

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

**DATED 21<sup>ST</sup> MAY,2010**

**PETITION No.26(C) OF 2010**

Hathway Cable and Datacom

...Petitioner

Vs.

Star Den Media Services 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**

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For Petitioner

: Mr. S. Ganesh, Senior Advocate  
Mr.Arun Kathpalia,Advocate  
Mr.Nasir Husain,Advocate  
Mr.Vikram Mehta,Advocate  
Mr. Abhinav Agnihotri, Advocate

For Respondent

: Mr. Ramji Srinivsan, Senior Advocate  
Mr.Gaurav Juneja, Advocate  
Mr. Prateek Kumar, Advocate  
Ms.Garima Sharma, Advocate

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**JUDGMENT**

**S.B. Sinha**

This petition is for all intent and purport is connected with Petition No. 189(c) of 2008. We have passed a separate judgment in that case having regard to the fact that the same was heard out separately.

The petitioner has filed this petition praying interalia for the following relief :

“A. Direct the respondent to consider the request dated 19.03.2009 of the petitioner for supply of signals of Star Bouquet of Channels (Bouquet Networks) and supply signals on reasonable and non-discriminatory terms.”

As the fact involved in the matter and the principal contention of the parties had already been noticed by us in Petition No. 189 (c) of 2008, the same in our opinion, need not be repeated herein once again. We would, however, notice the factual matrix involved herein to the extent necessary.

The petitioner entered into an Asset Transfer Agreement with Star Vision Cable Network (SVCN) on or about 26.02.2008. It informed thereabout to the respondent and furthermore requested it for transfer of IRD boxes in its own name. It did not receive any response thereto. It shifted the head-end from Viram Khand, Gomti Nagar, Lucknow to another area on 16.06.2008 in respect whereof allegedly an intimation was given to the respondent.

The petitioner contends that shifting of its head-end was necessary as it intended to retransmit the signals of the channels of the respondent in the entire town of Lucknow for which according to it, no protest was made by the latter.

It is furthermore not in dispute that prior thereto, the Regional Manager of the respondent had offered Bouquet II to the petitioner herein, at a monthly subscription charges of Rs. 25,001.60 on or about 02.06.2008, which was accepted by it.

The petitioner had allegedly entered into a subscription agreement with the respondent in respect of the entire town of Lucknow on 28.06.2008, which according to it is a forged and fabricated document. By reason of a letter dated 19.03.2009, the petitioner, while calling upon the respondent to renew the said purported agreement made an alternative request which is to the following effect :

“Without prejudice to our rights and contentions in Petition No. 189(c ) of 2008, wherein you have challenged the validity of the Agreement dated 28.06.2008, we would request you to treat this also as a request under regulation 3.2 of the said regulations for supply of Bouquets 1 and 2 of Star Network to us for the city of Lucknow. “

However, on the premise that the respondent had issued a notice on or about 25.07.2008 informing it that the agreement had expired due to efflux of time on 30.06.2008 and furthermore appointed one M/s Universal Cable as

its distributor and issued a notice under Regulation 4.1 as also public notice under 4.3 on or about 20.08.2008, Petition No. 189(c) of 2008 was filed before this Tribunal.

Admittedly, although this Tribunal directed the petitioner to restrict its activity within Viram Khand, Gomti Nagar by an order dated 10.09.2008, the High Court of Delhi on a Writ Petition filed by the petitioner restrained the respondent from disconnecting the supply of signals of the petitioner. The said order has been directed to be continued having regard to the pendency of this petition before us.

Mr. S. Ganesh, learned senior counsel appearing on behalf of the petitioner would contend :

1. As the petitioner has offered higher subscriber base as also additional fees in a progressive manner and thus there being no problem either on the subscriber base or additional fee, the respondent should be directed to perform its statutory obligations in terms of Regulation 3.2 of the Regulations.
2. The respondent has been acting malafide having been patronizing a MSO, in which M/s Den Networks has 50% share and one Mr. Omeshwar Singh, the Managing Director of Enjoy Cable Networks Pvt. Ltd. who is also a sole proprietor of M/s Universal Cable has 50%, having been appointed as a distributor and this is clearly violative of the decision of the Supreme Court of India in *Star India (P) Ltd. Versus Sea TV Network Limited & Anr.*, (2007) 4 SCC 656.

- (3) Clause 3.2 of the Regulations should be interpreted on broad terms and directed to be implemented in its letter and spirit and in that view of the matter, the petitioner cannot be directed to confine its activities in the area of Gomti Nagar alone.
- (4) Monopoly being frowned upon by this Tribunal as also by Supreme Court of India, the petitioner should be allowed a level playing field with the said M/s Universal Cable.
- (5) One of its distributors should not be allowed to be treated as its blue eyed boy of the broadcaster, which would be an anathema to Clause 3.2 of the regulations.
- (6) The petitioner having been operating under the orders of the Delhi High Court for a long time, it would be equitable to allow the petitioner to continue with the existing arrangement particularly having regard to the offer made by it for payment of additional subscriber fees and on a higher subscriber base in a progressive manner.

