TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 15th January, 2010

R.A. No.1 of 2010

In

PETITION No.40(C) OF 2009

Intermedia Cable Communications Pvt. Ltd. … Petitioner

Versus

M/s ZEE Turner Ltd. & Ors. …Respondent

BEFORE:

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

For Petitioner : Mr. Neeraj Kaul, Senior Advocate
Mr.Navin Chawla, Advocate
Mr. Sharath Sampath, Advocate

For Respondents 1, 2 & 3. : Mr. Maninder Singh, Senior Advocate with Mrs.Prathiba M. Singh, Mr. Saurabh Mishra, Mr.Arjun Natarajan,Ms.Nitya Thakur, Advocates

ORDER

This review petition has been filed purported to be under Section 16(2)(f) of the TRAI Act seeking review of this Tribunal's order dated 16.12.2009 whereby and whereunder an application for grant of injunction filed by the petitioner herein was disposed of with certain directions.

The original petition was filed by the petitioner praying inter alia for the following reliefs:

"(a) restrain the respondents from in any manner deactivating or disturbing the supply of their TV channel signals to the petitioner.

(b) set aside the impugned public notice dated 07.03.2009 issued by respondent no.1.

(c) direct the respondent no. 1 to enter into the subscription agreement in terms of the minutes of the meeting dated 11.4.2008 upon complying with the conditions set out therein and as set out above.

(d) direct the respondent no. 1 to forthwith supply their TV channel signals to the petitioner on digital mode through the SMS system installed by the petitioner and charge on the basis of CAS rates for the same."

This matter has a chequered history. Petitioner had pressed for an interim order. An interim order directing the respondent not to disconnect supply of signal pursuant to the public notice dated 07.03.2009 was passed on 24.03.2009.

The parties even held talks for settlement which, however, did not fructify. The premises of the petitioner were also inspected. However, no payment was made by the petitioner despite continuing to avail signals pursuant to the said interim order dated 24.03.2009.

By an order dated 20.10.2009 as an interim measure, the petitioner was directed to pay a sum of Rs.40 lakhs plus statutory taxes per month.

It was furthermore directed:

> **"**The learned counsel for the respondent also states that, as against Rs. 3.15 crores (approx) @ of Rs. 45 lakhs per month since 24.3.2009 till date, Rs. 2 crores may be paid as lumpsum money to the respondent. This payment will be without prejudice to the rights and contentions of the parties and be made to the respondent within two weeks' time by the petitioner. Learned counsel for the petitioner further submits that due adjustments for the carriage fee be also made while deciding the other issues finally. Learned counsel for the respondent refutes the claim of the counsel for petitioner and states that as per latest Regulations dated 17.3.2009, the petitioner cannot claim any carriage fee in case the signals are being asked under the must provide Regulation 3.2 and also the offer dated 03.08.2009 made by respondent having a mention of carriage fee was a conditional offer, which is not valid as on date.

Learned counsel for the petitioner further submits that his request for signals on SMS basis in the non-CAS area may be considered by the respondent. The Learned counsel for the petitioner reiterates that outstanding amount due towards the petitioner for carriage fee charges be also decided simultaneously. The Learned counsel for the respondent submits that non-compliance of this interim order by the petitioner will entitle the respondent for disconnecting the signals to the petitioner as per Regulations. The respondent can disconnect signals to petitioner in case of non-compliance of this order, after following Regulations."

The petitioner aggrieved by and dissatisfied with the said order filed a writ petition before the High Court of Delhi.

By a judgment and order dated 27.10.2009 the said court opined as under:

"3. Admittedly, the order dated 20th October, 2009 passed by Telecom Disputes Settlement and Appellate Tribunal is a non-speaking order. It does not deal with the contention of the parties or state the reason why interim direction to pay Rs. 40 lacs per month is being passed. Accordingly, the matter is remanded back to the tribunal for fresh adjudication on the interim application. The learned tribunal will give reasons for deciding the application and will not be influenced by its earlier order dated 20th October, 2009. It is clarified that this Court has not expressed any opinion on the merits of the order dated 20th October, 2009 in favour of the petitioner or the respondent. The matter is already listed before the learned tribunal on 4th December, 2009. However, it will be open to the parties to move an application for early hearing and fixation of the earlier date. The writ petition and all pending applications are disposed of."

Pursuant to the said directions, the matter was heard again by this Tribunal on 04.12.2009.

By reason of the order under review the direction contained in this Tribunal's order dated 20.10.2009 was reiterated.

Mr.Neeraj Kaul, the learned senior counsel appearing for the review petitioner would contend:

(i) This Tribunal committed an error apparent on the face of the record in so far as it relied upon the invoice dated 06.01.2009 which is a forged and fabricated document as would appear from the communication of the Star Den Media Service Ltd. contained in Annexure A appended to MA No.2 of 2010.

