TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

DATED 21.04.2011

Petition No.278(C) of 2009
(With MA No.236 of 2010)

CCN Entertainment (India) Pvt. Ltd. …Petitioner

Vs.

MSM Discovery India Pvt. Ltd. …Respondent

BEFORE:

HON'BLE MR.JUSTICE (RETD.) S.B. SINHA, CHAIRPERSON
MR. G. D. GAIHA, MEMBER
MR. P.K.RASTOGI, MEMBER

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

For Respondent : Mr. Aditya Narain, Advocate

J U D G E M E N T

S.B. Sinha

The petitioner herein is a Multi Service Operator. Respondent is a content aggregator of the channels of several broadcasters.

The parties hereto entered into an affiliation agreement on or about 13.09.2008.

The said affiliation agreement, apart from the parties thereto was signed by one Kamal Agarwal, Manager of one Krishna Corporation, the then distributor of the respondents.

Upon expiry of the said agreement, the parties entered into another agreement for which a validation form was filled up by the petitioner which was again witnessed by Shri Kamal Agarwal. On behalf of the respondent, one Shri. Vivek Sharma, Territory Manager had put his signature; whereas on behalf of the petitioner one of its directors Shri Ashok Agarawal who also examined himself as PW-I did so.

Indisputably, the said validation form was entered into in respect of two bouquets of channels of which the respondent is the content aggregator. Bouquet-1 consisted of five channels; whereas bouquet-2 consisted of six channels.

Interalia on the premise that various multistoried buildings at Bilaspur were demolished as also the entry of a DTH Operator viz. M/s Digi Cable, the subscriber base of the petitioner fell as a result whereof it allegedly found it difficult to continue with both the bouquets of the respondent, being beyond its capacity, the petitioner asked for downgradation in regard to the subscription fees by returning decoder boxes for bouquet-2, which was allegedly accepted by the respondent.

However, indisputably the petitioner continued to pay the subscription amount in terms of the agreement. The petitioner in this connection has wrote a letter to the aforementioned Krishna Corporation on or about 30th May, 2009, which reads as under:-

> *"Sub:-Return and De-activate the boxes of B-2 Package*
> *Dear Sir,*
> *As per our discussion dated 22.05.09, we are hereby returning B-2 package boxes.*

We are also would like to inform you that the deactivation of this bouquet 2 package is resulting due to Bilaspur administration have demolished so many houses, some customers purchased DTH and lots of our ground captured by Digi.

We again requesting you please downgrade my monthly subscription with the remaining packages wef June, 2009 and raise the new invoices with the remaining bouquets i.e. no. 1 and 3."

It also pursuant to the said arrangement returned the decoder boxes of bouquet-2, which was acknowledged by Krishna Corporation on the same day.

The petitioner on or about 10th June, 2009 by a letter addressed to M/s Krishna Corporation, stated as under :-

"Dear Sir,

As you know I return my B-2 package boxes. As on date , you have not given me any down gradation letter so, I requested you please downgrade my billing immediately and give down gradation letter.

I humbly again request you please downgrade my monthly subscription remaining packages. If you joint survey, then I agree"

It is, however, not in dispute that the respondent continued to issue invoices in terms of the agreement to the petitioner. The said invoices contained the following notice:-

"Please treat this as a notice under Regulation 4.1 of the Telecommunication (*Broadcasting* and Cable Services) *Interconnection (Third Amendment) Regulation, 2006.*
(In case you have paid your dues you are requested to ignore this notice)"

No separate notice admittedly was issued by the petitioners in terms of Regulation 4.1 of the Regulations.

A public notice was issued by the respondent, in terms of Regulation 4.3 on the ground of non-payment of dues, informing the public that the supply of signals to the petitioner's network would be discontinued.

