he had no personal knowledge either with regard to the financial aspect of the matter or the operational aspect.

Mr. Meet Malhotra, the learned senior counsel appearing on behalf of the first respondent, on the other hand, urged :-

- 1) The validation agreements entered into by and between the parties must be construed having regard to their conduct from which it would be evident that the petitioner accepted and acknowledged that it could not have transgressed into the areas of operation in which ten of the local cable operators who had joined the petitioner's network had been operating.
- 2) The petitioners network, on the said ground alone having been disconnected and having been restored only on its assurance that it would keep its operations confined to the area in question, it is not entitled to any relief from this Tribunal.
- 3) The respondent No. 2 being not an exclusive distributor of the first respondent, the contention of the petitioner that it is behind issuance of the disconnection notice as also a public notice as envisaged under Clauses 4.1 and 4.3 of 'the Regulations' must be held to be incorrect.
- 4) The petitioner having not responded to the notices issued by the respondent on 7.9.2009 and 5.11.2009, it is evident that the supply to its head-end was disrupted and restored only on the request of the petitioner.
- 5) Restoration of supply after disconnection was done on 25.11.2009 and 19.12.2009, and in fact the same having clearly been stated in the respondent No. 1's letter dated 5.11.2009, there cannot be any doubt whatsoever that disconnection had taken place twice and restoration also took place twice.
- 6) In the earlier agreements entered into by and between the petitioner's predecessor in interest and the respondent No. 1, territories might have not been mentioned, but the same was clearly mentioned in the agreement of June, 2009, and in that view of the matter the petitioner is bound

thereby and, thus, it is too late in the day to contend that the area of operation of the petitioner was the entire city of Kanpur and not the area specifically mentioned in the validation form and/or in the agreement; particularly when even according to the petitioner it intended to extend the area of operation only.

- 7) What is relevant is the area in which a multi service operator operates and, thus, the territory within which it does is of great importance as would appear from Paragraphs 10 and 11 of the Explanatory Memorandum issued by TRAI with the Regulations as amended in the year 2006.
- 8) The petitioner in terms of the agreement entered into by and between the respondent No. 1 with DEN Network, should be ready and willing to pay the charges, which the respondent No. 1 had been getting from Den Network for the entire city of Kanpur, if it intends to operate within the entire territorial limit of the town of Kanpur.

Mr. Vaibhav Srivastava, the learned counsel appearing on behalf of the respondent No. 2, urged :-

1. The respondent No. 2 merely being a collection agent of the first respondent, was not and cannot be said to be its distributor.
2. As a mere collection agent it could not be said to have any control over the activities of the first respondent in the matter of disconnection and reconnection of the signals of the channels of the first respondent.

3. The second respondent being not a share holder or director of the DEN Network and/or its subsidiaries, the contention of the petitioner must be rejected.
4. The DEN Network and other companies, in any event are separate and distinct juristic persons and it having not been shown that the respondent No. 2 had been controlling the functioning of the said companies, the petition is liable to be dismissed.
5. The respondent No. 2 being not a distributor of the TV Networks of the Respondent No. 1 within the meaning of clause 2(j) of the Regulations vis-à-vis clause 3.1, thereof the decision of the Supreme Court of India in Sea TV Network Vs. Star India Pvt. Ltd. would not be applicable.
6. The respondent No. 2 having not been transmitting or retransmitting any signal either on behalf of the broadcaster or on its own behalf, it must be held to be merely a collecting agent and looking after the interest of the respondent No. 1 in the city of Kanpur and, thus, was only interested to see that the petitioner made the payments of the subscription fee regularly and operates within the territorial limits adumbrated in the agreement.
7. It is incorrect to say that the respondent No. 2 has a hand in the matter of deactivation or reactivation of the signals of the respondent No. 1 as from the relevant documents appearing at pages 430 and 435 of the paper book, it will appear that one Jograj Singh Sanhar and Ayush/Rucheer were the concerned persons at whose instance such deactivation and/or reactivation had taken place.
8. The respondent No. 2 has nothing to do with the share holding of Den Ambey, as admittedly, only Den Network is one of the share holders out of the three.

9. Den Prayag Cable Network Pvt. Ltd. having operations only at Allahabad not at Kanpur, even assuming that the respondent No. 2 has any share therein (which in fact is possessed by another Sanjeev Dikshit), the respondent No. 2 cannot be said to be involved in any manner whatsoever with the functioning of Den Network or Den Ambey.
10. The petitioner being separate in mess and business with his brothers, he has nothing to do with their share holding pattern of other companies including Jai Mata Di Entertainment Pvt. Ltd.

The Agreement :

Admittedly, an affiliation agreement was entered into by and between the parties on or about 17th April, 2009. Its area of operation is said to be entire city of Kanpur on the premise that it has been described as Wire & Wireless (India Limited) – Kanpur.

The territory clause contained therein reads as under :-

“Armapur, Panki, Pandu Nagar, Kakadeo Sharda Nagar, Lajpat Nagar, Ashok Nagar, 80 Feet Road, Gumti-5, Chaman Ganj, Itikharabad, Kidwai Nagar, Barra, Yashoda Nagar, Saket Nagar, Govind Nagar, Hans Puram, Dabauli, Dada Nagar, Ganga Ganj in the town of Kanpur.”

The term ‘Territory’ has been defined in clause 1.9 therein in the following terms :-

“Territory shall mean the ‘Territory’ specified on page 1 hereto, as may be amended, modified or revised from time to time by the parties hereto by their execution of an amended Validation Form.”

The word ‘Term’ has been defined in clause 4 as under :-

“Subject to the Standard Terms, the term of this Agreement shall begin on the Start Date set forth on Page 1 hereto and end on the immediately following March 31 (the ‘Initial Term’). This Agreement shall be automatically renewed on the same terms and conditions provided herein for successive years starting on April 1 and ending on March 31 of the following year unless written notice of termination is provided by Distributor to Affiliate no later than March, 1. As used herein, ‘Term’ shall mean the Initial Term together with any renewal thereof.”

The said agreement was not only signed by the parties thereto but also by the respondent No. 2 Jai Mata Di Enterprises. The services offered to the petitioner and accepted by it were in respect of 19 channels.

Clause 4 of the standard terms and conditions read as under :-

“Affiliate shall not : (a) authorize or cause or suffer any portion of the Services to be recorded, duplicated, cablecast, exhibited or otherwise used for any purpose other than for distribution by Affiliate at the time the same is made available. If Affiliate becomes aware that any unauthorized third party is recording, duplicating, cablecasting, exhibiting or otherwise using the Services for any other purpose,

Affiliate shall immediately so notify Distributor and Affiliate shall take all reasonable steps necessary to prevent such unauthorized use; (b) authorize or permit the exhibition of the Services or any portion thereof at any place where admission for exhibition of such services is charged; or (c) use the rights granted to it hereunder for any unlawful purpose. Distributor reserves the right to initiate a criminal action against Affiliate in the event there is a breach of this Section.”

