

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

DATED 20th MAY, 2010

**PETITION No.156(C) OF 2008
(M.A.No.18 of 2009)**

Silver Line Broadband Services Pvt. Ltd. ... Petitioner
Versus
MSM Discovery Pvt. Ltd. ... Respondent

**PETITION No.157(C) OF 2008
(M.A.No.19 & 172 of 2009)**

Silver Line Broadband Services Pvt. Ltd. ... Petitioner
Versus
Zee Turner Ltd. ... Respondent

**PETITION No.158(C) OF 2008
M.A. Nos. 20 & 175 of 2009**

Silver Line Broadband Services Pvt. Ltd. ... Petitioner
Versus
ESPN Software India Pvt. Ltd. ... Respondent

BEFORE:

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

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

For Respondent (MSM) : Mr. Aditya Narain, Advocate
Mr. A. C. Mishra, Advocate

For Respondent (Zee) : Mr. Maninder Singh, Senior Advocate

Mrs.Prathiba M. Singh,
Mr. Arjun Natarajan,
Ms.Nitya Thakur, Advocates

For Respondent(ESPN) : Mr. N. Ganpathy, Advocate

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ORDER

G.D. Gaiha, Member

1. These petitions have been filed by the petitioner who claims to be a Multi Service Operator operating in Kolkata. The main prayer in all the three cases is as follows :-
 - (i) Direct the respondent to sign subscription agreement with the petitioner and provide TV signals to petitioner's cable TV network on reasonable terms and conditions;
 - (ii) Grant damages to the petitioner as against the respondents of Rs. 3,00,000/- along with cost of litigation,
2. The petitioner vide its letters dated 3.6.2008 and 11.6.2008 has requested all the three respondents to enter into subscription agreement with the petitioner for supply of signal by providing decoders and viewing cards for working in non-CAS zone of KMDA (Kolkata Metropolitan Development Authority) area.
3. The petitioner has sent a request to all the three respondents and has enclosed the following documents as required vide Clause 3.5 of the TRAI's Regulations dated 4th September, 2006.
 - (a) Post Office registration certificate.

- (b) MSO license issued by the Ministry of Information and Broadcasting, Government of India.
- (c) date of commencement of service as a multi system operator.
- (d) address of the head end.
- (e) list of equipment.
- (f) service tax registration certificate .
- (g) list of affiliate cable operators with details.
- (h) copies of agreement with local cable operators.
- (i) area of operation (map enclosed).

Photocopies of these documents have been filed along with the petition.

4. The petitioner has also invoked regulation 3.2 which is the must provide clause for obtaining signals from the broadcaster.

Regulation 3.2 Every broadcaster shall provide on request signals of TV channels on non-discriminatory terms to all distributors of TV channel, which may include, but be not limited to a cable operator, director for operator, Multi System Operators, head end in the sky with a operator; Multi System Operators Shall also on request retransmit signals received from a broadcaster, on a non-discriminatory basis to cable operators.

Provided that this provision shall not apply in the case of distributor of the TV channel having defaulted in payment.

Provided further that any imposition of terms which are un- reasonable shall be deemed to constitute a denial of request.

5. All the three respondents have contended that the petitioner has not disclosed the correct facts and has suppressed vital material information and claim of the petitioner that 60 days time period as envisaged as per Clause 3.5 of the Regulation dated 4.9.2006 has expired before the date of filing of the petition is not true. The petitions have been filed on 28th July,2008, while the request for signal has been made on 3rd June, 2008 and, therefore, only 55 days have expired before the petitioner has approached the Tribunal. The three instant petitions are, therefore, pre-mature and are liable to be rejected on this ground.
6. All the three respondents have claimed that the petitioner is receiving signals from M/s. Cable Com. The learned counsel for respondents M/s. MSM Discovery India Pvt. Ltd. & M/s. ESPN Software India Pvt. Ltd. would contend that the petitioner has submitted the requisite application form alongwith required list of documents which has been sent to the petitioner on 3rd September, 2008.
7. The petitioner has prayed to direct the respondent to sign an agreement with petitioner and to provide TV signals to the petitioner's cable network on reasonable terms and conditions.
8. The respondent on the other hand, would contend that the petitioner is already receiving the signals from Cable Com. and is affiliated with Cable Com. as a Multi System Operator. It is having a subscriber base to the tune of 25,000 spread over 40 to 45 km area of Kolkata metropolitan district and Howrah. The respondent would further contend that the petitioner has been receiving signals of star directly and has learnt that for non-payment of monthly subscription amount, star has disconnected supply of signal to the petitioner. The petitioner is declaring a subscriber base of approximately 2000 as against its subscriber base of more than 25,000 spread over a large area. Under these circumstances, the respondent would contend that without prejudice the submissions made herein and also since, the petitioner has failed to comply with minimum requirements and, therefore, is not entitled for any indulgence from this tribunal.

