

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

Dated 17th May, 2010

-
-
Petition No.254 (C) of 2009
-
-

Chhattishgarh Broadband Network Pvt. Ltd.

...Petitioner

Vs.

MSM Discovery India Pvt. Ltd.

...Respondent

-
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.Vineet Bhagat, Advocate
Ms.Neha Jain, Advocates

For Respondent : Mr.Gopal Jain, Advocate
Mr.Kaushik Mishra, Advocate

-

-

ORDER**S.B. Sinha**

The petitioner herein in this petition, inter alia, questions a public notice dated 05.11.2009 and also prays for a direction upon the respondent not to disconnect the supply of signals of the cable TV network of the petitioner.

A further prayer has also been made to give adjustment in terms of reduced subscription amount for decoders boxes for Bouquet-II already returned to the respondent and therefore a direction upon it to raise monthly invoices on a regular basis without Bouquet-II.

The factual matrix involved in this matter is not in much dispute.

The petitioner is a Multi Service Operator(MSO) whereas the respondent is a broadcaster. The petitioner had been taking supply of signals in respect of the channels of the respondent herein through its distributor known as M/s Krishna Corporation. The last of such agreement was entered on or about 01.02.2009.

Inter alia, on the premise that the DTH operators had taken over many of its subscribers and furthermore on the premise that the Bhilai Steel Plant had demolished many multi-storied buildings, the petitioner sought for reduction in the monthly subscription amount. The same, however, was not been granted. Allegedly the petitioner, upon holding a meeting with the cable operators decided to return decoder boxes in respect of Bouquet-II. In the aforementioned context, the petitioner issued a letter dated 30.05.2009 to M/s Krishna Corporation which reads as under:

“Sub: Return and De-activate the boxes of B-2 Package.

Ref: My e-mail dated 22.05.2009.

Dear Sir,

As our discussion dated 22.5.2009 according to mail and after your verbal consent we return B-2 package boxes.

Details as under:-

S.N	Channel Name	UA No.	Box No.	VC No.
1	Animax	4259577		
2	SAB TV	4106973		
3	Set Pix	5163907		
4	DH	4333282		
5	(Illegible)		PH02053211	214748388505
6	(Illegible)		PHN03020308	214748414536
7	VH-1		PHNS0FC0149	214748477137
8	NDTV Profit		1000003108x9	40096267964
9	NDTV 24 x 7		1000001845x7	40096268822
10	AAJ Tak		5STVT0718	40159080528
11	Tez TV		5STVT3037	40159069950

I deactivate this bouquet 2 package because in Bhilai many multistoreyed buildings have been demolished after being declared unfit and moreover we have time to time informed you about DTH penetration as well and lot of part is captured by Digi(My operators and direct Connections).

I humbly again request you please downgrade my monthly subscription remaining packages.

We are requesting you to please correct the same by raising the new Invoice wef June 2009 onwards after reduction of amount of bouquet 2.”

It is not in dispute that having regard to the pleadings of the parties, the decoders had in fact been returned to M/s Krishna Corporation. However, despite the same the petitioner was issued the monthly invoices for both Bouquet-I and Bouquet-II. The petitioner by a letter dated 10.06.2009 addressed to the distributor stated as under:

“Sub: Reduce my monthly billing of B-2 package.

Ref: My e-mail dated 22.05.2009 & letter dated 30th May, 2009.

Dear Sir,

As on date you have not given me any downgradation letter so I request you to please downgrade my billing immediately and give downgradation letter.

I humbly again request you to downgrade my monthly subscription and issue invoice for remaining bouquets, and if you want we can have a joint survey to ascertain the ground position.

We are requesting you to please correct the same by raising the new Invoice wef June, 2009 onwards after reduction the amount of bouquet 2.”

The contention of the petitioner is that in view of the return of the decoders boxes, the bill raised for both the Bouquets being illegal, it was bound to pay the subscription charges only in respect of Bouquet-I. The respondent, however, inter alia, on the premise of non-payment of dues issued a notice under Clause 4.1 as also a public notice under Clause 4.3 of the Telecommunication (Broadcasting & Cable Services) Regulations 2004 (issued on 10.12.2004) as amended on 04.09.2006 on or about 5.11.2009. The petitioner on 12.11.2009 paid a sum of Rs.5,45,858/- by a cheque drawn in the name of the respondent, the details whereof are as under:

“Period		Billing	Payment	Ch.No.	Bank	Balance
		OP.BAL.				402358
						979922
01-04-09	30.04.09	577564	527682	294646	Axis	452240
01-05-09	31.05.09	647757				1099997
01-06-09	30.06.09	373815.5				1473813
01-07-09	31.07.09	373815.5				1847628
			160000	294690	Axis	
			500000	294694	Axis	1561444
01-08-09	31.08.09	373815.5	1000000	341107	Axis	
			196828		Adjustment	
						738431.1
01-09-09	30.09.09	373815.5	200000	341110	Axis	
			107145		Adjustment	
						805101.6

01-10-09	30.10.09	373815.5				
			633079	341141	Axis	
						545838.1”

The respondent, however, in its reply would contend that the petition is not maintainable as M/s Krishna Corporation had not been impleaded as a party. It was furthermore contended that M/s Krishna Corporation was merely a collecting agent and had no authority to receive the decoders. The respondent further raised a contention that invoices having been issued regularly, the petitioner was bound to pay the same in terms of the Regulations and it admittedly having not done so, the notices impugned in this petition are legal and valid.

The petitioner in support of its case had examined one of its Directors, Mr.M. Suresh. The respondent, however, did not examine any witness.

In his cross-examination, he inter alia, stated:

“Q. Did you request for such downgradation.

A. Yes we had requested for downgradation but there was no assurance which was given to us.

I have requested the distributor of the respondent for seeking downgradations.

Yes we have returned the decoder boxes to the distributor in respect of Bouquet-II as there was no downgradation.

Q. Are you aware that the distributor was merely a collecting agent?

A. We are interacting with the distributor as first point of contact.

We have not supplied any fresh SLR at the time of seeking downgradation.

We have not made any direct request to the respondent herein.

Q. Will I be correct in saying that as per the validation form dated 01.05.2009 you have to pay Rs.5,87,280/- p.m.?

A. Yes.

Q. Will I be correct in saying that outstanding amount payable by you is Rs.26 lakhs?

A. According to us the amount outstanding was Rs.5,45,838/- as on 31st October, 2009.

Q. Have you made any payment for Bouquet-II from February 2010?

A. Yes, but we have not been paying any payment Bouquet wise.

Vol – Since June 2009 we have discontinued taking supply of Bouquet-II and we have returned the decoder boxes.

Q. Are you aware of the order dated 16.02.2010?

A. No I am not. We have been making payments according to our Statement of Accounts discontinuing Bouquet II.

Q. Have you made payment as per the invoices raised upto January 2010?

A. We made payment as per our statement of account. The witness produces a letter dated 22.02.2010 from its custody. This bears my signatures (marked Ex.I).

We never thought of making Krishna Corporation a party.”

Mr.Vineet Bhagat, the learned counsel appearing on behalf of the petitioner urged:

- (i) The impugned public notices dated 05.11.2009 being illegal, the petitioner must be held to be entitled to the reliefs prayed for in the petition;
- (ii) M/s Krishna Corporation, the distributor being an authorized agent of the broadcaster and as PW-I in his evidence categorically stated that the distributor was first line of the MSO's contact and furthermore the decoder boxes having been received from it, it must be held to be entitled to receive the same back.
- (iii) Although the petitioner has been taking supply of signals of the respondent for a long time, no cause for any dispute arose and having regard to the fact that valid points for downgradation were raised by the petitioner, they could have verified either from the erstwhile distributor or even the current distributor.
- (iv) The petitioner having not availed the services of Bouquet-II, the payments made to the respondent only for Bouquet-I must be held to be legal and valid and in any event the respondent has been accepting the said payments without any demur, it is estopped and precluded from raising any other question.

Mr.Gopal Jain, the learned counsel appearing on behalf of the respondent, on the other hand, submitted:

- (i) That the agreement having been entered into only on 01.05.2009, it is inconceivable that the downgradation was asked for or granted on the basis of the request made by the petitioner in its letter dated 10.06.2009.
- (ii) The request for downgradation is an invalid one in so far as the same is contrary to Clause 12 of the Regulations.

- (iii) In any event, no reason having been assigned nor any evidence having been adduced, the respondent had no legal obligation to allow downgradation.
- (iv) In any event, the petitioner having not furnished the monthly SLR, it was not entitled to any downgradation.
- (v) The petitioner having not complied with the order dated 16.02.2010 in letter and spirit, is not entitled to any relief.
- (vi) Para 7.2 of the agreement providing for the decoders being returned only to the broadcaster, this petition has been filed by the petitioner to wriggle out from the binding contract.
- (vii) The plea with regard to DTH operators, having been admitted by PW-I within its knowledge even prior to entering into the contract, the same must be held to be bad in law.