The validation form however, would show that a sum of Rs. 8,25,000/- per month was payable to the respondent No. 1 for 5,934 subscribers @ Rs. 139.02 per subscriber. The said validation form was not only signed by Shri Rucheer Mathur, but also by Shri Sanjiv Dikshit, as the distributor of the first respondent.

The details of the IRDS and viewing the cards are described in part-B of the said agreement, which read as under :-

“Channel wise UA number of details of All IRD’s and Viewing Cards (VC) currently with the Affiliate.

IRD/VC Details			
SET	2810399	Discovery	2922812
MAX IRD	2369108	Animal Planet	4218568
AXN IRD	5148962		
ANIMAX IRD	4258360	SAB IRD	4224299
DISCOVERY TRAVEL & LIVING IRD	4188107	SET PIX IRD	5163820
CHANNEL 8 IRD		CHANNEL 8 VC	
COLORS IRD	6 C 4 S 002173	COLORS VC	41037263906
MTV IRD	P 40 2052784	MTV VC	214748392625
NICK IRD	PHN 03020354	NICK VC	214748408397
VH1 IRD		VH1 VC	
NDTV PROFIT IRD	1000001963x1	NDTV PROFIT VC	40015679026

NDTV 24X7 IRD	ND31210013001747	NDTV 24X7 VC	40015633395
NDTV INDIA IRD	ND31210013001747	NDTV INDIA VC	40015672542
AAJ TAK IRD	5 STVT 2270	AAJ TAK VC	40159076153
HEADLINES TODAY IRD	5 STVT 3756	HEADLINES TODAY VC	4015907120Y
TEZ IRD	5 STVT 1150	TEZ VC	40159066337 "

Correspondences/Notices :

A notice purported to be under Regulation 4.1 of the Regulations was served on the petitioner on 7.9.2009.

A public notice was also issued on 12th September 2009.

The petitioner replied thereto by its letter dated 6th October, 2009, stating :-

"Since the basis of issuing the above mentioned Public Notice dated 12.09.2009 itself is wrong and further admittedly there is no compliance of the provisions of clause 4.3 of the Regulations as mentioned above there can be no deactivation/disconnection of the signals on the basis of this illegal notice and your threat of deactivation in this regard is entirely misconceived and unsustainable.

Without prejudice to the above, it may be mentioned that after these facts were brought to the notice of your executives, they had raised the issue of certain cable operators joining our network and claimed additional subscription fee from us on account of such additions. Our executives Mr. Manish Sehgal and Mr. Subhash Grover are in continuous discussions with your officials (Mr. Umesh Uppal) and various

meetings have been held to sort out the issues pertaining to the migration of cable operators to our network.

We categorically state that we are providing our signals within our authorized area as per agreement dated 17th April 2009 and as such the proposed disconnection threat is otherwise unsustainable. The same was also conveyed to your executives in response to your letter dated 7.09.2009 where the issues regarding the additional cable operators, etc. were raised in certain areas which are in addition to the areas mentioned in the agreement without any evidence/proof on your part. We categorically deny any such allegation of unauthorized cable casting and/or unauthorized transmission beyond our areas. We have been time & again assured by your executives that the matter would be settled amicably through negotiations and discussions.”

Another notice was also issued by the petitioner to the first respondent on 6th October 2009 asking it to have a meeting to sort out the issues.

Whether pursuant thereto or in furtherance thereof the alleged disconnection and reconnection took place in is an issue.

A public notice was again issued on 27th November, 2009 in the newspapers 'Maha Nagar Aaj' and 'Rashtriya Sahara Mahanagar' Kanpur.

Another notice under Regulation 4.1 was issued on 20th December, 2010, contending :-

“It is reiterated that you have added a number of operators, to your network without any prior intimation to us. You are aware that you are not authorized to distribute/retransmit the signals of the TOA Bouquet to these operators or to retransmit the signals of the TOA channels in areas outside the areas of operation declared by you.”

The petitioner thereby was called upon to cease and desist from providing signals in the manner not authorized by it.

The said notice was dispatched on 21.1.2010.

The public notice dated 23rd January, 2010 contains the following reasons :-

“The reason for de-activation is unauthorized cable casting by the following cable operator/s to MSM Discovery Pvt. Ltd. in given format (Name, City, Affected Area).

Wire and Wireless India Ltd. Kanpur, Armapur, Panki, Pandu Nagar, Kakadeo, Sarda Nagar, Lajpat Nagar, Ashok Nagar, 80 Ft. Rd., Gumti-5, Chaman Ganj, Itikharabad, Kidwai Nagar, Barra, Yahoda Nagar, Saket Nagar, Govind Nagar, Hans Puram, Dabauli, Dada Nagar, Ganga Ganj.”

Documents pertaining to Respondent No. 2 vis-à-vis DEN Networks :

A Press Release was issued by DEN Digital Entertainment Netowrk Ltd. on or about 30th April, 2008, stating :-

“Kanpur, 30th April 2008 : DEN Digital Entertainment Networks Ltd. (DEN), a leading cable network company, with a pan-Indian footprint today announced its maiden foray in the UP market, with initial launch of its digital cable services ‘Digitally’ in Kanpur and adjoining areas. The services and offerings will be provided by DEN in alliance with its strategic partner, DEN Ambey in Kanpur.”

It was furthermore reported :-

“Speaking on the occasion, Mr. S. N. Sharma, President DEN said, ‘we are delighted to be associated with DEN Ambey towards our effort to upgrade the last mile to deliver digital entertainment to consumers in Kanpur. DEN is India’s leading cable network, with a predominant market share in Kanpur and together with DEN Ambey; we shall become the preferred choice of customers for their TV entertainment needs.”

A red herring prospectus was issued by DEN Networks on or about 10th January, 2007 which has been registered with the Registrar of Companies, NCT of Delhi and the state of Haryana.

Before us, RW-2 Shri Sanjiv Dikshit was confronted with various documents.

Before, however, we refer thereto we may notice that according to him, he was not in any way associated with the company DEN Enjoy in Lucknow which in fact is a company of another Sanjiv Dikshit. In support of the said plea a copy of his passport has been annexed.

We would assume the same to be correct.

The respondent No. 2 in his evidence categorically denied and disputed his association with the other DEN Network group of companies.

Evidence of Shri Sanjiv Dixit relating to the issue as to whether he or his family members have shares in the DEN Network group of companies.

We may also notice the relevant portions of his deposition before us, which is to the following effect :-

“Que. Apart from WWIL, which are the other MSOs operating in Kanpur ?