(ii) This Tribunal ought to have referred to paragraphs 9 and 10 of the Rejoinder wherein reasons for non-signing of the agreement was explained.

(iii) This Tribunal erred in not taking into consideration the distinction between carriage fee and placement fee.

(iv) This Tribunal failed to appreciate that the petitioner agreed to pay Rs.30,05,860/- per month only after being assured that it would be paid a sum of Rs.24,00,000/- per month as placement charges.

Mr.Maninder Singh, the learned senior counsel appearing for the respondent, on the other hand, would urge:

(i) This review petition is an abuse of the process of court as the petitioner at no stage denied or disputed the genuineness of the invoice dated 06.01.2009.

(ii) The petition for review of an order cannot be premised on a subsequent event.

The petitioner has filed two applications; one for review of the order dated 16.12.2009 and another for initiation of a proceeding against the respondent under Section 340 of the Code of Criminal Procedure marked as M.A. No.2 of 2010.

A review petition should be a self contained document. It is beyond all canons of the rule of pleadings that for referring to a document which formed the basis for filing of the review petitioner, this Tribunal would be asked to refer to a document annexed to another petition on which even no cognizance has been taken or can be taken at this stage. Even in the review petition reference to relevant paragraphs of MA No.2 of 2010 was not made. Liberty was also not taken to refer thereto.

We deprecate such a practice.

The invoice dated 08.01.2009 was sent to the petitioner by M/s Star Den Media Service Ltd. It was filed on 10th August, 2009 after the respondent could obtain a copy thereof.

If the petitioner had not received the said invoice, it could have and should have stated so at the earliest possible opportunity.

In fact in response to the reply filed by the respondent, the petitioner in its rejoinder stated as under:

> "18. That in reply to the contents of paragraph 18, submissions made above are reiterated. It is reiterated that the amount being paid to Star Den is irrelevant to the adjudication of disputes raised in the present petition. It is denied that the Respondent No.1 is entitled to be paid the monthly subscription amount of not less than Rs.52.38 lakhs per month."

What was, thus, questioned was the relevance of the said invoice and not the genuineness thereof. The petitioner did not question the quantum of the subscription fee.

Before us, Mr.Singh has produced a copy of the Writ Petition filed by the petitioner before the Delhi High Court, ground (i) whereof reads as under:

> "(i) Because the Hon'ble Tribunal has failed to appreciate that the reliance of the Respondent on the subscription fee paid by the Petitioner to STAR is totally irrelevant for determining the amount payable by the Petitioner to the Respondent. It is most respectfully submitted that the mutual Agreement with STAR DEN is based on various factors wherein STAR DEN has been extending benefits and relief in terms of Commission on Distributorship for the entire District, Hotel Subscription directly collected by the Broadcaster and also substantial amounts paid for Events sponsored and the amount of subscription fees waived off at the year end reconciliation of accounts. With respect to the Channel Placement/placement fees paid by STAR DEN to the Petitioner, an annual amount totaling upto Rs.589,14,800/- (inclusive of taxes) is being currently paid for the preferential placement of STAR Bouquet of Channels on the Petitioner's network. Further the Respondent claim of the monthly subscription, as alleged to be paid by the Petitioner to STAR DEN is inclusive of all taxes. It is also a customary practice in the Industry that the Subscription Fees payable is always based on the negotiated amounts and not on Subscriber basis and therefore the TRAI had restricted the increase in the fees to percentile basis annually. The Petitioner further submits that another similarly placed broadcaster M/s MSM Discovery Pvt. Ltd., has also executed the subscription and Channel Placement/ placement agreements simultaneously, for the current period, which is a standard practice adopted by all the broadcasters. The

monthly subscription fees payable by the Petitioner was agreed on the basis of negotiated amount and not on the basis of subscriber base. The negotiated amount payable by the Petitioner to M/s MSM Discovery Pvt. Ltd. is Rs.29,00,000/- (Rupees Twenty Nine Lacs Only) excluding taxes per month which works out to Rs.348,00,000/- (Rupees Three Hundred Forty Eight Lacs only) excluding taxes annually and whereas the Channel Placement/ placement agreement has been executed for Rs.450,00,000/- (Rupees Four Hundred Fifty Lacs only) excluding taxes per annum for the preferential placement of MSM Discovery Pvt.Ltd. bouquet of channels. The Respondent is just exaggerating the claims so as to cause prejudice against the Petition."

Thus, even before the High Court no plea with respect to genuineness of the said invoice was raised.

Mr.Kaul has taken us through the contents of the invoice in question as also the new invoice which Star Den Media Ltd. has supplied to the petitioner to show the differences thereof.

The differences between the said two invoices inter alia are with regard to date, number of invoice, address, arrears. Whereas in the new invoice the subscription fee is shown as Rs.4,85,655.80p, in the invoice in question the amount was shown as Rs.4,85,655.84p.