(7) The petitioner having been operating on an all India basis, there cannot be any earthly reason as to why the petitioner should be deprived of the benefits of supply of signals to the entire town of Lucknow.

Mr. Ramji Srinivasan, the learned senior counsel appearing on behalf of the respondent, on the other hand, would urge :

1. The scope of this petition is limited as the alternative prayer made by the petitioner must be read in context of its prayer for renewal of the agreement dated 28.06.2008, and if so read, the Respondent is be entitled to invoke clause 3.2 of the Regulations.
2. A fresh application is required to be filed by the petitioner for compliance with the provisions of the interconnect regulations of 2004 and in particular clause 9.2 thereof.
3. The petitioner being guilty of commission of piracy which is one of the grounds for refusal of supply of signals as would appear from para 14 of Explanatory Memorandum issued by TRAI, this petition is not maintainable.

4. The respondent, having not entered into an Asset Transfer Agreement as it did not insist on due diligence which was required to be done in terms of its own 'red herring' prospectus, this petition is not maintainable.

TRAI in exercise of its jurisdiction purported to be under section 36 read as the sub- clauses (ii), (iii) and (iv) of clause (b) of subsection (1) of Section 11 of TRAI Act, 1997 (the Act) made regulations known as "The Telecommunication (Broadcasting and Cable Services) Interconnection Regulation 2004" (13 of 2004) (The Regulations).

Clause 3.2 of the 'Regulations' and the proviso appended thereto read as under :-

"3.2 Every broadcaster shall provide on request signals of its TV channels on non-discriminatory terms to all distributors of TV channels, which may include, but be not limited to a cable operator, direct to home operator, multi system operator, head ends in the sky operator; Multi system operators shall also on request re-transmit signals received from a broadcaster, on a non-discriminatory basis to cable operators.

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

Provided further that any imposition of terms which are unreasonable shall be deemed to constitute a denial of request.”

The Regulations were amended by Regulation No. 10 of 2006 in the year 2006 in terms of a notification issued by TRAI on 04.09.2006. We may notice the same so far as the same are relevant for our purpose:

3. In clause 3 of the Principal Regulation –

(a) after the second proviso to sub-clause 3.2, the following explanation and the entries relating thereto shall be inserted:-

“Explanation

The applicant distributors of TV channels intending to get signal feed from any multi-system operator other than the presently-affiliated multi system operator, or from any agent/ any other intermediary of the broadcaster/multi system operator, or directly from broadcasters shall produce along with their request for services, a copy of the latest monthly invoice showing the dues, if any, from the presently-affiliated multi system operator, or from any agent/ any other intermediary of the broadcaster/multi system operator who collects the payment for providing TV channel signals.”

(b) after sub-clause 3.2 and the entries relating thereto, the following new sub clause and the entries relating thereto shall be inserted as sub-clause 3.3, namely:-

“3.3 Any broadcaster/multi system operator or any agent/ any other intermediary of the broadcaster/multi system operator, who collects the payment for providing TV channel signals to any distributor of TV channels, shall issue monthly invoices to the distributor of TV channels. The monthly invoice shall clearly specify the arrears and current dues along with the due date for payment of the same.

#### Explanation

Any claim for arrears should be accompanied by proof of service of invoices for the period to which the arrears pertain.”

Clause 8 provides for renewal of the existing agreement; whereas clause 9 mandates for fixation of subscriber base at the time of first agreement.

Clause 9.2 which prescribes the requirement for the first time operates reads as under :

“9.2 In non-addressable systems, while executing an interconnection agreement for the first time between a multi system operator and a broadcaster, the multi system operator shall furnish a list of the cable operators who will be getting signals from its network along with their subscriber base. The parties to the agreement shall take into account the subscriber base of cable operators connected to the multi system operator while

negotiating the subscriber base of the multi system operator. For the consumers proposed to be directly served by the multi system operator, the procedure as laid down in sub-clause 9.1 of this regulation shall be followed.”

There cannot be any doubt or dispute that such a ‘must provide’ clause which is in effect and substance an exception to the general law of contract should be given a broad meaning. The same would not, however, mean that this Tribunal would direct the implementation of the said provision mechanically. The exception, which is provided in the said regulation as also in the explanatory memorandum appended to the main regulation must also be given its full effect.

This Tribunal in Petition No. 189(c) of 2008 has arrived at a conclusion that no agreement was entered into on or about 28.06.2008. It furthermore, does not bear the signatures of the respondent on the said agreement. There was nothing to show that the parties were even at negotiating terms and, thus, the said agreement has come to an end. The supply of signals, therefore, was being made only on the basis of interim orders passed by the Delhi High Court. The relationship of the parties has validly come to an end with the service of the termination notice.