Ans. DEN Ambey Cable Network Pvt. Ltd.

Vol. There are independent cable operators.

Que. Have you any connection with Den Ambey Cable Network Pvt. Ltd. ?

Ans. No.

Que. Den Ambey Cable Network is subsidiary of Den Network Pvt. Ltd.

Ans. I do not know.

Que. Have you any connection with Den Netowrk ?

Ans. No, I also do not have any connection with any subsidiary of Den Network in U.P."

Que. Have you ever written any letter or asked for any clarification with respect to the press release at page 367 that you are not associated with Den Ambey ?

Ans. No. I came to know of the press release only when it was filed in the petition. I have also not written any letter seeking clarification after filing of the petition. I know that there is a company Jai Mata Di Entertainment Pvt. Ltd. in Kanpur. I do not know the business it carries on. It is true that the address of Jai Mata Di Entertainment is same as that of my address."

With regard to the question as to why he had annexed only one page of the red herring prospectus of DEN Network, he has to say as under :-

"Q. Do you know where the registered office of the Den Network situated?

A. I do not know. I am also not aware that the address of Den Network and my lawyer is the same.

Q. Have you gone through the entire red hearing prospectus referred to in para 11 of your affidavit

A. No.

Q. Have you annexed just one page of red hearing prospectus without reading the whole?

A. I do not have the entire red hearing prospectus as the same was given to me by my lawyer, Mr. Vibhav Srivastava.

Attention of the witness is drawn to page 375.

Q. Can you tell us as to whether this prospectus is red hearing prospectus of Den Networks?

A. I do not know."

We may furthermore notice the following statements made by the said witness before this Tribunal :-

Que. I put it to you that you are fully involved in the Den business in Kanpur and all over UP and therefore you repeatedly interfered in the signals of Sony enjoyed by WWIL ?

Ans. No. I am not involved in Den Ambey. Sony has never disconnected WWIL. Only two times it was disconnected and on verbal request it was restarted.

Que. How have you come to know that Sony channels were disconnected twice ?

Ans. From newspapers

Que. Do you have any other documents other than newspapers in this connection ?

Ans. No.

Que. I put it to you that you have deliberately concealed the aspect of shareholding of you and your family in Den Network Ltd. and in all the other Den companies ?

Ans. It is incorrect.

The Documents pertaining to shares held by the Respondent No.2 and/or his family members :

Several documents however, have been produced before us.

Mr. Maninder Singh has also placed before us a compilation of the relevant documents which would be noticed hereinafter.

The first of it relates to DEN Prayag Cable Networks Pvt. Ltd. wherein Shri Sanjiv Dikshit has been shown to be holder of 11,998 equity shares that is 24% of the total shares whereas DEN Network has only 25,497 shares.

The respondent No. 2's address has been shown as 11/335, Shooterganj, Kanpur. The next document relates to DEN Ambey Cable Networks Pvt. Ltd. which is a private limited company.

Therein it has been shown :-

Name	AMIT DIXIT
Nationality I-Indian F-Foreign	I
Date of Birth	16.07.1978
Designation C-Chairman-cum-Managing Director W-Whole time Director, S-Secretary, R-Manager, D-Director, M-Managing Director, N-Nominee Director	D (Director)
Residential Address	11/335, Souter Ganj, Kanpur UP-208001
Date of Appointment	26.12.2007
Date of Ceasing	29.02.2008

DIN Number	01921662
Name	POOJA DIXIT
Nationality I-Indian F-Foreign	I
Date of Birth	03.11.1982
Designation C-Chairman-cum-Managing Director W-Whole time Director, S-Secretary, R-Manager, D-Director, M-Managing Director, N-Nominee Director	D (Director)
Residential Address	11/335, Souter Ganj, Kanpur UP-208001
Date of Appointment	26.12.2007
Date of Ceasing	29.02.2008
DIN Number	01934282

The third document relates to Jai Mata Di Entertainment Ltd. which has its office at 9, Silverline, Shooterganj which is also the office of the sole proprietorship concern viz Jai Mata Di Network of Shri Sanjiv Dikshit.

The said document shows that Shri Amit Dikshit, Smt. Gargi Dikshit, Smt. Pooja Dikshit are share holders who are brother-in-law and sisters-in-law of the respondent No. 2. The respective shares held by the said Shri Amit Dikshit, Smt. Gargi Dikshit and Smt. Pooja Dikshit have also been mentioned therein. The prospectus of Jai Mata Di Entertainment Pvt. Ltd. has also been filed.

One of the 'objects' of his company as mentioned in the Memorandum of Association was to carry on the business of entertainment through Cable TV Network and broadcasting. The names of the person having the share holding pattern go to show that Shri Amit Dikshit has 6,800 shares, Smt. Pooja Dikshit has 6,600 shares and Smt. Gargi Dikshit has 6,600 shares, totaling 20,000 shares.

We may also notice that the 'Form 20-B' of DEN Networks Limited contained the following entries in the list showing share holding pattern as on 3.8.2009.

S. No.	Name of Shareholder	Type of Share	Father's Husband's Name	Residential/Registered Office Address	Ledger Folio No.	No. of Shares held	% held
49.	Jai Mata Di Entertainment Private Limited	Equity	N.A.	11/312-B, Souter Ganj, Kanpur.	52	46053	0.04

It also contains a corporate information of share holding pattern. The third column of it shows the number of voting shares.

Item No. 62 thereof reads as under :-

S.No.	Name of the Shareholder	Category of Shareholder's (Promoters/Public)	Number of locked in shares	Locked-in shares as a percentage of total of shares (i.e., Grand Total (A)+ (B)+(C) indicated in Statement at para (I)(a) above)
62.	Sanjeev Dixit	Public Shareholding	1736	0.00

Item No. 152 of the said share holding pattern is as under :-

S.No.	Name of the Shareholder	Category of Shareholder's	Number of locked in	Locked-in shares as a percentage of total of shares (i.e., Grand Total (A)+
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		(Promoters/Public	shares	(B)+(C) indicated in Statement at para (I)(a) above)
152.	Jai Mata Di Entertainment Pvt. Ltd.	Public Shareholding	46053	0.04

We may now come to Hathway Jai Mata Di Sherewali Cable Datacom Pvt. Ltd..

The names of the directors of the said company inter alia are Sanjiv S. Dikshit and Deepchandra S. Dikshit.

A certificate granted by the Director of the company reads as under:-

“In view of non-availability of Director Identification Number (DIN) of Mr. Deep Chandra Dixit and Mr. Sanjeev Dixit, the information for these two Directors is not reflected in Form 20B though given in Schedule V attached to Form 20B.”