The petitioner has filed this petition praying for the following reliefs:-

> *"(i) Direct the Respondent to withdraw its illegal; Public Notice dated 21.11.2009;*
> *(ii) Direct the Respondent not to disconnect the supply the signals to the Cable TV Network of the Petitioner;*
> *(iii) Direct the Respondent to give adjustment in terms of reduced Subscription Amount for Decoder Boxes for Bouquet – II returned to the respondent;*
> *(iv) Direct the respondent to raise monthly invoices regularly for Bouquet – I only;*
> *(v) Direct the respondent to restrain from harassing the Petitioner for ulterior purposes.;*
> *(vi) Direct the respondent to reconcile the accounts;"*

By reason of an interim order dated 16th December, 2009, it was directed as under:-

> *"As it is stated at the Bar that despite expiry of 21 days from the date of service of notice under Regulation 4.3, the petitioner has been receiving signals from the respondent and having regard to the letter of the respondent dated 30.5.2009, from a perusal whereof it appears that the decoders in respect of Headline Today, NDTV India, NDTV Profit, NDTV 24X7, Aaj Tak and Tej TV have been received by the respondent.*
>
> *Taking prima facie view of the matter, we direct respondent to supply signals to the petitioner on its depositing a sum of Rs.5 lakhs till further orders."*

The said order has been complied with.

The respondent in its reply, however, interalia raised the following contentions:-

1. The petitioner is guilty of suppression of material facts;
2. It is incorrect to contend that the petitioner had returned the IRD Boxes in respect of Bouquet-2 Channels.
3. Having regard to Clauses 6 & 7.1 of the affiliation agreement, M/s. Krishna Corporation could not have accepted the IRD Boxes.
4. The petitioner as on 30th January, 2010 owed a sum of Rs. 8,49,581/-. The petitioner at no point of time approached the respondent for downgradation of its subscriber base.
5. The purported statement of accounts filed by the petitioner is contrary to both the validation form dated 1.5.2009 and affiliation agreement dated 13.9.2008.

In view of the pleadings of the parties, the following issues were framed:

"1. Whether the petitioner has suppressed and concealed material documents in its petition?
2. *Whether the petitioner had returned the decoders to the distributors of the respondent as the latter's agent?*
3. *Whether M/s Krishna Corporation had any authority to receive the decoders from the petitioner on behalf of the respondent?*
4. *Whether in the event the answer to Issue No. 2 is in affirmative, whether the petitioner is entitled to pay any subscription fee for package 2?*
5. *Whether the invoices raised by the respondent upon the petitioner included the subscription amount for package-2?*
6. *If the answer of the issue No. 5 is in the affirmative, whether inclusion of the subscription fee for package -2 for the invoices raised by the petitioner is legal or valid?"*
7. *Whether the petitioner is entitled in law to ask for downgradation of the subscription fee in terms of the extant regulation?*
8. *What relief, if any, the petitioner is entitled to?"*

The petitioner in support of its case examined one Ashok Agarwal, one of its Directors on 1.4.2010. He was cross examined on 29.4.2010. On the same day, witness on behalf of the respondent, Shri S. P. Sinha was examined. He was cross examined on 29.6.2010. In his cross examination, Shri Sinha contended that he had checked up with both Mr. Vineet Sharma as also Mr. Kamal Agarwal in regard to the return of the decoder boxes as according to him the said decoder boxes had been received by the said Krishna Corporation.

The respondent, however, filed an application, for adduction of additional evidence marked as M.A. No. 236 of 2010, interalia contending that the proprietress of the aforementioned M/s. Krishna Corporation is wife of Shri Ashok Agarwal.

By an order dated 27th August, 2010, the said application for adducing of additional affidavit was allowed. We have, however, given an opportunity to the petitioner also to adduce other or further evidence if any. Both the witnesses appearing on behalf of the parties were directed to be present on 14.09.2010. Shri Ashok Agarwal was cross-examined again on 27 September; whereas Shri S.P Sinha was cross-examined on 28thSeptember, 2010.

The respondent, however, in the mean time filed four compact discs to establish that the petitioner had, in fact, been retransmitting signals of the Bouquet-2 channels of the respondents.

