

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

**DATED 28<sup>th</sup> MAY, 2010**

**PETITION No.165(C) OF 2009**

Intermedia Cable Communication Pvt. Ltd.

-  
... Petitioner

Versus

The One Alliance & Anr.

... Respondents

**BEFORE:**

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

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

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

For Petitioner : Mr. Atul Sharma, Advocate

For Respondent No.1 : Mr. Aditya Narain, Advocate

For Respondent No. 2 : Mr.Gopal Jain, Advocate  
Mr. Kaushik Mishra, Advocate

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**ORDER**

The petitioner herein is a Multi System Operator (MSO). Admittedly, the Respondent No.1 is a distributor inter alia of the Respondent No.2, who broadcasts a large number of channels under the name of New Delhi TV. It is also not in dispute that the first Respondent had been undertaking the matter relating to entering into contract with the petitioner through validation forms and realization of subscription fees for three of the channels of the Respondent No. 2, being NDTV India, NDTV 24X7 and ND

TV Profit. It is also not in dispute that the Respondent No. 2 had been supplying signals of its channels known as NDTV Good Times and ND TV Imagine and also entered into a channel placement agreement with the petitioner herein. Disputes and differences arose between the parties. Despite the same, several Memorandums of Settlement recorded in the Minutes of Meetings were entered into by and between the parties herein. The Petitioner contends that the Respondent No. 2 disconnected the supply of the signals, wherefor, the Petitioner served a legal notice upon the Respondents herein through its advocate on or about 16.3.09. Paragraphs 2, 8, 12, 13 and 14 of the said notice read as under:-

“2. That you, addressee no. 2 are the broadcaster of popular current affairs/news channels, namely NDTV India, NDTV Profit and NDTV 24x7. You have appointed addressee no. 1 as your agent/distributor in India to deal with the MSO(s) in India for and on your behalf.

8. That, my client, without prejudice to its rights and under protest, entered into negotiations with you as recorded in the Minutes of Meeting dated 31.3.08. That in spite of the above my client settled the accounts till 31.3.08 as demanded and paid the said amount, albeit under protest and without prejudice to its rights.

12. That you persisted with your illegal acts forcing my client to keep approaching you until it had no option but to kneel before you and plead for mercy. Finally, you entered a further Minutes dated 22.1.09 wherein you while recording that you were giving rebate for the restriction on subscription fee put on my client by TRAI, also imposed a further increase of 7% on my client. You further acknowledged that the above channels had been disconnected from the network of my client by you, addressee no. 2 without any just cause or reason and without following the requirements of Interconnect Regulations. You forced my client to agree not to claim any damages for the said illegal acts of yours. My

client, having no means to fight you, agreed to the same, hoping that at least now you shall mend your ways and deal fairly and reasonably with my client.

13. That now more than a month has passed since the above Meeting, however, you addressee no. 2 have failed to reactivate your above channels leading to further loss and damage to my client. The total loss, both in for of loss of subscriber base as also loss of goodwill and reputation, is assessed presently at Rs.200,00,000/- (Rupees two crores only) which you are liable to pay to my client.

14. That from the above it would be apparent that you have not only acted in violation of the Tariff Order and the Interconnect Regulations framed by TRAI, i.e., law, but have also otherwise acted in a discriminatory and unlawful manner with my client thereby deliberately causing loss and damage to my client. You were well aware that in absence of the above channels my client shall be suffering the above loss and damage. Now you addressee no. 2 are liable to compensate my client for the loss and damage suffered by it.”

Admittedly, the first Respondent did not respond thereto; the second Respondent did, in terms of its letter dated 22.4.09, the relevant portions whereof are as under:-

“1. ICC and NDTV had entered into a carriage deal vide a Memorandum of Understanding which was signed between the parties on 21.9.04 for the NDTV channels, viz., NDTV India and NDTV 24x7 which were to be placed by the ICC on their network in Pune on the bands E-8 and S-7 respectively for a period of 10 years w.e.f. from 15.9.04 to 14.8.13. A carriage fee of Rs.10,00,000/- (Rupees Ten Lakh) was paid by NDTV under the said Memorandum of Understanding.

3. On the expiry of the agreement for NDTV Profit, NDTV had contacted your Client for its renewal. However, ICC flatly refused to honor the first Memorandum of Understanding (for the placement of NDTV 24x7 and NDTV India) and threatened to switch all our channels off air if NDTV did not enter into a fresh placement deal for NDTV India and NDTV

24x7 along with NDTV Profit. This was in clear breach of the terms of the said Memorandum of Understanding since it was still valid and binding and NDTV had paid the entire consideration.