Evidence of Shri Subhas Grover :

Shri Subhas Grover the witness of the petitioner in his deposition, stated :-

1. Hathway Cable Network has been taken over by Den Network.
2. Shri Sanjiv Dixit is a major stakeholder in Jai Ambey Den Network.
3. Shri Sanjiv Dikshit is a share holder in Den Ambey Network.
4. The whole industriy knows that Mr. Sanjiv Dikshit represents the joint venture partners of Den Ambey Cable, Kanpur.

5. He, as a distributor, can interfere with the signal of a MSO.
6. It is incorrect that Mr. Sanjiv Dikshit has no role to play in the supply of signal to the petitioner.
7. It is not correct that Mr. Sanjiv Dikshit is a different person altogether and not the same who is distributor of the respondent No. 1.
8. The respondent No. 2 came to meet the deponent with the local representative of MSM in his office.
9. The outcome of meeting was that WWIL should at least pay 40 to 50 percent more than what they had been paying for the town of Kanpur.
10. The respondent No.2 has an interest in the cable network as mentioned at page 273. The only relevant factor was the amount payable on increasing subscribers and not the area from where the increased subscribers come from.
11. The MSO need not have any permission of the broadcaster for additional subscribers. The subscriber base with Star was about 20,000.
12. The margin retained by the petitioner is about 25% and the balance 75% is paid to MSM.

Area of operation :

As has rightly been submitted by Shri Malhotra, that the area of operation of the petitioner is of great significance.

We may at the outset notice that in its reply to the respondent's notices under Regulation 4.1 of the Regulation, the petitioner did not raise any question that its area of operation was the entire city of Kanpur. It only took all the legal pleas and as it stands now admitted that in the aforementioned public notice dated 12.09.2009, the areas mentioned were those areas within which petitioner was entitled to operate and the areas mentioned were not the one where petitioner's cable operators were operating.

The signal of the petitioner is said to have been discontinued on or about 5th October, 2009. The same according to the respondent No. 1, was restored having regard to the alleged assurances given by the petitioner on 8th October, 2009.

The 'exception request' for disconnection was made by Mr. Jograj Singh Sandhera.

The signals were said to have been restored on 9th October, 2009.

The respondent No. 1 thereafter is said to have issued a notice on 5th November, 2009 which was dispatched on 7.11.2009 inter alia alleging :-

"You are aware that we had earlier deactivated your network on account of violation of copyright of the TOA channel. Believing your assurances that you shall cease to operate in the unauthorized areas, we had activated your network on 9th October 2009, in light of our long standing business relationship."

The said letter had not been replied to by the petitioner. The said notice, according to the first respondent was a notice under Regulation 4.1. Yet again a public notice under Regulation 4.3 was issued on 27.11.2009. No reply was given by the petitioner either to the said notice under Clause 4.1 or the public notice under Clause 4.3 of the Regulations.

Yet again a disconnection was said to have been effected on 19.12.2009, although from the 'exception request' form, it appears that the process therefor was initiated on 20th December, 2009.

According to the first respondent, it has been reactivated on 24th December, 2009 but the petitioner continued with its acts of transgression of area.

The impugned notice dated 20th December, 2009 which according to the respondent No. 1 should be read as 20th January, 2010, thus, was issued followed by a public notice dated 23rd January, 2010.

The petitioner have issued a composite reply only on 6th February, 2010.

This petition was filed on 10th February, 2010.

Activation and Reactivation :

The "Exception Request" form on 5th October, 2009 was issued, as noticed hereinbefore, by Jograj Singh Sanghara. It was processed by one Ms. Megha Desai and authorized by Mr. Rajesh Kaul and Mr. Shankar Narayan.

A screen shot containing 15 lines showing deactivation of 8 channels on 8.10.2009 at 12.00 o'clock and reactivation of seven channels on 9.10.2009 also at 12.00 o'clock has been shown.

A printout of the relevant screen shot was received by Shri Rucheer Mathur, RW-I in the afternoon of 4.8.2010.

Admittedly, the reply was to be filed on or before 3rd August 2010. The said screen shot was referred to the deactivation shown in the 'exception request' form dated 5th October, 2009.

It appears that in respect of certain channels like NDTV India, the IRD No. was stated as at page 430 to be 312100130017 but the same has been shown at page 429 to be ND-31210013001747 and another being ND-31210013004418.

Another IRD for NDTV 24x7 was shown to be bearing No. ND-312100130044. It is, therefore evident that the number in respect of both the IRD Nos. was incorrect.

Similarly, an 'Exception Request' form for reactivation of the channels of the first respondent of which deactivation was allegedly made on 19th December, 2009, has been filed. The said 'Reactivation Request' is said to have been made by Umesh/Rucheer, the later presumably being RW-I.

In that requisition form NDTV 24x7 IRD Number has been shown as ND-31210013004418 but for NDTV India IRD Number has been shown as ND-31210013001747. Whereas in respect of the first disconnection and reconnection which took place in October, 2009, no reactivation form has been filed, so far as the deactivation and the reactivation which took place on 20th December, 2009 is concerned, no deactivation form has been filed by the first respondent.

Why in one case only 'Deactivation Request' form has been filed and in the second one, the 'Reactivation Request' form has been filed, has not been explained.

It may be true as has been urged by Mr. Vaibhav Srivastava that the respondent No. 2 on the face of the said requisition forms had no role to play. It may, however, be noticed that Sri Rucheer Mathur in his cross examination categorically stated as under :-

"Attention of the witness is drawn to page 429 & 434.

Q. From whose computer, these have been printed?

- A. From the Mumbai Office of the company.
- Q. Who took these prints?
- A. The operations person has taken these prints.
- Q. Please tell us the date of these print outs?
- A. I cannot tell the exact date. Then again said, the date of print out is mentioned as 4th August, 2010 on the print out right hand top corner.
- Q. The print out you have filed in the court, is it is original or is it scanned copy?
- A. It is a scanned copy. I was not involved in the taking of these prints as also the scanning.
- Q. Have you got this on your e. mail?
- A. Yes, on my official e. mail ID did.
- Q. On what date and at what time you get this e.mail.
- A. On 4th August in the afternoon.
- Q. Did you know that you were to file the affidavit in this Tribunal on 3rd/4th August, 2010?
- A. Yes, it was supposed to be filed.
- Q. Which are the VC Cards, according to you, that have been de-activated?
- A. The first is Tez Channel, Aaj Tak, Headlines Today, Colors, NDTV India, NDTV 24x7, MTV and Nick.
- Q. None of the others were de-activated. Is that right?
- A. All the channels were de-activated.
- Q. One IRD relates to only one channel. Is that correct?