Mr. Vineet Bhagat, the learned counsel appearing on behalf of the petitioner would contend:-

1. M/s Krishna Corporation being a party to the validation form and it being a distributor of the respondent was entitled to take back the IRD boxes;

2. So far as the purported C.Ds are concerned, it would appear therefrom that MTV and Nick Channels had also been shown, decoders whereof admittedly had not been issued to the petitioner.
3. No finger printing for any channel having been carried out, no reliance can be placed thereupon.
4. Upon termination of the distributorship agreement of M/s Krishna Corporation, the new MSO itself has been appointed as a distributor and the relationship of the owners of the said MSOs and the distributor is that of a father and son.
5. Prema Agarwal or her husband Ashok Agarwal have in fact nothing to do with M/s Krishna Corporation, which was being run by Shri Kamal Agarwal, the Power of Attorney holder of Ms. Prema Agarwal; although for income tax purposes, the concern was shown in the name of Ms. Prema Agarwal, in respect whereof, both Mr. Vineet Sharma and Mr. S. P. Sinha had full knowledge.
6. Having regard to the fact that all the decoder boxes were in the possession of the respondents and/or their distributors, they could show the respondent's bouquet-2 channels as if the same were being retransmitted from the IDR boxes, which had been given to the petitioner.

Mr. Aditya Narain, the learned counsel appearing on behalf of the respondent, on the other hand, urged :-

1. The cause of action for filing the petition being three letters issued by the petitioner to M/s Krishna Corporation, contents of which having not been established, the petitioner is not entitled to any relief whatsoever.
2. The petition itself should be rejected in terms of Order VII Rule 11 (e) of the Code of Civil Procedure as it does not disclose any cause of action.
3. The Petitioner having wrongly alleged in the petition and in particular in paragraphs 4, 5 and 6 thereof that the request for downgradation had been made to the respondent and accepted by it, although in fact such requests were made only to M/s. Krishna Corporation, who had no authority in relation thereto, no relief can be granted to the petitioner.

4. The petitioner having been served with a large number of invoices even after issuance of the letters in question as well as return of the decoders and it having not protested thereagainst, it must be held that the petitioner has failed to prove its case.
5. Having regard to the fact that the agreement was entered into by and between the parties hereto, the petitioner should have made requests for downgradation only to the respondent and not to Krishna Corporation.
6. The petitioner, having suppressed material facts as it did not file the agreement, must be held to have committed fraud on the respondent as also on this Tribunal and on that ground too, no relief should be granted in its favour.
7. M/s. Krishna Corporation having not been impleaded as a party, the petition should be dismissed.
8. The contract between the parties is binding on them and in that view of the matter having regard to Clause 6.1 and Clause 7 relating to payment of subscription fees and IRD boxes and furthermore having regard to the distributionship agreement entered into by and between the respondent and M/s. Krishna Corporation in terms whereof the later did not derive any right of ownership in respect of the IRD boxes, neither the IRD boxes could be taken by it nor could it downgrade the amount of subscription fees otherwise payable by the petitioner. The purported unilateral act on the part of the petitioner must be held to be bad in law as by reason of any unilateral downgradation, no novation of contract could take place.
9. The witness examined on behalf of the respondent having not been cross examined on the statement of account filed by the respondent, the same must be held to have been admitted.
10. The alleged demolition of building and/or entry of some DTH Operators by themselves could not have been the ground for downgradation of subscriber base vis-à-vis the return of the decoders within the meaning of the provisions of Clause 10.2 of the Regulations, particularly having regard to the fact that even no monthly SLR had been filed by the petitioner.
11. The petitioner having adduced evidence which is contrary to it's pleadings, namely novation of contract, and requests for downgradation having only been made to Krishna Corporation; no evidence adduced by the petitioner in that behalf is admissible.

12. An analysis of the cross examination of Mr. Ashok Agrawal would clearly go to show that he had admitted that:-

i. the Channels comprised of different bouquets,

ii. the monthly subscription charges payable to the respondent was at Rs. 2,40, 240/-,

iii. Although received the payments for sums of Rs. 3,77,287 and 3,78,329 towards carriage charges in the months of July and November, 2009, he was required to verify the same,

iv. no letter had been issued to the respondent and furthermore no letter has been written to the distributor after 10.06.2009,

v. had been making payments less than the amount mentioned in the invoices.

vi. no SLR was filed on monthly basis,

vii. Krishna Corporation ceased to be the distributor of the respondent on and from 1.9.2009 and one M/s. Prime Communication has been appointed as a new distributor,

viii. did not ask the respondent to refund the security deposit,

ix. Prema Agarwal is his wife,

x. the distribution agreement dated 2.5.2006 having been signed by his wife, commission have been paid to her as the proprietor of respondent to Krishna Corporation, as she was to file income tax return for the said purpose.