The relationship between the parties is not in dispute. The fact that an agreement has been entered into on or about 01.05.2009 is also not in dispute. The short question, however, which arises for consideration is as to whether in the facts and circumstances of this case, the petitioner was entitled to pay only for Bouquet-I channels of the respondent.

At the outset, we may notice Clause 10.2 of the Regulation which reads as under:

“10. Variation of Subscriber Base during validity of agreement

**-
Between Multi System Operator and Broadcaster**

10.2 In non-addressable systems, the subscriber base agreed upon by the parties at the time of execution of the interconnection agreement between a multi system operator and a broadcaster shall remain fixed during the course of the agreement except in exceptional circumstances that warrant an increase or decrease in the subscriber base. In

such an eventuality, it is for the service provider seeking a change in the subscriber base to provide reasons and accompanying evidence including local survey for the proposed change.

Provided that this sub-clause shall not apply to changes in the subscriber base of a multi system operator on account of any cable operator joining or leaving the multi system operator.

Provided further that any change in the subscriber base of a multi system operator, which is the basis of payment to a broadcaster, on account of any cable operator joining or leaving the network of the multi system operator shall be equal to the subscriber base of the cable operator, joining or leaving the network.”

The submission of Mr. Jain that violation of the said provision would render the request of downgradation made by the petitioner illegal and invalid cannot, in our opinion, be accepted for more than one reason:

- (a) Because the said provision is not imperative in character. Although the word “shall” has been mentioned in the first part of the said Regulation, the second part provides for an exception thereto also.

In G.P. Singh’s Principles of Statutory Interpretation, the word “shall” has been interpreted as under:

The use of work ‘shall’ raises a presumption that the particular provision is imperative; but this prima facie inference may be rebutted by other considerations such as object and scope of the enactment and the consequences flowing from such construction. There are numerous cases where the word ‘shall’ has, therefore, been construed as merely directory. “The word ‘shall’”, observes Hidayatullah, J. “is

ordinarily mandatory but it is sometimes not so interpreted if the context or the intention otherwise demands”, and points out SUBBARAO, J.: “When a statute uses the word ‘shall’ , prima facie it is mandatory, but the court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute”, If different provisions are connected with the same word ‘shall’, and if with respect to some of them the intention of the Legislature is clear that the work ‘shall’ in relation to them must be given an obligatory or a directory meaning, it may indicate that with respect to other provisions also, the same construction should be placed. If the word ‘shall’ has been substituted for the word ‘may’ by an amendment, it will be a very strong indication that use of ‘shall’ makes the provision imperative. Similar will be the position when the Bill as introduced used the word ‘may’ and the Parliament substituted the word ‘shall’ in its place while passing the Act. The use of word ‘may’ at one place and ‘shall’ at another place in the same section may strengthen the inference that these words have been used in their primary sense and that ‘shall’ should be construed as mandatory. When the expressions ‘shall’ and ‘may’ are defined in the Act (for example ‘shall presume’ and ‘may presume’ in section 4 of the Evidence Act) the expressions have to be given the meaning as defined.

The words ‘shall and may’ are construed imperatively.”

Even a mandatory provision, as is well known, can be held to be directory in certain exceptional situations. This aspect of the matter has been considered by the Supreme Court of India in Chandrakant Uttam Chodankar Vs. Dayanand Rayu Mandrakar - 2005(2) SCC 188 in the following terms:-

“75. In U.P. SEB v. Shiv Mohan Singh this Court stated the law in the following terms: (SCC p. 440, paras 96-97)

“96. Ordinarily, although the word ‘shall’ is considered to be imperative in nature but it has to be interpreted as directory if the context or the intention otherwise demands. (See Sainik Motors v. State of Rajasthan, AIR para 12.)

97. It is important to note that in Crawford on Statutory Construction at p. 539, it is stated:

‘271. Miscellaneous implied exceptions from the requirements of mandatory statutes, in general. —Even where a statute is clearly mandatory or prohibitory, yet, in many instances, the courts will regard certain conduct beyond the prohibition of the statute through the use of various devices or principles. Most, if not all of these devices find their jurisdiction in considerations of justice. It is a well-known fact that often to enforce the law to its letter produces manifest injustice, for frequently equitable and humane considerations, and other considerations of a closely related nature, would seem to be of a sufficient calibre to excuse or justify a technical violation of the law.’ ”

76. In Nasiruddin v. Sita Ram Agarwal it is stated: (SCC p. 589, para 37)

“37. The court’s jurisdiction to interpret a statute can be invoked when the same is ambiguous. It is well known that in a given case the court can iron out the fabric but it cannot change the

texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of the provision is plain and unambiguous. It cannot add or subtract words to a statute or read something into it which is not there. It cannot rewrite or recast legislation. It is also necessary to determine that there exists a presumption that the legislature has not used any superfluous words. It is well settled that the real intention of the legislation must be gathered from the language used. It may be true that use of the expression ‘shall or may’ is not decisive for arriving at a finding as to whether the statute is directory or mandatory. But the intention of the legislature must be found out from the scheme of the Act. It is also equally well settled that when negative words are used the courts will presume that the intention of the legislature was that the provisions are mandatory in character.”