A. Yes.

Q. Have you filed any document to show that other channels were de-activated?

A. As of now, there is no other document. However, such documents can be filed.

Q. What is meant by Samba?

A. Samba is the programme or module used by our company.

Q. Pages 429 and 434 are screen shots and not extracts from the original programme. Am I right?

A. I cannot comment it is the operations person who can comment.

Q. Please inform us why the date of re-activation 9.10.2009 has been highlighted?

A. I cannot say as I do not have any access to Samba.

Q. From the scroll which appears on the right side, these entries could have been changed at any point of time?

A. I do not think so but I can not make any comment as I am not involved in the operations.

Q. The only channels shown as re-activated at page 429 and 434 are the ones mentioned after the first eight entries on these pages. Is that correct?

A. I cannot comment as I do not have any access to this. According to me, the entire channels were switched off and then switched on. Since there is a cursor it may be possible that it can be moved down also.

Q. If there is a cursor and the sheet can be moved down, why you have not filed the entire extract?

A. Since the contention was that there was no de-activation, we filed the extract to show that there was de-activation.

Attention of the witness is drawn to page 430.

Q. What is the exception request form at page 430?

A. This is the form sent by the distributor to us requesting for the de-activation. After this form is received, the process of de-activation is started.

Q. Why has Ms. Megha Desai, who has processed this de-activation, not signed?

A. The original form in the Mumbai must have been signed by her.

Q. Where is the original of this form?

A. This is at Mumbai Office.

Q. From where you got photocopy of this form?

A. From the Delhi Office of the company.

Q. Where Rajesh Kaul and Shankar Narain sit?

A. At Mumbai Office.

Attention of the witness is drawn to page 434.

Q. What is the modified date highlighted?

A. 19.12.2008. Again said 2009.

Q. What is the date of de-activation?

A. 19.12.2009.

Attention of the witness is drawn to page 435.

Q. What is the date of exception request form?

A. 20.12.2009?

Q. You have just now said that the request form is received and thereafter the de-activation process is started but the pages 434 and 435 shows that de-activation process started on 19th December but the form is of 20th December?

A. The same form is used both for de-activation and re-activation. The form at page 435 relates to re-activation and not de-activation.

Q. In the re-activation form, do you mention the date of de-activation?

A. It is not done.

Q. What is the meaning of exception start date?

A. This request for re-activation was made on 20th December, 2009.

Q. What is meant by DN/CN?

A. Debit Note/Credit Note. These are operational things and it is hard to comment.

Q. Who fills up these request forms?

A. The operation persons.

Q. What is meant by financial impact?

A. Hard for me to comment as it is operational.

Q. As sales Head, are you aware that if Debit Note and Credit Notes are issued for the period of de-activation to the MSOs?

A. Yes.

Q. In this case have you issued any credit note to WWIL for the alleged de-activation period?

A. I have to check.

Q. When you were alleging in your affidavit that two de-activations had taken place, did you not consider it necessary to check if a credit note had been issued to WWIL?

A. That is to be answered by Finance Department.

Attention of the witness is drawn to pages 429 and 434.

Q. The channels shown to be de-activated on these pages are absolutely identical. Am I right?

A. Yes.

Q. When there is de-activation/re-activation is there a time gap between de-activation/re-activation of the various channels?

A. This is a request which has gone and therefore the request time is reflected in the form. Only an operations person can tell.

Q. How come in both pages 429 and 434 de-activation is 12'0 clock and re-activation is 12'0 clock?

A. Only the operations person can tell.

Q. I put it to you that these prints do not show the date of de-activation/re-activation because these have been prepared as an after-thought?

A. I deny.

Q. When did you see this document for the first time?

A. On 4th August.

Q. Have you filed these documents earlier in these proceedings?

A. No.

Q. If these data were available with the company, why the same were not filed before?

A. It has been filed only as a matter of proof."

We have referred to the cross examination of the said witness in details as evidently there are gross discrepancies therein vis-à-vis the materials on record.

Apart from the fact that the same was not filed earlier, it is difficult to conceive as to why only one page of the document showing deactivation of eight channels and reactivation of seven channels had to be filed.

Mr. Malhotra would urge that the same had been filed only with a view to show that in fact there had been a deactivation and reactivation.

If that be so, the document and/or proof in respect thereof was available with the respondent.

RW-I was not involved with operation. Even no witness has been examined to prove the actual deactivation and reactivation.

Why both deactivation and reactivation has taken place exactly at 12.00 o'clock again has not been not explained. Moreover, the process of deactivation and reactivation of all IRD would require some time gap, may be of a few seconds but such time gap has not been mentioned. We are of the opinion that deactivation and reactivation of all the IRDs at the same time is technologically not possible. Since there has to be some time lap, it is, therefore, difficult for this Tribunal to rely upon the said documents.

We have also noticed heretofore that the 'exception request' according to the RW-I was received from the distributor and after the said form was received, the process of the deactivation started.

It is of some importance to notice that RW-1 in his evidence categorically admitted that the first respondent has no office in Kanpur and it has only a distributor's office. He has further admitted that records are maintained in the office of the distributor and only some relevant copies thereof are sent to Delhi or Mumbai office. He further admitted that Mr. Sanjiv Dikshit runs the affairs of the Jai Mata Di Enterprises which is the distributor of the first respondent.

We, therefore, are of the opinion that the disconnection took place at the instance of the respondent No. 2 as admittedly neither Mr. Jograj who was working with the first respondent and now working in Sony nor RW-I and/or

one Umesh whose name appear in the exception request form were stationed at Kanpur.

Megha Desai who processed the said requests also appears to be working at Mumbai. We, however, intend to deal with the same at an appropriate stage as also the contention of Mr. Meet Malhotra with regard to the conduct of the petitioner vis-à-vis non-response of the notices dated 7.9.2009 and 5.11.2009 a little later.

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The documents which have been brought on record and as noticed heretofore would clearly go to show that the evidence of Shri Sanjiv Dikshit cannot be relied upon. The documentary evidence clearly postulates that he and his family had been holding shares in various companies which have a direct stake in the respondent.

In a situation of this nature, it is also permissible to lift the corporate veil. We may notice a few decisions in this behalf.

In *New Horizons Ltd. and Another Vs. Union of India* reported in 1995 (1) SCC page 478, the Supreme Court of India held as under:-

“27. The conclusion would not be different even if the matter is approached purely from the legal standpoint. It cannot be disputed that, in law, a company is a legal entity distinct from its members. It was so laid down by the House of Lords in 1897 in the leading case of *Salomon v. Salomon & Co.* Ever since this decision has been followed by the courts in England as well as in this country. But there have

been inroads in the doctrine of corporate personality propounded in the said decision by statutory provisions as well as by judicial pronouncements. By the process, commonly described as "lifting the veil", the law either goes behind the corporate personality to the individual members or ignores the separate personality of each company in favour of the economic entity constituted by a group of associated companies. This course is adopted when it is found that the principle of corporate personality is too flagrantly opposed to justice, convenience or the interest of the Revenue. (See : Gower's Principles of Modern Company Law, 4th Edn., p. 112.) This concept, which is described as "piercing the veil" in the United States, has been thus put by Sanborn, J. in US v. Milwaukee Refrigerator Transit Co. :

"When the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."