The basic fact of the matter, as noticed heretobefore, is not in dispute.

An affiliate agreement was entered into by and between the parties hereto on 13.8.2006. Clauses 6.1 and 7.2 thereof read as under:-

*"**6. <u>Calculation of actual and Declared Number of</u>***

<u>Subscribers; Audit rights.</u>

6.1 Affiliate agrees and acknowledges that distributor may, at any time during the Term, review and, based on such review, at its sole discretion, determine that the actual number of subscribers is greater than the Declared Number of Subscribers. In this case, Distributor may call for an increase in the Declared Number of Subscribers which affairs

has declared for its System on the Validation form and with reference to which Affiliate is paying the Fess. In the event Distributor believes in its sole discretion that (a) Affiliate has suppressed or failed to disclose to Distributor the correct actual number of subscribers, Distributor may call for increased fees from Affiliate to the extent of the number of subscribers that were not properly disclosed by Affiliate. In addition, if during the course of such review it is revealed that Affiliate has declared a higher number of subscribers to the Basic Service to any other television provider than the Declared Number of Subscribers, then such higher number of subscribers may, at the Discretion of Distributor, be deemed to be the Declared Number of Subscribers and the Validation From shall be amended accordingly. This remedy shall not restrict Distributor from recovering fees relating to the actual number of Subscriber confirmed during the course of the review, or from seeking to enforce any other of its rights and remedies under this Agreement. If the review show that the fees for prior months were not paid in full, Affiliate shall pay distributor the difference within 7 days after such determination. If Affiliate fails to pay such additional fees, Distributor may immediately suspend any of the Services or terminate this Agreement without prejudice to its right to claim such additional fees.

…….

7.2 The IRDs shall at all times remain the property of Distributor or the Service Providers, and not Affiliate. Distributor makes no representation or warranty as to the capabilities of the IRDs. Distributor shall not under any circumstances be responsible or liable for any malfunctions of the IRDs. However, in the event an IRD requires repair or replacement, Affiliate may send a written complaint to Distributors and Distributor shall inform the relevant Service Provider and endeavor to repair the IRD at Distributors sole discretion subject to the service Providers policies. All IRDs shall be returned to Distributor or the relevant Service Provider immediately upon the end of the Term, or earlier if requested by Distributor."

It is furthermore not in dispute that a validation form was filled up by the petitioner for supply of signals of both the bouquets on or about 1.5.2009 in terms

whereof decoders were supplied and the terms and conditions of the earlier agreement were to govern the rights and obligations of the parties.

It is also not in dispute that a distributorship agreement had been entered into by and between the respondent and the said Krishna Corporation, the relevant clauses whereof are as under:-

> ***"2. <u>Term.</u>***
> *... In the event of the expiry of the Term, or its prior termination, the Distributor shall immediately return to SETD any and all equipment/material, including database and modifications made thereon by the Distributor and Decoders/IRD's in stock for the Programming Services"*

Clause 4 provided for the duties and responsibilities of the distributor. Clause 5 provided for the limitation on rights and powers of the distributor, which reads as under :-

> *"**<u>Limitations on Rights and Powers of the Distributor.</u>** Distributor shall not, without prior written authorization from SETD, take any action for or on behalf of SETD. Neither Distributor nor any of its agents has any right or authority to assume or create, in writing or otherwise, any obligation of any kind, expressed or implied, in the name of or on behalf of SETD."*

Clauses 6, 7 relate to the IRD Boxes. Sub-Clauses a and b of Clause 6 read as under:-

> ***"6. <u>Integrated Receiver Decoders</u>***
>
> *(a) Upon payment of the Security Deposit (defined below), SETD may begin delivering integrated receiver decoders (''IRDs'') to Distributor shall stock IRDs for each of the Programming Services at all times. Following the execution of an Affiliation Agreement. Distributor shall install the necessary IRDs (and the appropriate viewing cards, if necessary) according to SETD's instructions.*

(b) Distributor acknowledges that it is not a dealer or re-seller of IRDs and the Distributor is not entitled to remain in possession of or deal in any IRDs except those sent to Distributor be SETD and in accordance with the directions of SETD. SETD reserves the right, without any obligation to dispatch IRDs directly to System which may be procured by Distributor.