9. The respondent would further contend that this petition is not maintainable as it is clearly premature in view of the fact that the first written request of the petitioner despite being incomplete for seeking decoders of the respondent was made on 3rd June 2008. The regulations mandate that the broadcaster to whom a request for providing TV channels is made has to either provide the signals in a reasonable time period but not exceeding 60 days from the date of request. This period of 60 days commencing from 3rd June 2008 would have expired on 3rd August 2008 whereas the petition has been filed on 28th July 2008.
10. Another contention which has been expressed by the respondent in Petition No. 157(C) of 2008, M/s. Zee Turner is that petitioner is already having an existing agreement with answering respondent for the supply of signals for the conditional access system area in the city of Kolkata and in this capacity; the petitioner is a regular defaulter in making complete and timely payment of the subscription charges.
11. Respondents would further contend that the petitioner claiming itself to be a multi system operator has failed to provide renewed/valid registration certificate for cable operator, despite repeated requests from the respondent. The registration certificate of the petitioners has already expired on 30th of July 2008. The respondent would infer that on the date of expiry of 60 days period, that is, on 3rd August 2008, the cause of action of filing this petition arises.
12. We have directed in this case on 5th September 2008 that the representatives of both the parties may meet to sort out disputes and differences and in this context a meeting was held on 8th September 2008 in the office of the respondent at Kolkata office to resolve the pending disputes. The respondent would contend that the petitioner declined to sign the minutes of the meeting and left the meeting by giving an oral assurance of reverting back with the relevant documents as sought by the answering respondent. It has been further submitted by the respondent that on the failure of the petitioner to revert back to the concerned representatives of the respondent, the respondent is still in constant touch with the petitioner and in the absence of any positive response from the petitioner, the respondent was forced to send a written communication dated first October 2008 thereby reminding the petitioner of assurance as given in the

meeting to submit its business proposals in respect of cable services along with true and correct subscription line report and a renewed MSO license of the petitioner.

13. In its rejoinder, the petitioner in response to the letter dated 1.10.2008 as denied the contention of the respondent in regard to the subscription base. The learned counsel for the petitioner would contend that this tribunal has ordered for a joint survey while the respondent has not bothered to conduct the same, despite several requests made by the petitioner. The petitioner's counsel would further contend that the claim of the respondent that petitioner is a defaulter in the conditional access system area is not correct. That petitioner would further contend that has been operating in the CAS area with the past many years and has been regularly making payments without inviting any complaint in regard to being a defaulter in payments. The petitioners Counsel would specifically bring to our notice that the default on the two stances, which is being highlighted is totally baseless because the entire amount was immediately paid by way of demand draft to the respondent, and therefore on the basis of these two defaults the petitioner should not be classified as a habitual defaulter, and therefore not entitled for signals non-CAS area.
14. The respondent would further contend that the petitioner is seeking the signals for a subscriber base of only 2075, while at the time of filing instant petition, the petitioner has deliberately suppressed subscription agreement dated 1.1.2006 which it has signed on a negotiated subscriber base of 15,000 subscribers with M/S Star India Pvt.Ltd. The learned to counsel for respondent would further contend that after coming to know of this agreement for 15,000 subscribers, this tribunal passed in interim order on 30.3.2009 in which as an interim measure and subject to final determination, this tribunal has fixed a figure of subscriber base of 5000 subscribers. The learned counsel for the respondent would further contend that this figure of 5000 subscribers was fixed on in experimental basis for a period of three months and the payments to be made to the petitioner was subject to whatever is the final figure arrived at after final determination of subscriber base by this tribunal.
15. The learned counsel for the respondent would further bring to our notice that the respondent moved a miscellaneous application in which the respondent has strongly contended that a subscriber base of 5000 is much less than the subscriber base on a negotiated basis

which has been offered to M/S Star India Ltd by the petitioner. The learned counsel for the respondent would further highlight that on this basis the figure of 5000 was further revised to a figure of 7500 in this tribunal's order dated 1.5.2009. The directions were also issued that signals should be provided within 12 hours of the payment being deposited by the petitioner on the above basis.

