

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHIDATED 14th NOVEMBER, 2010**PETITION No. 357 (C) of 2010**

S.N. Cable Link ... Petitioner

Versus

Silverline Broadband 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

For Petitioner : Mr. Atul Sharma, Advocate

For Respondent : Mr. Vineet Bhagat, Advocate
Ms. Neha Jain, Advocate**ORDER**

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S.B. SINHA-
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Interpretation and/or application of the order of this Tribunal dated 20.5.2010 passed in Petition No. 157 (C) of 2008 of this Tribunal directing M/s. Zee Turner Ltd. to enter into an agreement for supply of signal of its channels on a subscriber base of 10,000 is the question, which arises for consideration in this Petition.

2. The petitioner is a Local Cable Operator. The respondent is a Multi Service Operator and is engaged in distribution of Cable Television Services to its local cable operators in the city of Kolkata.

Admittedly, the petitioner in its capacity as a local cable operator had entered into an agreement with the respondent herein on or about 05.05.2006 to provide cable television services to its network. As per the said agreement, the subscriber base was to be determined in terms of Clause 4 thereof i.e. in terms of the number of subscribers maintained by the petitioner in its register with their names and addresses.

According to the petitioner, in compliance of the terms of the agreement, he had also been sending on quarterly basis the list of subscribers. It is on such declaration of the subscriber base, which according to the petitioner is 125 only, the respondent has been raising invoices.

The respondent had some disputes with regard to the renewal of agreement with the broadcasters, for which it approached this Tribunal by filing the aforementioned petition. By an order dated 05.10.2010 purported to have been passed therein, it was directed :-

“We therefore are of the opinion that subject to the direction, that a joint survey should be concluded 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 payment of the monthly subscription fee to the broadcaster on a regular basis”

3. The respondent herein by a letter dated 07.10.2010 asked the petitioner to pay the subscription fee on the basis of 603 subscribers in stead and in place of 125 subscribers, inter-alia on the premise that by a reason of the said order, this Tribunal by directing the subscriber base has effected 382% increase therein, as originally the subscriber base of the respondent was only 2076.

4. The petitioner is, thus, before us, questioning the validity of the said demand, praying inter-alia for the following relief :

“direct the Respondent to accept the payment of subscription charges on the basis of 125 subscribers.”

5. The respondent in its reply inter-alia stated :

“4. That earlier as an interim arrangement the Respondent was directed to pay to the said Broadcasters @ 7,500 Subscribers which the Respondent has been paying with the expectation that the excess payment will be refunded back to the Respondent when the actual connectivity of the Respondent is arrived at after the joint survey which ought to have been conducted by the Broadcasters and the Respondent under the directions of this Hon’ble Tribunal given by this Hon’ble Tribunal vide its order/judgment dated 20.05.2010, which survey has not been conducted by any of the Broadcasters, thus the Respondent has no other option but to comply with the directions of this Hon’ble Tribunal.

5. That is very humbly submitted that earlier the Respondent has not demanded increased subscription and had continued to pay to the Broadcaster on the basis of 7,500 as against the declared connectivity of 2,086 subscribers out of its pocket just in order to sustain itself in the Cable TV business coupled with the expectation that excess payment will be refunded back to the Respondent when the actual connectivity of the Respondent is arrived at after the joint survey and now it has become very difficult for the Respondent to pay to the Broadcasters on the basis of either 7,500 or on the basis of 10,000 subscribers as the connectivity as declared by the sub-operators/local cable operators of the Respondent including the Petitioner, is much less than what the Respondent has been made liable to pay and in the peculiar facts and circumstances the Respondent has no option but to rely on the unilateral survey report of the Broadcaster (which has been relied upon by this Hon. Court to fix the liability of the Respondent) and demand increased connectivity from the Petitioner.”

6. It was furthermore stated :

“8. That it is submitted that the Respondent had a Subscription Agreement with STAR for the year 2007 @ 7,500 Subscribers, which Agreement was signed on 06.03.2007. In the month of June 2007, the Subscribers of the Respondent were further decreased to 3,720 because it could not get signals of ZEE Turner, Sony and ESPN and it became very difficult for the Respondent to pay @ 7,500 subscribers and therefore, the Respondent contacted STAR and updated STAR about the changed scenario and requested STAR to decrease the subscription amount. The Respondent started paying on the basis of the reduced subscription amount, which payments were duly accepted by STAR without any objection. With the continuing situation the Cable Operators of the Respondent started leaving the Respondent for joining some other MSO, who were having the signals of all the other broadcasters also and in this situation it became very difficult for the Respondent to continue with STAR Bouquet-I only and hence the Respondent, vide its letter dated 08.08.2007, with mutual consent of both the parties to settle the accounts with STAR, submitted the new and updated SLR and vide its letter dated 30.8.2007 requested STAR to issue the Invoice from the month of June 2007 on the basis of the new SLR and the agreement came to end with mutual consent of both the parties.”