Clause 7 of the said distributorship agreement provide for the collection and service fees for which targets entered into by the parties for the month of April 2006 Rs. 37, 0000/-, May 2006 Rs. 45,0000/- and June, 2006 Rs. 45,0000/-. The distributor was to be treated as an independent contractor and not as a joint venture partner nor by reason thereof the relationship of principal and agent shall come into being.

The aforementioned Krishna Corporation, thus, being was not the agent of the respondent, the principal question which would arise for our consideration is as to whether it could entertain any request from the petitioner for downgradation of the subscription fee.

Mr. Bhagat, in our opinion, is not correct to contend that M/s. Krishna Corporation was a party to the agreement as also the validation form. It is true that both the agreement as also the validation form had been signed by Mr. Kamal Agarwal, but he had put his signature only as Manager of the M/s Krishna Corporation.

Indisputably, the proprietress of M/s. Krishna Corporation was Prema Agarwal, wife of Mr. Ashok Agarwal. Mr. Aggarwal is said to have only 1% share, which according to him is a nominal share in the petitioner company.

It, however, appears that Shri Ashok Agarwal had not only examined himself as a witness; he had even signed the validation form as also the agreement on behalf of the petitioner. He is indisputably a Director of the petitioner.

In any event, a witness to an instrument, save and except some just exceptions, would not become a party thereto. He even otherwise is not supposed to know the contents of the document to which he is a witness, unless specific evidence is adduced that he had read the contents thereof.

Mr. Bhagat, however, urged that to a Multi Service Operator or a Local Cable Operator, the local representative of the broadcaster would be its distributor. Ordinarily, it would have been so.

But there are two supervening circumstances in this case –

1. Mr. Vineet Sharma was the local representative of the respondent. He even had signed the validation form on behalf of the respondent. It was, therefore, Mr. Sharma and after him Mr. S. P. Sinha would be the local representative of the respondent and not the distributor.

2. Mrs. Prema Agarwal was the proprietress of Krishna Corporation, although, according to Mr. Ashok Agarwal, she had lent her name only for the Income Tax purpose being mainly a housewife and resides at Bilaspur and not at Raipur where the office of M/s. Krishna Corporation is admittedly situated and as in favour of Mr. Kamal Agarwal a General Power of Attorney is said to have executed; but the same would not mean that she had no contractual liability vis-à-vis Krishna Corporation at all.

However, the fact that even Mr. Kamal Agarwal is a close relative of Mrs. Prema Agarwal, being her uncle is not in dispute. We would assume that the contention of Mr. Ashok Agarwal is correct, but then keeping in view the relationship between the parties, it was expected that Mr. Ashok Agarwal would know the nature of the distributorship agreement.

The petitioner company was the only MSO which had been operating at Bilaspur. Mr. Ashok Agarwal had stakes also in several companies working as operator in the State of Chhatisharh including M/s. Chhatisgarh Broadband.

In that view of the matter, it is difficult to accept that the petitioner company having regard to the magnitude of its operation would not know the legal status of Krishna Corporation. The petitioner was expected to ask the respondent directly for downgradation. It's approach to Krishna Corporation by a letter dated 30th May 2009 which had been replied to by it as also the letter dated 10th June, 2009 could not have given rise to any novation of the contract.

Another aspect of the matter cannot also be lost sight of. The validation form had been signed by Mr. Ashok Agarwal, both in respect of bouquet 1 and bouquet 2 only on 1.5.2009. Entry of a DTH Operator and demolition of certain buildings as a result whereof the petitioner is said to have lost a large number of subscribers was not expected to have occurred within one month.

It is also unlikely that Krishna Corporation would act of its own without any inhibition whatsoever, although having regard to Clause 5 of the distributorship agreement, it's right to act on behalf of the respondent was limited.

So far as the IRD Boxes are concerned, Krishna Corporation was merely a stockist and not the owner thereof. It may be true that it, as a distributor, was entitled to provide the IRD Boxes to the new subscribers. But then, its authority being limited, it could have accepted the IRD Boxes on behalf of the respondent on termination of a subscription agreement but not for the purposes of novation of the contract.