16. In its order dated 4.8.2009 we directed the parties to conduct the joint survey with effect from 10.8.2009, however the respondent would contend that the joint survey could not be completed because of the non-cooperation on the part of the petitioner. The respondent has placed on record the documents related to the joint survey. It appears from these documents that the process of joint survey has been continuing since 25.8.2009 till 24.11.2009 and the minutes of meetings have been exchanged between the parties during this period of time while the survey could not be completed so far. There are letters on record which go to show that the parties' representatives have tried to be present for conducting the joint survey however in spite of all these efforts the joint survey has not concluded successfully. The respondent has however placed on record a report of survey conducted unilaterally by it for the subscriber base of the petitioner in different areas of Calcutta. The learned counsel for the respondent would contend that the survey conducted by the respondent has brought out the total number of subscriber of the petitioner as 27605.
17. The learned counsel for petitioner on the other hand would contend that the survey carried out by the respondent has literally got several flaws. No affidavit has been fixed by the person who has conducted the survey on behalf of the respondent. There was no whisper by the respondent about conducting a unilateral survey without involving the petitioner. One cable operator has been repeated 10 times in the list submitted by the respondent. No other tangible proof has been placed on record by the respondent about this unilateral survey report.
18. The learned counsel for the respondent would contend that petitioner had a subscriber base of 15,000 as early as in the year 2006 and, therefore, the same can grow to a larger number rather than reducing. The learned counsel for the respondent would further bring to our notice the letter dated 31.10.2009 which has been addressed to the petitioner, mentioning therein that discussions were held as on

14.10.2009 in which a subscriber base of 25,000 was agreed upon mutually. A courier receipt has also been annexed to prove that this letter has been delivered to the petitioner. This letter has not been denied by the petitioner in its rejoinder.

19. The respondent has submitted a detailed document of the unilateral survey carried out by the respondent in the court. On the strength of this document the learned counsel for the respondent would contend that as far as the cable operator appearing in different places in the report, the obvious reason is that the cable operator with the same name is operating in different locations in Calcutta. Like for example New National Cable Network operates as a dummy operator from Das Nagar Howrah figures at eight locations, since there are different cable operators like Badal Mukherjee, Debashis Maity, fair vision, high-tech cable communication, Kamala cable operator, Nirmal Manna (Sity Cable), etc. and they are all getting the feed from the petitioner. The respondent has counted the number of subscribers of all these cable operators while doing the survey and therefore the name of the dummy operator that is New National Cable TV network appears at more than one location in the survey report.
20. The learned counsel for the petitioner would draw our attention to a letter written on 30.11.2009 which speaks about the completion of the joint survey of pursuant to the orders of this tribunal indicating the total connectivity at 2086 subscribers only. A receipt stamp of the petitioner dated 30.11.2009 was also brought to our Notice which has been placed on the face of this letter. The learned counsel for the respondent on the other hand would contend that the letters dated a 31 .10. 2009 in which the mutually agreed figure is 25,000 subscribers and this letter has neither been denied nor has been pleaded to be as not received. In this letter the agreed figure has been indicated as 25,000 subscribers and the proof of dispatch of this letter has also been placed on record. The learned counsel for respondent would also like to bring to our notice the letter dated 28.11.2009, in which the detailed analysis of the joint survey is carried out and it has been shown that the list submitted is highly under declared.
21. In this case we find a persistent default in the process of carrying out the joint survey and despite the best efforts made by respondent the petitioner has neither supplied the requisite information to the respondent for carrying out the joint survey nor it has co-operated in this process. The joint survey has, therefore, not been possible to be conducted in the spirit in which we can arrive at the correct figure

of the subscriber base of the petitioner. The survey carried out by the respondent independently in petition no. 157(C) of 2008 which brings out a subscriber base of 27605 has been denied by the petitioner. We cannot give complete correctness to the survey carried out by the respondent. However, the figure arrived at can give us a clue as to what can be the nearest subscriber base which can be used for the purpose of signing the agreement between the parties. In this context it is worth mentioning that the petitioner has deliberately concealed the fact of signing an agreement with the Star for 15000 subscribers in the year 2006. It is a fact that normally this business is one way traffic in regard to the subscriber base and until and unless there is some substantial factor which results in the reduction of the subscriber base, it is going to grow only with the passage of time. Therefore, atleast the subscriber base of 15000 for which the agreement was signed for the year 2006 can be taken as a subscriber base which cannot be contested by the petitioner for signing the agreement.

22. The points raised by the learned counsel for the respondent in pt. No. 157(C) of 2008 in regard to the petitioner being a defaulter in CAS area does not hold water because the amount mentioned is a very meager sum and that also has been paid through demand draft by the petitioner to the respondent. We, therefore, cannot hold that the petitioner is a defaulter and therefore, not eligible for seeking signals from the respondent as per the provisions of Clause 3.2 of the Regulations dated 10.12.2004, as amended on 4.9.2006.