5. Thereafter, NDTV had approached ICC for the placement of the channel Good Times prior to its launch in September, 2007. However, your Clients demands were ridiculous, unjustified and arbitrary. Since your Client refused to accept NDTV's offer we couldn't launch Good Times on ICC's network.

8. Even though NDTV could not meet ICC's extremely high and unreasonable demands for placement fees for placing its channels on preferred frequencies, it was still making its channels available to ICC for distribution through its network. However, in order to pressurize NDTV into giving into ICC's demands, ICC arbitrarily switched off the NDTV News Channels in the Month of April, with complete disregard to and in violation of the applicable TRAI guidelines of serving notices to the end users and to the concerned broadcaster / distributor, i.e., to NDTV and MSM Discovery. Neither was any public notice brought but as mandated under the relevant Regulations. The dates on which NDTV Channels were switched off by ICC are as follows:-

E-8 NDTV India Switched off on 11.4.08

S-7 NDTV 24x7 Switched off on 26.4.08

S-4 NDTV Profit Switched off on 4.4.08

6. Contents of para 10 of your Notice are frivolous, misplaced and denied as incorrect. Anyone conversant with the distribution market in India can vouch for the fact that it is driven by the whims of the operators and the broadcasters are generally left with no option but to agree to their demands if they want their channels to be carried on the operator's networks. In this case, it is frivolous to suggest that your Client begged or pleaded with NDTV for the reconnection of the channels and this allegation is denied. To reiterate, NDTV has never received any complaint/correspondence from ICC

stating that they are facing problems with regards to the transmission of NDTV channels. It is also incorrect and baseless to allege that NDTV has supported the rival MSOS(s) in the city to put pressure on your Client or to encroach upon the area and subscriber base of your Client. The said allegation is vague and baseless and is vehemently denied.”

The said Respondent also served a supplementary reply on the Petitioner, in continuation of its letter dated 22.4.09 sent to its advocate, in which it was stated as under:-

“We had categorically stated in our reply to your notice that our channels are and have always been available to your network, and that the decoders have always been active from our end. We have on numerous occasions, through our representatives and also through our reply, conveyed our intention of having all our channels carried on your network.”

We have referred extensively to the said legal notice. As would be noticed hereinafter that the principal contentions raised by the Petitioner in its Petition are more or less based on the said notice. Before, however, we refer thereto, it would be relevant to see the prayer made in this Petition which reads as under:-

“(a) Direct the Respondents to jointly and severally pay to the Petitioner a sum of Rs,2,00,00,000/- (Rupees two crores only) or such other amount as may be found just and reasonable, as damages to the Petitioner caused by the unlawful and illegal disconnection of the signals of NDTV India, NDTV 24x7 and NDTV Profit channels by the Respondents.”

The statements made in the Petition, it appears, i.e., from paras 1 to 7, are re-production of the legal notice. In para 8, however, some additions have been made alleging that the Respondents insisted on supply of signals of channels of the Respondent No. 2 in the Bouquet form, instead of the a-la-carte basis as had been mandated by Telecom Regulatory Authority of

India Limited in its Regulation dated 4.10.07. In para 12 of the Petition, the petitioner instead of mentioning Respondent No. 2 being responsible for causing loss to the Petitioner has mentioned respondents. In para 14 of the Petition, it has been stated as under:-

“This statement of the Respondent No. 2 is patently false and can be proved from mere production of their SMS records.”

It has not been denied or disputed that despite its assertion that the Respondents had disconnected supply of signals of the channels of the Respondent No. 2 on or about 4.4.08, the Petitioner had entered into an agreement by filling up a validation form as also a minutes of meetings both dated 1.4.2009, the Petitioner in its rejoinder to the reply filed by the Respondent No. 1 has accepted the said omission contending that the same was an inadvertent error. It is also of some significance to notice that the Petitioner in para 11 of its Petition inter alia calculated the amount of damages principally on three heads:-

- (a) Loss of goodwill.
- (b) Loss of reputation.
- (c) Loss of subscriber base.

However, the alleged loss suffered by the Petitioner had not been quantified under different heads. How and in what manner the Petitioner suffered such losses had also not been spelt out. Mr. Sharma, the learned counsel appearing on behalf of the Petitioner has taken us through the Memorandum of Understanding dated 31.3.08, 22.1.09 in extenso to contend that whereas on the one hand, the illegal disconnection of supply of signals stood admitted by Respondent No. 1, but for all intent and purport, the Petitioner had been forced to pay a huge amount by way of subscription fee to the Respondent no. 1 and despite

assurances made by it to take up the matters with the Respondent No. 2 so that proper redressal of its grievances may be met, the same has not been carried into effect.