Section 62 of the Indian Contract Act reads as under:-

> ***"62. Effect of Novation, Rescission, and Alteration of Contract -*** *If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."*

A novation of contract requiring *ad idem* of mind of the contracting parties, therefore, must be done by the parties to the agreement. No third party will have any say in that.

Mr. Aditya Narain had relied upon a large number of decisions, in support of the aforementioned contention. We may notice some of them. In *Seth Loonkaran Sethia v. Ivan E. John*, reported in (1977) 1 SCC 379, it has been held:-

> *"23. Question 5 : Before proceeding to determine this question, it would be well to advert to the legal position bearing on the matter. As aptly stated in para 1378 of Volume 12 of Halsbury's Laws of England (Fourth Edition)*
>
> *"if an alteration (by erasure, interlineation, or otherwise) is made in a material part of a deed, after its execution, by or with the consent of any party to or person entitled under it, but without the consent of the party or parties liable under it, the deed is rendered void from the time of the alteration so as to prevent the person who has made or authorised the alteration, and those claiming under him, from putting the deed in suit to enforce against any party bound by it, who did not consent to the alteration, any obligation, covenant, or promise thereby undertaken or made.*

24. A material alteration, according to this authoritative work, is one which varies the rights, liabilities, or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally unascertained and as such void, or which may otherwise prejudice the party bound by the deed as originally executed.

25. The effect of making such an alteration without the consent of the party bound is exactly the same as that of cancelling the deed."

In *Polymat India (P) Ltd. v. National Insurance Co. Ltd*., reported in (2005) 9 SCC, the law has been stated in the following terms :-

"22. *…… When the terms of the contract have been reduced to writing it cannot be changed without the mutual agreement of both the parties."*

In *CITI Bank N.A. v. Standard Chartered Bank,* reported in (2004) 1 SCC 12, it was held:-

"47. *Novation, rescission or alteration of a contract under Section 62 of the Indian Contract Act can only be done with the agreement of both the parties of a contract. Both the parties have to agree to substitute the original contract with a new contract or rescind or alter. It cannot be done unilaterally."*

In *Mukesh K. Tripathi v. Senior Divisional Manager , LIC,* reported in (2004) 8 SCC 387, it was held:-

"37. *In case any person raises a contention that his status has been changed from apprentice to a workman, he must plead and prove the requisite facts. In absence of any pleading or proof that either by novation of the contract or by reason of the conduct of the parties, such a change has been brought about, an apprentice cannot be held to be a workman."*

In *DDA v. Joint Action Committee, Allottee of SFS Flats*, reported in (2008) 2 SCC 672, the Supreme Court of India opined :-

> ***"62.*** *It is well-known principle of law that a person would be bound by the terms of the contract subject of course to its validity. A contract in certain situations may also be avoided. With a view to make novation of a contract binding and in particular some of the terms and conditions thereof, the offeree must be made known thereabout. A party to the contract cannot at a later stage, while the contract was being performed, impose terms and conditions which were not part of the offer and which were based upon unilateral issuance of office orders, but not communicated to the other party to the contract and which were not even the subject-matter of a public notice."*

In *Dayal Singh v. Union of India,* reported in (2003) 2 SCC 593, it was held:-

> ***"32.*** *Once the matter is concluded by a contract, a novation of contract would also fall within the realm of contract only. If the contention of Mr Narasimha is accepted, a contract can be reopened only with the agreement of both the parties. The parties must be ad idem therefor."*

Yet again in *BSNL v. BPL Mobile Cellular Ltd.*, reported in (2008) 13 SCC 597, it was held :-

> ***"51.*** *In the instant case, the resources to be leased out were subject to agreement. The terms were to be mutually agreed upon. The terms of contract, in terms of Section 8 of the Contract Act, fructified into a concluded contract. Once a concluded contract was arrived at, the parties were bound thereby. If they were to alter or modify the terms thereof, it was required to be done either by express agreement or by necessary implication which would negate the application of the doctrine of "acceptance sub silentio"."*

If the parties had entered into a valid contract, they were bound thereby; they could not have acted contrary to the terms thereof.