- (b) Because the respondent in its affidavit had not raised any question in regard to violation of Regulation, effect of violation of Clause 10.2 of the Regulations which it ought to have done having regard to the provisions contained in Order VI Rule 8, Order VI Rule 9 and Order VI of Rule 12 of the CPC. The said provisions read as under:

“8. Denial of contract— Where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract.

9. Effect of document to be stated.— Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

12. Implied contract, or relation— Wherever any contract or any relation between any persons is to be implied from a series of letters or conversations or otherwise from a number of circumstances it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letter, conversations or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.”

(c) Because the respondent having not examined any witness and having not filed any distributorship agreement, must be held to have failed to establish the limited role of M/s Krishna Corporation thereunder. This Tribunal, in Petition No.260(C) of 2009 (Mahamaya Cable Network Vs. M/s MSM Discovery Pvt. Ltd.) disposed of on 05.05.2010 having regard to the definition of “distributor”, Section 226 of the Indian Contract Act, it was held as under:

“The respondent did not say that Krishna Corporation was not its agent. It only referred to its invoices to contend that no such downgradation was given or any settlement has been arrived at.

The petitioner is a small-time operator. He had dealing with the aforementioned Krishna Corporation only. Not only the petitioner but also the Krishna Corporation had admittedly made complaints to the

Superintendent of Policy in regard to piracy committed by another. That may or may not be correct but at least the respondent does not deny the same.

.....

.....

It is contended by Mr.Kaushik Misra that the distributorship and/or appointment of M/s Krishna Corporation as a collecting agent was terminated soon after the acceptance of purported payment by it from the petitioner. No plea has been raised in that behalf, far less any proof. The respondent has also not brought on record its distributorship agreement to show that M/s Krishna Corporation was not authorized to enter into a settlement/agreement for downgradation. It being within its special knowledge should have disclosed the same before this Tribunal. In any event, it ought to have also proved its accounts to show that it had not received the sum of Rs.60,000/- from the said Krishna Corporation who admittedly was its collecting agent.”

- (d) Because the respondent cannot invoke Clause 10.1 as it is not a case of downgradation on the basis of a claim that the subscriber base has decreased. The subscriber base remains the same even now and, therefore, the demand of the respondent of monthly SLR also required to be submitted to the broadcaster in terms of Clause 12 of the Regulation must also be held to be wholly misconceived.
- (e) Because, the distributor of the respondent having accepted the decoder boxes for which it was either authorized expressly or impliedly by the respondent herein would bind the latter.

(f) Because the respondent therefor even if it had a legal right in terms of Clause 10.1 of the Regulations must be held to have waived the same and/or even otherwise estopped and precluded from raising the said contention. In G.P. Singh's Principles of Statutory Interpretation, it is stated:-

“The general rule, that non-compliance of mandatory requirements results in nullification of the act is subject at least to two exceptions. One exception is when performance of the requirement is impossible; performance is then excused. Another exception is waiver. If certain requirements or conditions are provided by a statute in the interest of a particular person, the requirements or conditions although mandatory may be waived by him if no public interests are involved, and in such a case the act done will be valid even if the requirement or condition has not been performed.”

The request contained in its letter dated 10.06.2009 must be understood in the context of the backdrop events, namely, request for the downgradation as number of subscribers had left but it having kept its relief confined to the return of Bouquet-II without effecting any change in the subscriber base. Even otherwise, the case would squarely fall within the purview of the second part of Clause 10.2 of Regulations.

In view of the aforementioned position it must be held that the respondent is not correct to contend that the request made by the petitioner in its letter dated 10.06.2009 is invalid in law.

It is true that this Tribunal in its order dated 16.02.2010 directed as under:-

“Counsel for the parties agree that the agreement will be renegotiated after the petitioner has made the payments as per the invoices raised upto the month of January, 2010 within one week since the dispute has

arisen about the number of channels required by the petitioner vis-a-vis the channels mentioned in the agreement. The issue for negotiations for supply of bouquet-1 will be open to the parties during the process of the renegotiation of the agreement. Learned counsel for the respondent submits that the date for negotiations will be communicated to the petitioner within the next three days after giving two days' advance notice. The petitioner is directed to make payment as agreed above. In case this payment is not made as per the agreement, the respondent is free to disconnect the signals to the petitioner.”