One of the principle issues which calls for determination is as to whether the figure of 25000 mentioned in the letter dated 31.10.2009 of the Zee Turner or the figure of 15000 in agreement in the year 2006 could be taken into consideration for the purpose of determining the subscriber base. The petitioner in each of these petitions have inter-alia proceeded on the basis that the subscriber base is very high. It was with that end only a joint survey was directed to be held. It is also pertinent to mention that according to the petitioner it had never given any assurance to M/s. Zee Turner as contended in the letter dated 31.10.2009 or at all. The petitioner had although suppressed the agreement with Star but according to it no joint survey was conducted.

Furthermore the petitioner has made the entire payment to M/s. MSM Discovery upto November, 2010. ESPN has also not raised any complaint. The petitioner furthermore raised the contention that it had made all payments to Star.

23. Be that it may as we have noticed heretofore that the core issue is the subscriber base. Taking into consideration the aforementioned factual backdrop we have to determine the question as to whether the petitioner should be granted the relief of obtaining connections from the respondents herein and if so on what terms. Clause 3.2 of the Regulations provide for a statutory obligation on the part of the broadcasters to supply signals in respect of its channels. The Regulator has brought in the said provision so that a level playing field from the point of the viewers is established as also a competition amongst various MSOs/LCOs so that the consumers interest is protected.

24. The respondents, therefore, are required to make out a case for refusal to grant supply of signals in respect of their respective channels. The Regulator recognizes only the default on the part of the distributor. We may further notice that the paragraph 14 of the Explanatory Memorandum appended to the 2003 Regulations also speak of piracy as one of the grounds. A default clause may be attracted when a distributor takes recourse to piracy as it would not be paying the amount for retransmission of the signals of the channels of the broadcaster to the number of consumers to which it was otherwise bound. In this case we noticed hereto before that no case has been made out for refusing relief to the petitioner on the ground of default. The only question which survive for our consideration is as to what should be the subscriber base. On the one hand the petitioner contends that even the subscriber base of Star had steadily decreased in respect whereof information used to be furnished to the broadcaster and in fact the number of subscriber had come down to 2075 (3720 in August, 2007). The relevant portion of the letter dated 8th Aug,2007 is as under:

“Reference to the discussion held between you and the undersigned, we are providing you with a copy of our Subscriber Listing Report of 3720 subscribers for the month of July, 2007 which please find enclosed.

We request you to kindly raise your monthly invoice accordingly and oblige.”

Yet again the petitioner stated :

Sl. No.	Name of the Operator	Address	Area of Operator	Sub. base
1.	New National Cable Network	Shanpur(North),Shibtala Dasnagar Howrah-711105.	Das Nagar Howrah	600

2.	<i>Vision Network</i>	<i>15 G.b. Lane, Post Rajpur, Kol-149</i>	<i>Banstala Bospukaur, Barendrapara</i>	<i>300</i>
3.	<i>S.N. Cable Link</i>	<i>19 H/2, Harish Neogi Road, Kolkata 67</i>	<i>Ultadanga</i>	<i>125</i>
4.	<i>Sky Vision Network</i>	<i>2, Kabi Nabin, Sen Road Kolkata-28</i>	<i>Dum Dum</i>	<i>150</i>
5.	<i>SCN Broadband services</i>	<i>63m Sahid Colony, Ashwini Dutta Road, Panihati, Kol-114</i>	<i>Sodepur, Panihati</i>	<i>600</i>
6.	<i>Subhas Nagar Consumer Co-Operative Stores</i>	<i>77 Subhas Nagar Road, Kolkata-65</i>	<i>Dum Dum Cantonment</i>	<i>300</i>
				<i>2075</i>

25. The petitioner once again mentioned the figure of 2075 as the subscriber base. It is on the aforementioned premise, the subscriber base should be determined. By an interim order dated 1st May, 2009 this Tribunal directed supply of signals with a subscriber base of 7500. We have noticed heretofore, according to ZEE the petitioner had about 25000 subscribers whereas according to petitioner it has only about 3000 subscribers. The petitioner admittedly had entered into an agreement with Star for 15000 subscribers. Even if we assume that there has been a steady decrease in the subscriber base, the same in our estimates should not exceed by 5000. We furthermore are of the opinion that the figure of 25000 subscriber base as contended by Zee relying on or on the basis of the purported service report or the channel mapping. We, therefore, are of the opinion that subject to the direction, that a joint survey should be conducted so as to the parties hereto can arrive at a negotiated subscriber base, we direct that for the time being the respondents shall enter into agreements with the petitioner on a subscriber base of 10000. The petitioner, however, must make payments of the monthly subscription fee to the broadcaster on a regular basis.

....., J
(S.B.Sinha)

Chairperson

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(G. D. Gaiha) Member