We may furthermore notice that admittedly despite the purported acceptance of the IRD Boxes by Shri Kamal Agarwal, the petitioner had been receiving invoices. The monthly invoices which the petitioner itself has produced are for the period March, 2009 for a sum of Rs. 2,36,267/- which had shown a balance of a sum of Rs. 2,82,537/- and payments having been made to the extent of Rs. 2,19,902/- a sum of Rs. 2,98,902/- was said to have become due.

Similarly in the month of April also the petitioner paid a sum of Rs. 2,19,902/- out of the total invoiced sum of Rs. 2,36,267/- and thus a sum of Rs. 3,15,267/- became due. In the month of June the petitioner paid a sum of Rs. 2,47,444/- resulting in a sum of Rs. 3,68,074/- becoming due. (No payment appears to have been made nor has any invoice been filed for the month of May, 2009)

For the month of July, 2009, the petitioner merely paid a sum of Rs. 2,63,932/- out of the invoiced amount of Rs. 2,64,974/- resulting in an outstanding of Rs. 2,87,393/-. So far as the month of August is concerned, the petitioner again paid a sum of Rs. 2,59,926/- out of the invoiced amount of Rs. 2,64,974/- and, then, a sum of Rs. 2,75,079/- became outstanding.

It is difficult to conceive as to why the petitioner did not protest thereagainst. He has not explained as to why a higher amount of subscription fee was paid.

We, therefore, are of the opinion that in law, no novation of contract can be inferred.

There is another aspect of the matter.

The terms of the contract between the parties are covered by the provisions of the Telecommunications (Broadcasting and Cable Services) Interconnection Regulations, 2004 as amended from time to time.

Clause 10.2 and Clause 12 of the said Regulations read thus :-

> *"**Between Multi System Operator an 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."*
> **……..**
> ***12. Monthly Subscriber Base Statement***
> *12.1 In non-addressable systems, the multi system operators shall furnish the updated list of cable operators along with their subscriber base to the broadcasters on a monthly basis."*

A Multi Service Operator in terms of Clause 9.1 of the Regulations as also Clause 12 of the Regulations should file monthly 'Subscriber Line Report.' The 'Subscriber Line Report' would indicate the subscriber base of the MSO and for that

purpose it has to be an agreed figure, wherefor indisputably negotiations are to be held between the parties.

The MSO and/or a Local Cable Operator may seek for downgradation only in the event of fall in the subscriber base. It may also be possible if any discrimination is alleged.

In terms of Clause 10.2, downgradation can be allowed as an exceptional measure (subject of course to the 2nd Proviso appended thereto), wherefor it is necessary for the MSO to adduce requisite evidence. It was also required to assign reasons.

A survey might also have been necessary to be conducted. When such down gradation is to be given, it must be in regard to the entire subscriber base. It cannot be segregated bouquet wise. We may, however, hasten to add that it does not mean that different subscriber base cannot be arrived at between the parties in respect of different bouquets. They indisputably can do so. But the Regulations do not provide for surrender of a few channels out of one bouquet. It can only be done with the consent of the parties to a contract, as rents thereof has to be recovered. Recourse thereto cannot be taken by one of the parties to the agreement unilaterally, subject of course to the exercise of rights in terms of the Regulations. Even otherwise, an appropriate notice in relation thereto as provided for under Clause 4.2 of the Regulations was necessary to be served.

For the said purpose, a novation of contract would become necessary.

On the fact of the matter, however, it is not possible for us to accept the contention of Mr. Aditya Narain that the IRD Boxes had in fact not been returned.

Mr. Sinha stated in unequivocal terms that he enquired thereabout both from Mr. Sharma as also from Mr. Kamal Agarwal. What was the response of Mr. Sharma has not been disclosed. Mr. Kamal Agarwal, however informed him that the said IRD Boxes had been returned. It in fact was evidenced by the letter of the distributor; it was on the letter head of the respondent. We have, therefore, reasons to believe that only with a view to negate the basis of the said admission, the distributorship agreement was produced. It is difficult to accept that Mr. Sharma or Mr. Sinha were not aware thereof. It is also difficult for us to accept that they would not be aware of the relationship between the parties.