Mr. Aditya Narain, the learned counsel appearing on behalf of the first Respondent, on the other hand, would contend that the claim of damages, as would be evident from the tenor of the legal notice dated 16.3.09, having been made only as against Respondent No. 2, the first Respondent was not a necessary party.

Mr. Gopal Jain, the learned counsel appearing on behalf of the second Respondent, urged that no disconnection of supply of signal having been effected by the second Respondent, and in view of the fact that the Petitioner itself was responsible therefor, this Petition is not maintainable. The tenor of the legal notice clearly suggests that the Petitioner for all intent and purport laid claim of damages for the acts of omission and commission on the part of the second Respondent. Although, before us, a contention has been raised that the first Respondent acted as an agent of the second Respondent, not only in the matter of entering into different contracts but also the performance thereof on the part of the second Respondent having been assured by it, both are jointly and severally responsible therefor.

The core question which, however, arises for our consideration is as to whether the second Respondent is responsible for disconnection of supply of signal to the network of the petitioner. Admittedly, the supply of the Petitioner's network by the second Respondent was on digital mode. It was supplied with the IDR boxes. The Petitioner itself in para 14 of the Petition asked the Respondent No. 2 to produce its SMS record as presumably the same would be conclusive in nature. Although the SMS records had not been produced with the reply, the witness examined on behalf of the Respondent No. 2 did so alongwith its

affidavit. Several e-mails had also been annexed. We would refer to the said e-mails a little later. However, the SMS records produced by the Respondent under the heading “history of customer” clearly go to show that its IRD No. is 31210013001261.

The statement made by Shri Siddharth Barhate in that behalf is as under:-

“I say that the SMS records are maintained to show activation of signals. The SMS record prior to filing of the petition, after filing of the petition and as on date clearly shows the status of the NDTV channels to be ‘active’. A copy of the SMS statement for the period May, 09 to March, 10 is annexed hereto and marked as **Annexure-E.**”

Mr. Shyam Sunder Pappu, a Project Manager of the Petitioner, was examined on its behalf. He in his cross-examination stated as under:-

“Q. Can you give us your IRD no.?”

A. The witness goes to the records and states that IRD no. ND31210013001261.”

The attention of the said witness was, however, drawn to the aforementioned SMS records. In view of the said witness’s expressing doubt about the authenticity of the document, the question put by the learned counsel for the purpose of verification of the said IRD No. was dis-allowed. However, it was recorded as under:-

“Q. Mr. Pappu I put it to that the history sheet of the SMS report would show the active status of three NDTV channels.

The witness is confronted to a document of history sheet of SMS record.

I am not sure the authenticity of the document.”

It is true that this Tribunal did not permit the confrontation of the witness with the said SMS report, but from the cross-examination of Mr. Siddharth Barhate it appears that no question was put to the said witness in regard to the genuineness or otherwise thereof. The only question put to him in that regard is :-

“Yes, I know the meaning of the word ‘Re-triggering’.

It is correct that ‘Re-triggering is not required for active signal.

It is not correct to say that the respondent No. 2 has disconnected the signals of the petitioner despite receipt of payment of subscription charges.”

The statement made by the said Mr. Siddharth Barhate to that effect, thus, went unchallenged. It is now a well-settled principle of law that if a witness is not cross-examined on a point and that too on a vital aspect of the matter, as the present one, the same would be deemed to have been admitted. Mr. Sharma would submit that question had been put with regard to the re-triggering of the system. It is in that context only, the e-mails filed by the Respondent No. 2 assume significance. We may reproduce the relevant ones:-

Annexure-A :

Dear Surjit,

Please send a retrigger for WI 3888 Intermedia Cable Communication Pvt Ltd for the Below mentioned NDTV channels :

NE IRD No. ND31210013004901 Vc No. 40015644376

NH IRD no ND31210013001261 Vc No 40015671106

NP IRD no 41100886 VC no 40016442655

Regards

Taronish”

Annexure ‘B’:

From : Umakant S. Dalvi

Sent : Fri 5/15/2009 6:28 PM

To : [superlextradingcorporation@setdiscovery.com](mailto:superlextradingcorporation@setdiscovery.com); [surjitp@setindia.com](mailto:surjitp@setindia.com)

CC: [robin.rajan@setdiscovery.com](mailto:robin.rajan@setdiscovery.com); [mukul.naik@setdiscovery.com](mailto:mukul.naik@setdiscovery.com); Siddharth Barhate