7. A question, which arises for our consideration, is as to whether the respondent can increase the subscriber base proportionately purported to be pursuant to the order of this Tribunal dated 05.10.2010, so far as the subscriber base of the petitioner and other LCOs are concerned.

8. The petitioner was not a party to the aforementioned Petition No. 157 (C) of 2008.

The dispute between the respondent herein and the broadcaster was strictly between the parties to the said lis. If the respondent thought it fit that it was unable to continue to pay the subscription amount on the subscriber base of 10,000, the only remedy available to it was to approach this Tribunal for review of the order. It could have preferred an appeal also against the said order before the Supreme Court of India.

We are informed at the Bar that the respondent did file an appeal and as also filed a Review Application, but the same had been dismissed.

The order of this Tribunal, therefore, attained finality. The aforementioned order dated 20.5.2010 was a conditional order. The joint survey, according to the respondent itself, has not yet been carried out. The respondent, in our opinion, in the aforementioned situation could not have asked the petitioner to pay a subscription fee on the basis of subscriber base of 603 in stead and in place of 125.

9. Mr. Bhagat, the learned counsel appearing on behalf of the respondent would urge that what has been done is to call upon the respective LCOs to pay the increased subscription fees proportionately on the premise that if the respondent was responsible for certain under-declarations, the petitioner and other LCOs must have also under-declared.

10. In law, we are afraid, such a course of action cannot be taken. The parties hereto have entered into an agreement with their eyes wide open. They are bound by the terms thereof.

11. No novation of the contract is permissible unilaterally by any other party. A contract must be preceded by agreement on the part of the parties with regard to its terms & conditions consequently any alteration in the terms & conditions and that too in terms whereof a fiscal liability is cast on the one party to the contract can be altered/thrust upon to the prejudice of the other without its consent.

This has been so held by the Supreme Court of India in Bharat Sanchar Nigam Ltd. & Anr. Vs. BPL Mobile Cellular Limited and Ors. reported in 2008 (13) SCC page 597.

12. The effect of an order passed by the Tribunal was not such that the petitioner would automatically be bound thereby.

13. Mr. Bhagat, the learned counsel appearing on behalf of the petitioner, would submit that the respondent could issue the impugned notice in terms of Clause 4.1 of the Regulations.

The said provision read thus :

“No broadcaster or multi system operator shall disconnect the TV channel signals to a distributor of TV channels without giving three weeks notice to the distributor clearly giving the reasons for the proposed action.

Provided that a notice would also be required before disconnection of signals to a distributor of TV channels if there was an agreement, written or oral, permitting the distribution of the broadcasting service, which has expired due to efflux of time.

Provided further that no notice would be required if there is no agreement, written or oral, permitting the distribution of the signals”

A bare perusal of the aforementioned provision would clearly go to show that the subscriber base declared by a local cable operator or a Multi Services Operator shall not be varied save and except in the manner laid down therein.

One of the ingredients of the aforementioned provision is existence of an exceptional circumstances which warrants increase or decrease in the subscriber base. However, the increase and decrease in the subscriber base can be effected only when all the conditions precedents provided for therein are fulfilled namely :-

- i) Assignment of Reasons; and
- ii) Furnishing of evidence including local survey.

The impugned letter of the respondent evidently postulated a change in the conditions of the agreement. It was issued only on one ground namely Order passed by this Tribunal dated 20.5.2010. An Order passed by a court of law ipso facto cannot be a ground for effecting change in the subscriber base in a situation of the present nature. The Order was passed by this Tribunal in a matter between the respondent and M/s. Zee Turner Ltd. The petitioner was not a party thereto. There is nothing to show that it would be bound by the said order.

14. Mr. Bhagat, however, would contend that this Tribunal relied upon some survey purported to have been conducted by the broadcaster.

The impugned letter has not been issued relying on or on the basis of the said survey. The said order dated 20th May, 2010 was passed inter-alia keeping in view the fact that the respondent had entered into an agreement with 'Star' for 15,000 subscribers. It was on amongst other reason that an order was passed for the time being subject to the result of a joint survey. The said order dated 20th May 2010, therefore, was not binding on the petitioner.

15. The order of this Tribunal was meant to be acted upon by the parties thereto and not by a 3rd party to the lis and who had entered into a separate agreement with the respondent.

16. We, therefore, are of the opinion that the action on the part of the respondent cannot be said to be valid or legal.

It is, therefore, set aside.

17. This petition is allowed and it is directed that the petitioner shall continue to pay the subscription fee in terms of the agreement dated 05.05.2006 unless and until a case is made out for invocation of Clause 10.1 of the Regulations.

In the facts and circumstances of this case, however, there shall be no order of costs.

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

Chairperson

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(G.D. Gaiha)
Member

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(P.K. Rastogi)
Member

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