A copy of the distributorship agreement must be with Mr. Kamal Agarwal for the purpose of at least verifying as to whether the target was being met or not. The agreement must have been seen by the representatives of the respondent. Mr. Sharma was supposed to keep a watch thereover. It was furthermore the responsibility of the distributor to see that the placement of its channel is done by the MSO. Admittedly such placement charges were paid to the petitioner by the respondent. Such placement agreement between the parties, therefore, must be within the knowledge of Mr. Sharma and consequently with Mr. Sinha.

If the distributorship agreement had been terminated, M/s. Krishna Corporation was bound to return all the decoder boxes and viewing cards to the respondent. An inventory must have been prepared therefor. The said IRD Boxes and/or viewing cards must be handed over to the new distributor wherefor also a list of materials was required to be prepared. The respondent could have shown by producing the said documents that in fact, Krishna Corporation had not received the said IRD Boxes.

Mr. Aditya Narain, however, contends that no IRD Box was returned by Krishna Corporation. No such plea has been raised in the reply. RW1 also did not say so in his deposition.

We have noticed heretobefore that Mr. Aditya Narain made strong comments on the conduct of the petitioner vis-à-vis non-production of certain documents. We fail to understand as to why the respondent itself did not come clean. As a big broadcaster, it should not have taken recourse to withholding of important documents.

It is true that we allowed the respondent to adduce additional evidence, but we have done so with a view to ascertain the truth. We did so in the interest of justice, but at the end of the day, we are not convinced as to why the distributorship agreement as also other document which were within the power and possession of the respondent have not been produced.

Mr. Aditya Narain submitted that the burden is on the petitioner in respect of the matters which were within its special knowledge.

The same principle would apply so far as the respondent is concerned. We, therefore, do not intend to go into the contentions of Mr. Aditya Narain that the petitioner by suppression of some documents has committed fraud on the court. It did not and in any view of the matter, if that be so, the respondent would also be guilty thereof.

A large number of contentions have been raised by the learned counsel of the parties, but for the reasons mentioned heretobefore we need not consider all of them.

We must, however, refer to one of the issues raised by the parties.

The respondent had not issued any notices under Regulation 4.1. It merely issued a public notice under Regulation 4.3. According to the respondent, notice under Regulation 4.1 had been issued in the invoices.

We have held in Petition No.25(C) Of 2009, M/s Steel City Central Network v. MSM Discovery Private Limited decided on Dated 8th October, 2010 that the statutory requirements of Clause 4.1 are met by issuing a statement that the invoices must be construed to be a notice under Regulation 4.1. The agreement between the parties had thus not been validly terminated. Issuance of public notice would therefore, not be sufficient.

Moreover, the respondent has not filed any counter claim. By reason of our interim order, the supply of signal continued. The agreement between the parties for the year 2009-2010 has come to an end. It would, therefore, be open to the parties to hold negotiations. We also make it clear that it would be open to the respondent to take recourse to such remedies as may be available to it in law.

However, so long as the supply of signals is not validly stopped as provided for under the Regulations, the respondent shall continue to supply the signal to the petitioners on the same terms subject to any contract which may be entered into by and between the parties.

We, however, having regard to the fact that the petitioner has not paid the due subscription fees to the respondent, direct it to pay the balance amount due from it after adjusting a sum of Rs. 5,00,000/- in terms of our interim order. The said amount should be paid within four weeks from date, failing which this petition would stand dismissed.

Before parting with this matter we may mention that we have purposely not gone into the question as to whether the petitioner had been pirating the signals. Both the parties have a lot to say. If, according to the respondent, the petitioner had taken recourse to piracy, it may take such fresh action as may be available to in the law. We have not gone into the said question keeping in view of the fact that piracy was not one of the grounds mentioned in the public notice issued under Regulation 4.3, apart from the fact that it is necessary for us to do so having regard to the findings arrived at by us.

The petition is disposed off with the aforementioned observations and directions. In the facts and circumstances of the case, the parties shall pay and bear their own costs.

……., J
(S.B. Sinha)
Chairperson

…….
(G. D. Gaiha)
Member

…….
(P.K. Rastogi)
Member