- (g) It is also true that PW-I in his cross-examination that he has not made payments strictly in terms of the said order and had made payments for Bouquet-I only. We, however, must notice that the said witness had produced from its custody a letter dated 02.02.2010 addressed to the respondent wherein it was stated as under:

“Dear Sirs,

In compliance of Hon’ble TDSAT order dated 16.02.2010 in the aforesaid Petition as per the court order you were supposed to inform the date, time and venue for renegotiating the subscription agreement within three days of the court order which has been overlooked by you any way we are enclosing herewith Cheque bearing No.341191 dated 22 February 2010 for Rs.854388.00 drawn on UTI, Bhilai in favour of MSM Discovery Private Limited, in compliance with the above mentioned order as detailed below:

S.N	Billing period	Invoice amt.(Rs.)	TDS (Rs.)	Net amount (Rs.)	Amount paid (Rs.)	Balance (Rs.)
01	01/11/2009 – 30/11/2009	647752.00	12955.00	634796.00	350000.00 Vide ch.No.341170 dt.30.12.09	284796.00

02	01/12/2009 – 31.12.2009	647752.00	12955.00	634796.00	350000.00 Vide ch.No.341181 dt.30.01.10	284796.00
03	01/01/2010 – 31.01.10	647752.00	12955.00	634796.00	350000.00 Vide ch.No.341184 dt.12.02.10	284796.00
					Net Balance	854388.00

(Rupees Eight Lakh Fifty Four Thousnad Three Hundred and Eighty Eight Only)

We are also enclosing cheque for Rs.634796.00 vide cheque No.341192 dated 25.02.2010 against subscription for February, 2010, drawn on UTI, Bhilai in favour of MSM Discovery Private Limited, we have not received invoice for the month of February, 2010.

This payment is made without prejudice to the rights and contentions of Chhatisgarh Broadband Network Pvt.Ltd.

Kindly acknowledge receipt.”

In any event, in view of our findings aforementioned, we are of the opinion that even if there has been improper understanding of the effect and consequence of the said order, the petitioner has acted bonafide.

Mr.Jain has, across the Bar, handed over a chart showing that a sum of Rs.14,66,999/- is owing and due although no witness has come forward to prove the same. We cannot rely thereupon but in view of the order proposed to be passed by us, we would proceed on the assumption that the contents thereof are correct.

The provisions contained in Clause 7.2 of the agreement to the effect that the IRD Boxes should be returned to the broadcaster cannot be considered in isolation. M/s Krishna Corporation was an agent of the respondent having regard to the provisions of Indian Contract Act, to which we have referred to earlier. The respondent would not only bound thereby. The return of the decoder boxes by the petitioner who is a small time operator to the distributor who is based at Raipur (the petitioner is based at Bilaspur), would amount to return to the broadcaster validly. It is on the aforementioned premise it was not necessary for the petitioner to assign any other or further reason or adduce any evidence in support of its plea of downgradation. The petitioner had asked for conducting a joint survey. The respondent could have accepted the same, keeping in view the contents of the petitioner's letter dated 30.05.2009 and 10.06.2009.

It is again true that the DTH operation was in vogue when the agreement dated 01.05.2009 was entered into but the contention of the petitioner was that DTH operators have penetrated in their subscriber base.

We, in the facts and circumstances of the case, are of the opinion tht the petitioner must be held to have proved its case. The respondent, therefore, is directed to reconcile the accounts with the petitioner keeping in view that decoder boxes have been returned to the respondent on 30.05.2009 and, thus, from 01.06.2009, the petitioner had been availing the services of Bouquet-I only.

As the petitioner has not availed the supply of signals in respect of Bouquet-II, in our opinion, it will be wholly unjust and inequitable if the petitioner is asked to pay the subscription fee also on the basis thereof as a result of the same the respondent would unjustly be enriching itself.

The public notice is set aside. The respondent shall enter into a fresh agreement with the petitioner for the year 2010-2011 only on the basis of Bouquet-I. In the event a question is raised that the subscriber base of the petitioner has reduced, a joint survey may be undertaken and completed within a period of two months. The respondent is also directed to raise monthly invoices for Bouquet-I only.

The petition is allowed. The respondent shall pay and bear the costs of the petition. Counsel's fee assessed at Rs.50,000/-.

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

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

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