Yet again in DDA Vs. Skipper Construction Company Pvt. Ltd., the Apex Court held :-

"28. The concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned."

Effect of the Respondent No. 2 being the distributor of the Respondent No.1.

The submission of Mr. Srivastava is that by reason thereof only the judgement of the Supreme Court in *Star India Pvt. Ltd. Vs. Sea TV Network*, 2007 (4) SCC 656 may not stricto-sensu apply as in that decision, it has been held as under :-

“16.1. We have quoted the definition and provisos from the Interconnection Regulations. Under clause 2(b) an agent is a person authorised by a broadcaster to make available TV channels to a distributor of TV channels. In that definition we have a broadcaster, an agent of the broadcaster and a distributor. Under the agreement between Star India Pvt. Ltd. and Moon Network Pvt. Ltd. (which agreement was not placed before the Tribunal), Moon Network Pvt. Ltd. is a distributor of TV channels. It is not an agent. In fact, the contract indicates that the relationship between Star India Pvt. Ltd. and Moon Network Pvt. Ltd. is not based on principal-agent relationship. In other words Star India Pvt. Ltd. has given distribution rights exclusively to Moon Network Pvt. Ltd. for the territory of Agra. This was never disclosed to the Tribunal. Before the Tribunal it was argued that Moon Network Pvt. Ltd. was the agent of Star India Pvt. Ltd. It is for this reason that Sea TV Network is asked to approach Moon Network Pvt. Ltd. as a distributor. It is for this reason that Sea TV Network is made to depend for the signals on the feed to be provided by Moon Network Pvt. Ltd.

16.2. Further under clause 2(j) the word “distributor” of TV channels is defined to mean, any person who retransmits TV channels through electromagnetic waves through cable.

16.3. When signals are provided through decoders the matter comes under the expression “make available TV channels” in terms of clause 2(b) of the Interconnection Regulations. Clause 2(b) is applicable because the broadcaster makes available the TV channels to its distributor, namely, Moon Network Pvt. Ltd.

16.5. In our view the Tribunal has, therefore, correctly drawn a distinction between what is called as “making available of TV channels” and retransmission of TV channels under the above two clauses. Keeping in mind the above distinction it is clear that although a broadcaster is free to appoint its agent under the proviso to clause 3.3 such an agent cannot be a competitor or part of the network, particularly when under the contract between the broadcaster and the designated agent-cum-distributor exclusivity is provided for in the sense that the signals of the broadcaster shall go through the cable network owned and operated by such an agent-cum-distributor which in the present case happens to be Moon Network Pvt. Ltd.”

But in this case, the factual matrix involved is somewhat different. RW-1 in his evidence clearly stated that disconnection was effected at the instance of Shri Sanjiv Dikshit, although there is no documentary evidence in that behalf that Shri Sanjiv Dikshit, the respondent No. 2 had any hand in reactivation of the signals.

The representative of the respondent No. 1, therefore, does not deny or dispute the possibility of the respondent No. 2's exercising his influence over the respondent No. 1 in harassing the petitioner.

We hope and trust that such a course of action shall not be resorted to by the respondent No. 2 in future with any other operator whatsoever.

AREA :

The question which now arises for consideration is as to whether the area of operation of the petitioner is the entire territory of Kanpur or the areas mentioned in the agreement.

The agreement dated 17.4.2009 has admittedly been entered into by and between the parties hereto. Prior thereto in the agreements entered into by and between the respondent No. 1 and the predecessor in interest of the petitioner, no area had been mentioned. The parties could have continued with the same position.

It, however, did not choose to do so. In the affiliation agreement dated 17th April, 2009, the territory within which the petitioner was to operate had clearly been mentioned which we have noticed heretobefore. If that be so, the parties had arrived at a consensus that its area of operation should be limited and the same would not be the entire town of Kanpur.

Time and again Mr. Maninder Singh had drawn our attention to the description of the petitioner as Wire and Wireless India Limited, Kanpur.

It has, in our opinion, no relevance. It merely at best refers to the name description and not to the territory.

Territory has been defined in clause 1.9 to mean the territory specified in page 1 of the agreement.

We may also notice that the terms (a) services, and (b) system had been defined in clauses 1.5 and 1.8 which are as under :-

“ ‘Services’ shall mean the twenty-four hour per day, advertiser-supported television services listed on Schedule A attached hereto and deemed a part hereof, which Schedule A may be revised from time to time (i) by Distributor in its sole discretion if it chooses to delete any of the Services from Schedule A upon notice to Affiliate, and (ii) by mutual agreement of the parties hereto by their execution of an amended Validation Form if they choose to add or delete any new television services to Schedule A; ‘Systems’ shall mean the subscriber television system(s) owned or controlled by the Affiliate and all subscriber television systems that are authorized by Affiliate, or will be authorized by Affiliate during the Term (subject to Distributor’s prior written consent), to carry the Services that are available solely for reception by Subscribers located solely within the Territory, and which Affiliate represents to Distributor are as listed in the Validation Form (upon any written consent of the Distributor to add a new System, the Validation Form shall be deemed to have been revised accordingly).”

‘Validation form’ has been defined in Clause 1.10 to mean ‘validation form’ as form set forth in Exhibit-T attached thereto. It was deemed to be a part thereof and which the affiliate was to complete in full and the parties thereto execute and deliver together with the agreement. Thus, the changes which were required to be made in writing was to be done in the manner laid down therein.

We have referred to the definition of various terms heretofore including 'service, system, validation form'.

The agreement is binding on the parties thereto. The same has to be construed keeping in view the definition of the term. It must be construed in its entirety. Only one part of the agreement viz the description of the petitioner shall not be decisive. On the other hand the territory having been defined and as the same refers to various other terms of the said agreement and, therefore, the same has to be given their due effect. They can neither be ignored nor can be said to be subservient only to the description of one of the parties to the agreement.

Clause 8 of the agreement relate to the 'intellectual property'.

By reason of the said provision the petitioner could be held responsible only with regard to its action within the territory, which would indisputably mean 'territory' as defined in clause 1.9 and not beyond the same.

Clause 18 of the said agreement provides that the agreement would constitute the entire agreements between the parties with regard to the subject matter therein and would supersede all prior agreements with respect thereto.

This also is a pointer to the fact that the agreement in question cannot be, for any intent or purport, referred to the earlier agreements whether for construction thereof or otherwise.

The petitioner in paragraph 6 of the petition highlighted the word 'Kanpur' before the areas in question which in our considered opinion is not at all relevant.