In that view of the matter, the core question which arises for our consideration is whether the alternative prayer can be granted to the petitioner herein.

From para 1 of the petition, it appears that despite the fact that the petitioner had made a similar prayer in Petition No. 189(c ) of 2008 and even in para 1 of this petition, it has proceeded on the basis that the petitioner was seeking direction from this Tribunal to the respondent to renew the said agreement only and in the alternative clause 3.2 has been invoked.

Indisputably, the said provision has been invoked only as an alternative request by the petitioner in the aforementioned letter dated 19.03.2009, a bare perusal of which would show that the main thrust thereof is attribution of malafide on the part of the respondent in creating a monopoly.

The petitioner, therefore, has proceeded on two different premises; which although in a given situation may not be held to be contrary in terms, but the same in our opinion, in the peculiar facts and circumstances of this case, cannot be permitted.

SVCN, admittedly, entered into an agreement, the area of operation whereof was confined to ViramKhand, Gombi Nagar. By reason of the Asset Transfer Agreement the petitioner did not derive any legal right to transgress its area of operation. Its activity of retransmission of signals of the channels of the respondent was therefore, clearly illegal. If the petitioner has taken recourse to illegality, it cannot be permitted to take advantage of its own wrong. When the Delhi High Court has passed an interim order, which was subject to judgment of this Tribunal, if any relief in terms thereof is granted in favour of the petitioner, the same, in our opinion, would amount to giving premium to illegality. It is not countenanced in law.

TRAI, presumably while making its regulations, in respect of the default as envisaged in the Proviso to clause 3.2 of the 'Regulation' has also taken into consideration this aspect of the matter. If the petitioner is guilty of piracy in respect of a very large area, it was bound to pay increased subscription charges as also damages. Even in that sense the petitioner would be a defaulter. We, for the aforementioned purpose have proceeded on the basis that there was no valid agreement between the parties hereto. The petitioner, however, has filed this petition, as indicated hereinbefore on the premise that the agreement dated 28.06.2008 is valid and thus could be subject to renewal.

If it was a valid agreement, the petitioner was bound to pay subscription charges and even if the agreement was not valid, the petitioner was bound to re-compensate the respondent having regard the principles of quasi contract as envisaged under Section 70 of the Indian Contract Act. The Doctrine of Restitution, in a case of this nature, therefore, is squarely attracted.

Compensation to the respondent is, thus, not to be paid by way of damages, the same, although, requires some computations.

The respondent, in our opinion, was, thus, legally entitled to refuse to supply the signals to the petitioner. If that be so, this Tribunal, cannot direct continuation of supply of signals to the petitioner by the respondent at least

at this stage unless the parties may enter into an agreement, on an agreed subscriber base which is determined by mutual negotiation.

For the views we have taken, it is not necessary for us to enter into the larger questions with regard to construction of Regulation 3.2 of the Regulations in the manner suggested by Mr. Ganesh or otherwise.

There cannot be any doubt or dispute that if the petitioner had requested the respondent to supply signals to it for the first time as it is a separate juristic person vis-à-vis SVCN and on that basis that it had stepped into its shoes by reason of the Assets Transfer Agreement dated 26.02.2008, in our considered opinion, it cannot be permitted to invoke clause 3.2 in the manner in which it has been prayed for in this petition or otherwise only on the basis of the interim order passed by the Hon'ble Delhi High Court .

The submission of Mr. Ganesh that the respondent is bound to act bonafide in a matter of this nature may not be of much controversy having regard to the decision of the Supreme Court of India in Sea TV (Supra) as also the principles contained in Regulation 3.2 of the Regulations. Level playing field, it is well settled, is a facet of Article 14 of the Constitution of India, as has been held by the Supreme Court of India in Reliance Infrastructure V. Maharashtra State Electricity Board (2007) 8 SCC 1.

We must also observe that the submissions of Mr. Srinivasan that the Assets Transfer Agreement dated 26.02.2008 had been entered into by the parties thereto in violation of the petitioner's red hearing prospectus, in

our opinion, is found wholly irrelevant and in that view of the matter it is not necessary for us to determine the same.

We, therefore, do not find any merit in this petition. It is dismissed accordingly. This order shall not, however, come on the way of the petitioner to file a fresh application in terms of Regulation 3.2 of the Regulations as a separate juristic person upon furnishing all the requisite details as per regulations.

Respondent shall be at liberty to disconnect the supply of signals. We furthermore, grant liberty to the respondent to take appropriate action for realisation of its dues which according to it is owing and due from the petitioner including the period during which interim order passed by this Tribunal as also Delhi High Court was subsisting subject of course to adjustment of such sum which the petitioner has already paid to the respondent.

In the facts and circumstances of the case, the petitioner must pay and bear the cost of the respondent. Counsel's fee assessed at Rs.1,00,000.00.

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

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

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