It is stated by Mr. Kaul that having regard to difference in a few paise, the petitioner did not make any enquiry. It does not, in our opinion, constitute a valid explanation. The question was, whether the appellant had received the invoice in question or not ?

We, thus, fail to appreciate the aforementioned contention.

If the same has not been received by it for the Broadcaster, it should have raised the said contention immediately after 10.08.2009.

This Tribunal in any event was concerned with the number of subscribers on the basis whereof the invoice was drawn and not with the other details.

The number of subscriber on the basis of any of the aforementioned invoices would be about 48,492.

Respondent claimed a sum of Rs.52,00,000/- towards subscription fee only on that basis.

Why all of a sudden the petitioner wrote a letter to M/s Star Den Media is difficult to appreciate, particularly when even on merit of the matter namely the amount of subscription fee raised on the aforementioned subscriber base, no difference would have been created thereby.

It is, therefore, not a case where a new plea is sought to be raised on the basis of a new document which was not available to the applicant despite due diligence.

In Anibam Tuleshwar Sharma Vs. Aribam Pishak Sharma & Ors. - 1979(4) SCC 389, the Supreme Court of India held as under:

> "3. The Judicial Commissioner gave two reasons for reviewing his predecessor's order. The first was that his predecessor had overlooked two important documents Exhibits A/1 and A/3 which showed that the respondents were in possession of the sites even in the year 1948-49 and that the grants must have been made even by then. The second was that there was a patent illegality in permitting the appellant to question, in a single Writ Petition,

'settlement' made in favour of the different respondents. We are afraid that neither of the reasons mentioned by the learned Judicial Commissioner constitutes a ground for review. It is true as observed by this Court in Shivdeo Singh v. State of Punjab (AIR 1963 SC 1909) there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Sub-ordinate Court."

"4. In the present case both the grounds on which the review was allowed were hardly ground for review. That two documents which were part of the record were not considered by the Court at the time of issue of a Writ under Article 226, cannot be a ground for review especially when the two documents were not even relied upon by the parties in the affidavits filed before the Court in the proceeding under Article 226. Again, that several instead of one Writ Petition should have been filed is a mere question of procedure which certainly would not justify a review. We are, therefore, of the view that the Judicial Commissioner acted without jurisdiction in allowing the review. The

> Order of the Judicial Commissioner dated 7th December, 1967 is accordingly set aside and the order dated 25th May, 1965, is restored. The appeal is allowed but without costs."

(Underlining is ours)

A review is not an appeal in disguise. A petition for review would be maintainable inter alia when there is an error apparent on the face of the record. Even any other sufficient reason would mean a reason sufficient on grounds which is at least analogous to those specified in Rule 1 of Order 47 of the Code of Civil Procedure.

In Sow Chandra Kante and Another Vs. Sheikh Habib – 1975(4) SCC 674, it has been held as under:

> "A review of judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repletion, through different Counsel of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient."

So far as the second contention of Mr.Kaul is concerned, suffice it to observe that admittedly no relief has been sought for against the respondent Nos.2 and 3. Carriage charges were claimed against them.

The petitioner may have some reasons not to sign the agreement, but the fact remains that the agreement has not been signed. The petitioner could have signed the agreement and questioned the correctness or otherwise of some of the clauses contained therein at a later stage.

So far as our memory goes, even our attention was not drawn to the said paragraphs of the rejoinder. In any view of the matter there would not be any difference on the merit of the matter as evidently no relief had been claimed against the respondent Nos. 2 and 3.

In so far as the question as to whether the petitioner was entitled to placement charges is concerned, we may place on record that no such argument was advanced before us.

In a situation of this nature, we feel, that the counsel who had appeared in the main matter should have argued the review petition also.

A counsel who is an officer of the court should before pressing a point which had not been argued should say so explicitly. Had the said point been raised, this Tribunal would have dealt therewith.

It would, in our opinion, not be correct to suggest that this Tribunal has erred in determining an issue without even raising the same before it.

Mr.Navin Chawla, however, accepted that he had not raised the question of placement charges before us. He says that he was not fully prepared. We are not concerned therewith. We may incidentally mention that the question of placement charges were raised in the writ petition filed before the High Court.

In our order dated 16.12.2009, we have observed that so far as one of us (Shri G.D. Gaiha) recollected that even the order dated 20.10.2009 was a consent order although the same was not mentioned (See paragraphs 15 and 16 of the order dated 16.12.2009).

The petitioner, in our opinion, has not approached this Tribunal with clean hands.

It's conduct must be deprecated in strongest terms.

We, for the foregoing reasons, are of the opinion that no case has been made out for review of our order dated 10.12.2009. It is dismissed accordingly.

The petitioner in view of its conduct is directed to pay exemplary costs which is assessed at Rs.2,00,000/-.

……. J
(S.B. Sinha)
Chairperson

……..
(G.D. Gaiha)
Member