The very fact that several areas have been mentioned is, in our view, itself a pointer to show that even in the public notice, it was not given out that the entire area of Kanpur was the subject matter of agreement between the

parties. The petitioner by a notice dated 28th August 2009 was called upon to immediately refrain, cease and desist from unauthorized supply/pirating of the signals of respondents channels.

For reasons best known to it, it did not respond thereto. Infact the petitioner has not made any mention thereabout in the petition.

Yet again the respondent by a letter dated 7.9.2009 as also by an E-mail contended that the petitioner had gone beyond the said territory to which also no reply was given.

On that premise a notice under Clause 4.1 was issued. A public notice were also issued on 12 September, 2009.

The petitioner replied thereto by its letter dated 6th October, 2009.

In that reply also no contention has been raised by the petitioner that it was entitled to carry on its operations in the entire territory of town of Kanpur.

In fact in the said letter, the petitioner referred to the subscription agreement, stating :-

“Since the basis of issuing the above mentioned Public Notice dated 12.09.2009 itself is wrong and further admittedly there is no compliance of the provisions of clause 4.3 of the Regulations as mentioned above there can be no deactivation/disconnection of the signals on the basis of this illegal notice and your threat of deactivation in this regard is entirely misconceived and unsustainable.

Without prejudice to the above, it may be mentioned that after these facts were brought to the notice of your executives, they had raised the issue of certain cable operators joining our network and claimed

additional subscription fee from us on account of such additions. Our executives Mr. Manish Sehgal and Mr. Subhash Grover are in continuous discussions with your officials (Mr. Umesh Uppal) and various meetings have been held to sort out the issues pertaining to the migration of cable operators to our network.

We categorically state that we are providing our signals within our authorized area as per agreement dated 17th April 2009 and as such the proposed disconnection threat is otherwise unsustainable. The same was also conveyed to your executives in response to your letter dated 7.09.2009 where the issues regarding the additional cable operators, etc. were raised in certain areas which are in addition to the areas mentioned in the agreement without any evidence/proof on your part. We categorically deny any such allegation of unauthorized cable casting and/or unauthorized transmission beyond our areas. We have been time & again assured by your executives that the matter would be settled amicably through negotiations and discussions.”

We are not, however, inclined to give any importance to the wrong areas mentioned in the aforementioned public notice dated 13.9.2009 as it has been accepted that the petitioner categorically mentioned that it had been operating within its own areas.

The petitioner according to respondent was aware of the consequence thereof. From the aforementioned reply of the petitioner dated 6th October, 2009 it appears that it raised a wrong contention that it had been operating within its own areas.

The question as to whether the contention of the respondent that there had been disconnection and reconnection of the petitioner's signal in the aforementioned premise was justified may now be considered.

We have discussed heretofore in regard to the technical aspect of the matter. Although we are not fully satisfied that the manner in which a document has been filed by the respondent No. 1 is correct, but we intend to, for the purpose of this case, accept the contention of the petitioner. The deactivation or reactivation notices which are sought to be proved by way of screenshots may not be correct.

Effect of the petitioner's operating beyond the stipulated area :

With a view to correctly appreciate the materials brought on record by the parties, the conduct of the petitioner assumes some significance.

The respondent No. 1 on a number of occasions had been asking the petitioner not to transgress its area of operation.

It had issued notices under clause 4.1 of the Regulations.

For reasons best known to it, the petitioner had not replied the notices of the respondent in regard thereto.

The respondent in its notice dated 5th November, 2009 also called upon the petitioner not to transmit the signals illegally in an unauthorized area. It was only thereafter the so called deactivation has taken place. The

respondent in its reply contended as under :-

“The respondent No.1 again wrote to petitioner on 5.11.2009. A copy of the letter dated 5.11.2009 alongwith proof of dispatch is annexed hereto and is marked as Annexure R-1/2. The letter dated 05.11.2009 clearly records that signals of the petitioner had been deactivated on account of piracy and unauthorized transmission and that the signals had been restored only on account of assurance from the petitioner that petitioner would cease to operate in unauthorized area. Again the abovesaid letter was also not annexed or mentioned in the petition. It is clear that the petitioner is guilty of suppressio veri and suggestio falsi. The petition deserves to be dismissed out right on account of the conduct of the petitioner and at least, interim order granted on 11.02.2010 need to be recalled, the same having been obtained fraudulently by the petitioner.

It is further pertinent to state that even after the petitioner's channels been disconnected once the petitioner did not stop from pirating the TOA Channels to the answering respondent. The answering respondent in view of the same again gave a notice dated 05.11.2009 under Clause 4.1 of the Interconnect Regulation to the petitioner clearly stating that the petitioner is still engaged into Unauthorised Cable Casting/Piracy. Not only this, but also the answering respondent categorically and specifically mentioned in the said letter that the petitioner was deactivated earlier and that believing the petitioner's oral assurances that the petitioner would cease to operate in the unauthorized areas, (this fact not been disputed by the petitioner) the network of the petitioner was re-activated on 09.10.2009, in light of the long standing business relationship of the parties to the Subscription Agreement.

Thereafter, the answering respondent issued public notices dated 27.11.2009 in accordance to the TRAI Regulation. Regardless, to state that the petitioner was again deactivated on 19.12.2009. The petitioner again orally assured the answering respondent that the petitioner will not further engage into unauthorized Cable Casting/Piracy. The answering respondent once again looking into the long term relationship re-activated the signals of the petitioner on 24.12.2009.

Regardless to state that, despite all efforts of the answering respondent to maintain the long standing relationship, the petitioner never stopped the Unauthorised Cable Casting/Piracy, thereby, leaving no other option to the answering respondent other than again issuing a notice under Clause 4.1 of the Regulation and Public Notice to the petitioner dated 20.12.2009 and 23.01.2010, respectively. It is pertinent to note here that in the said notice under Clause 4.1 of the Regulation the answering respondent again specifically mentioned that the petitioner was deactivated earlier and only on believing the oral assurances by the petitioner to cease to operate in the unauthorized area and keeping in view the long standing relationship, the petitioner's network was reactivated."

In its rejoinder the petitioner did not traverse to the said contentions specifically. It, however, made a bald statement in its letter dated 6.2.2010 that the said notices had never been acted upon. Why the petitioner had to take that stand immediately before filing of this petition is difficult to comprehend particularly when it even did not reply to the public notice issued in terms of Regulation 4.3 on 27.11.2009 also.

Again according to the respondent a disconnection was caused on 19.12.2009. There had thus, been an alleged activation and reactivation but according to the respondent they did it for the third time for which the notice dated 28th January, 2010 wrongly mentioned as 28th December, 2010 was issued. Whatever be the correct date, admittedly the letter was dispatched on 21.1.2010 and the petitioner received the same on 22nd January, 2010. A public notice was also issued on 23rd January, 2010. It is only in the aforementioned context, the petitioner's letter dated 6th February, 2010 must be considered, as immediately thereafter this petition was filed.