Subject: Re : Retrigger NH / NE / NP W13888

Dear all ... All the 3 NDTV news channels were always active and they are still active...It is important that the decoders are connected to the System head end)...As you are aware that NDTV channels have been kept off air by ICC by removing the decoders from the system so please ask ICC to reconnect these decoders with the system and get them online and wait for few minutes the channels will come Live.. Re trigger is not required for active service however just for your satisfaction we had done the same

Hi Mukul – Siddharth will be happy to help in case you have any difficulties...please get the channels on air at ICC and revert with confirmation...Thanks

Regards – Umakant S. Dalvi”

Annexure ‘D’:

From : Sidharth Barhate

Sent : Mon 5/18/2009 9 : 46 PM

To : [mukul.naik@setdiscovery.com](mailto:mukul.naik@setdiscovery.com)

Cc: [robin.rajan@setdiscovery.com](mailto:robin.rajan@setdiscovery.com); umakant S. Dalvi; [surjitp@setindia.com](mailto:surjitp@setindia.com);  
[superlextradingcorporation@setdiscovery.com](mailto:superlextradingcorporation@setdiscovery.com)

Subject: RE: Retrigger NH / NE / NP W13888

Dear ... As per our ground verification all our NDTV news channels are still off air at ICC... We had informed you that our service was active still as per your request we had done the re-trigger More than three days have elapsed still ICC has not put our channels on air in his network. As you are aware ICC has deliberately ranked off all NDTV channels last year and even now he is not willing to carry the NDTV channels hence I would sincerely appreciate your kind help and intervention in getting the NDTV channels restored on ICC's analogue and digital networks at the earliest. Awaiting your early revert..Thanks.

Regards – Sidharth Barhate.”

The technical evidence adduced on behalf of the Respondent No. 2 thus had not been traversed. Even otherwise, keeping in view the nature of the dispute, it was expected that the Petitioner would respond to the communication of the Respondent dated 22.4.09, we have set out the relevant portions whereof. We, therefore, are of the opinion that what has been argued before us, namely, that the Petitioner, for all intent and purport, accepted that claim for damages was in the legal notice made on Respondent No.2, had not been proved. It is also of some significance to notice that even in para 10 of its reply, the Respondent No. 2 stated as under:-

“The respondent denies the allegation that it has switched off the channels. The respondent submits that even though the respondent could not meet the petitioner's unreasonable demands, it was willing to make its channels available to the

petitioner for distribution through its network. However, in order to pressurize the respondent, the petitioner switched off all the news channels of the answering respondent on its network in the month of April. The dates on which NDTV Channels were switched off by the petitioner are as follows:-

- i) NDTV India on 11.4.08
- ii) NDTV 24x7 on 26.4.08
- iii) NDTV Profit on 4.4.08.”

It is also interesting to note that Shri Pappu in his cross-examination stated as under:-

“The cause of action for this petitioner i.e. deactivation of signals is neither from the breach of subscription agreement nor the placement agreement.”

Even the subscription agreement had not been placed on record, which, according to the said witness was by and between the Petitioner and the Respondent No. 1 and only a subscription agreement was entered into by and between the Respondent No. 1 and the Respondent No.2. It would be relevant to notice the following statement of the said witness:-

“Placement agreement was entered into by and between the respondent no. 1 and respondent no. 2.

Placement agreement has not been placed on record.

Vol – At the time of deactivation of signals of NDTV there was no valid placement agreement between the petitioner and respondent no.2.

In absence of any signals, where was the question of any placement of channel. We have never asked for placement of channels.”

Furthermore, the Petitioner, in terms of Section 73 of the Indian Contract Act, was bound to prove the actual damages suffered by it. It has neither pleaded nor proved the actual damages suffered. It has not also pleaded how it has suffered a loss of reputation. It is now well-settled that damages cannot be recovered in a contractual action for injury to reputation per se, unless it has anything to do with the terms of the contract itself. **(See Addis Vs Gramophone Company Ltd [1909 Appeal cases page 488]).**

In the facts and circumstances of this case, there cannot be doubt whatsoever that the Respondent No. 1 has unnecessarily been impleaded as a party.

It is also well-known that punitive damages can only be awarded in deliberate breach of contract and not otherwise.

Taking any view that matter, we have no doubt in our mind that the petitioner has failed to prove its case. This Petition is dismissed with costs payable to both the respondents. Advocates' fee assessed at Rs.50,000/- each, payable separately to both the Respondents.

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

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

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