The question as to whether the 'territory' contained in the agreement has any real significance or not may now be considered. Apart from the fact that in a case of this nature, the extent of territory specifically mentioned in the agreement vis-à-vis a situation, where the entire town or area or even a surrounding areas are mentioned would carry different meanings.

The petitioner raised a contention that all the Den Cable Operators had joined its network in October, 2009 and December, 2009, who operate within a radius of 1.5 kilometers from the centre of the town. In a given situation of the present nature where there may be a large subscribers within a distance of 1.5 kilometers, the same in our opinion cannot altogether be ignored.

Be it mentioned that TRAI also in paragraphs 10 and 11 of the Explanatory Memorandum appended to the 2004 Regulations stated as under :-

“10. Area of operation and Subscriber base

The term subscriber base is rather vague in the absence of addressability, as it is impossible to know the real number of subscribers being served by a service provider in non-CAS areas.

Thus, it is not possible to have agreements based on the actual subscriber base. Hence, the negotiations for fixation of subscriber base for an interconnect agreement depend crucially on area proposed to be served by the distributor of TV channels. However, the actual number of subscribers is reflected by the Subscriber Management System (SMS) wherever addressable systems are deployed. Thus, the subscriber base in such a situation is accurately reflected by the SMS. As mentioned in para 8 above, the TDSAT judgment in the case of Sea TV Network Ltd. has been challenged before the Supreme Court of India and the matter regarding determination of subscriber base of cable operators and MSOs has been raised in the appeal before the Supreme Court. However, the Supreme Court vide its interim order dated 2.3.2006 had specifically permitted the Authority to proceed with its exercise on devising a system for ascertaining the subscriber base of distributors of TV channels. The Supreme Court had observed that:-

“... Further, pendency of these matters shall not stand on the way of the Central Government if it so chooses, to implement the CAS or of the TRAI in devising any system to identify and arrive at the correct number of subscribers of each distributor of TV channels.... ”

In view of this observation of the Hon’ble Supreme Court the Authority has proceeded to lay down a system to identify and arrive at the correct number of subscribers of each distributor of TV channels.

The Authority had recognized in its recommendations on issues relating to Broadcasting and Distribution of TV channels dated 1.10.2004 that a gradual transition to addressability is a must and that it cannot be done immediately throughout the country. In these recommendations, the Authority had recommended mandating a register of subscribers to be maintained by the cable operators and multi system operators. The Authority had recommended that:-

“...All cable operators and multi system operators shall maintain a register of subscribers containing the names of the subscriber, address, monthly fee charged and number of channels received.

The register shall be furnished for inspection to the Authorised Officer whenever he considers it expedient to inspect such register to find out if there has been a violation of any regulation...”

In the absence of addressability and register of subscribers, it is very difficult to ascertain the number of subscribers of a distributor of TV channels. In spite of this limitation, the Authority has provided a methodology to arrive at the subscriber base of each distributor of TV channels.

11. The primary reason for disputes arising on account of expansion of area is that without addressability, it is impossible to know the actual subscriber base and area is the basis on which a subscriber base is arrived at. Any change in area of operation has direct bearing on the negotiations with respect to subscriber base.

However, the expansion of area by a multi system operator on account of giving feed to a cable operator operating outside the existing area of operation of the multi system operator can be taken care of by negotiations based on the Subscriber Line Report (SLR).

Similarly, the expansion of area of operation by a cable operator will also get reflected through the Subscriber Line Report (SLR).”

Malafide Issue :

We are not oblivious of a situation where the business of a big operator like petitioner may be brought to a halt without any justifiable reason. The action of the Broadcaster may be malafide. A malafide action, it is trite, is no action in law. It might have taken the action at the instance of respondent No. 2 but there cannot be any doubt or dispute that it had acted within its contractual and statutory rights.

However, the factual matrix involved in this case clearly points out that the conduct of the petitioner is also not above board. It had again and again harped on a mistaken nomenclature description of its company. It sought to take benefit of a mistake committed by the respondent No. 1 in a public notice. There was absolutely no reason as to why it could not have taken a definite stand when the first respondent had been issuing notices after notices and public notices after public notices. The plea of malafide could have been taken even at that point of time. Moreover, it is a trite law that an action on the part of a contracting party should be held to be binding be legal and not unauthorized in law. Only because the respondent is said to have a motive to do so would not by itself result in a different conclusion.

For arriving at the conclusion one way or the other, a court of law is not entitled to take into consideration only one side of the picture, but it must take into consideration both the sides.

Conclusion :

Before us, Mr. Malhotra has produced a copy of the agreement entered into by the respondent with M/s. Den Network for the entire town of Kanpur. We do not find the same relevant.

We, thus, need not go into the aforementioned question.

In view of our aforementioned findings the petition should be dismissed but we must place on record that Mr. Malhotra has made an offer that in the event the petitioner intends to take supply of signal for the entire town of Kanpur, it may do so but for the said purpose may have to hold negotiations.

We are sure that the parties would be taking recourse thereto as negotiations must precede a valid agreement of supply of signals. The matter has been pending before us for a long time. The petitioner had been enjoying the signal pursuant to our interim order.

We, therefore, keeping in view the magnitude of the problem which may be faced by the petitioner besides the subscribers, if we do not give an opportunity for the parties hereto to enter into negotiations for renewal of the agreement, some injustice may be caused.

We, therefore, direct that negotiations may be held between the parties for which a meeting may be arranged between two top most officers/Managing Directors/Directors of both the respective companies, so as to enable them to arrive at a settlement for the purpose of carrying out of the operation of retransmission of signals by the petitioner to carry either on the existing terms i.e. within the territory of the agreement dated 18.07.2009 or for the entire town of Kanpur, as the case may be.

We have no doubt in our mind that the respondent as a reputed broadcaster shall enter into negotiations with the petitioner with an open mind. Such negotiation may be held and completed within a period of one month from date. The interim arrangement shall continue for the aforementioned period. We have passed this order only to adjust the equities between the parties and with a view to enable the parties to hold an effective and fruitful negotiation.

However, in the event of failure on the part of the parties to enter into an agreement, the respondent may give effect to this judgement. There cannot be any doubt or dispute that in the even the parties agree to a subscriber base, the agreement has to be given a retrospective effect. The parties must also negotiate on the excess amount payable by the petitioner owing to new cable operators joining the petitioner's network from September 2009 and December 2009.

This petition is disposed of on the above terms. In the facts and circumstances of this case there shall be no order as to costs.

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

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(G. D. Gaiha)

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