

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated : August 4, 2011

Petition No.273(C) of 2011

Sky Vision ...Petitioner

Vs.

MSM Discovery Private Limited ...Respondent

BEFORE:

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

For Petitioner : Mr.Vineet Bhagat & Ms. Neha Jain,
Advocates

For Respondent : Mr.A.C. Mishra, Mr. Jasmeet Singh &
Ms.Andrabi Mazag, Advocates

J U D G M E N T

The petitioner is a Multi Service Operator.

The respondent herein is a content aggregator of various channels of different broadcasters.

The petitioner by this petition has inter alia prayed for issuance of a direction upon respondent to sign a subscription agreement for providing TV signals to its network by supplying decoders on reasonable terms and conditions.

The petitioner is registered in terms of Cable T.V. Network Act, 1995.

It made a request for supply of signal of various channels of which respondent is the distributor on or about 3.2.2011. With the said application, however, no document was annexed furnishing informations as are required in terms of the Telecommunication (Broadcasting & Cable Services) Inter Connection Regulations 2004 as amended from time to time (the Regulations). A reminder thereto was sent on 10.2.2011.

The respondent by its letter dated 14.2.2011 acknowledged the receipt of the said letters and asked the petitioner to furnish the following documents.

- "1. Postal Registration Certificate
2. Details of direct connections/details of subscribers, Subscriber Line Report (SLR) and in case there is no SLR then please provide evidence to corroborate your subscriber base (including local survey)

3. List of cable operators who are / will be getting signals from your network along with their subscriber base.
4. A details diagram/map of your cable network as well as the locations of your head ends/control rooms.
5. Details of your existing areas of your operations you are requested to specifically mark your existing area of operation on the diagram/city map as referred to above.
6. Declaration before Entertainment/Service Tax Authorities.
7. Please also provide details of the Mode of transmission of signals (whether overhead or underground) and the copy of permissions from competent authorities in this regard.
8. Certification showing the equipments used by you and your franchisee cable operators as prescribed under CATV Act, 1995.
9. A copy of other documents for e.g., Partnership Agreement, Joint Venture Agreement, Right to Use Agreement, MOA/AOA, etc."

The respondent with the said letter also purported to have enclosed an application for affiliation, the receipt whereof is denied and disputed by petitioner.

In terms of its letter dated 23.2.2011 the petitioner supplied the requisite documents, being: -

1. Postal registration certificate
2. Details of Direct Connections and Operators Connections.
3. List of Cable Operators who are getting signals from it.
4. A detailed map of its Cable Network
5. Details of existing areas which were marked on the map.
6. Service tax certificate.
7. Mode of Transmission was stated to be overhead and receipt of ground rent to Municipal Corporation were enclosed.

As despite the same no agreement was entered into; a legal notice was issued on 26.4.2011 asking respondent to enter into a subscription agreement with petitioner.

By a letter dated 20.6.2011 the respondent, contended that the application form had not been sent by petitioner, stating:

"In furtherance to your application for request of signals of the channels of the "OneAlliance" Bouquet we once again request you to provide the following information as the information provided by you is incomplete and improper.

1. You have failed to supply us with a Certificate showing the equipments used by you and your

franchisee cable operators as prescribed under CATV Act, 1995. Despite various reminders the same have not been provided to us due to reasons best known to you.

2. A copy of other documents for eg. Partnership Agreement, Joint Venture Agreement, Right to Use Agreement, MOA/AOA etc.
3. The map provided by you is not legible and the same should specifically lay down you area of operation.

It is requested that the aforementioned documents be sent to us at the earliest to enable us to process your request for supply of signals of the TOA channels. Please note that neither this communication nor any other communication purports to admit your eligibility or entitlement to receive the 'The OneAlliance' channels.

This petition has been filed by the petitioner on 30.5.2011

praying inter alia for the following reliefs:

(i) Direct the respondent to sign Subscription Agreement with the Petitioner, provide TV signals to Petitioner's Cable TV Network and also direct the Respondent to supply of decoders boxes to the Petitioner on reasonable terms and conditions;

(ii) Grant damages to the petitioner as against the respondents of Rs.3,00,000/- along with costs of litigation, and

(iii) Pass any other such order(s) as this Tribunal may deem fit and proper in the facts and circumstances of the present case."

It is contended that the petitioner has complied with all the requirements of the Regulations as not only a list of cable operators but also details of the subscribers have also been furnished along with a plan showing its area of operation.

The respondent in its reply, however, averred that the petitioner despite several oral reminders did not furnish the requisite documents and also failed to furnish a verifiable 'Subscription Line Report'.

The petitioner, however, along with the rejoinder filed a filled up application for its affiliation. It had also filed its Income Tax Returns, the list of cable operators, renewal certificate, the payments made to the Municipal Corporation of Chandigarh and certificates granted by other Post Masters, and a map showing its area of operation.

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

(i) Having regard to the fact that the respondent now is in possession of all the relevant documents, there is absolutely no reason why it would not comply with its statutory obligations of providing signals to the network of petitioner as envisaged under Clause 3.2 of the Regulations.

(ii) It is incorrect to contend that the petitioner has not supplied SLRs which are verifiable.

(iii) All the requisite documents enabling the respondent to supply signals of the channels of which it is the content aggregator having been supplied, there is absolutely no reason as to why it should not be directed to comply with its statutory obligations.

Mr. A.C. Mishra, learned counsel appearing on behalf of the respondent, on the other hand, urged:

(a) The map filed with the petition and/or rejoinder showing the area of operation of the petitioner is not legible and, thus, no action on the basis thereof is possible to be taken.

- (b) The petitioner should be asked to confine its area of operation within the towns of Chandigarh, Mohali and Panchkula and not the adjacent areas.
- (c) Having regard to paragraphs 10 and 11 of the Explanatory Memorandum of the TRAI appended to the Regulations, it would be evident that an MSO must furnish to the broadcaster all the details of subscribers so as to disclose its universe enabling the latter to enter into meaningful negotiations for the purpose of fixing the commercial terms of the subscription agreement. The petitioner in any event alternative should be directed to confine its operation by retransmitting signals only to its direct subscribers.

The obligations on the part of a broadcaster to supply signals on a request made by a multi service operator is covered by clause 3.2 of the Regulations. Ordinarily having regard to the provisions contained in Clause 3.5 of the Regulations, the broadcaster is to offer supply of signals of its channels to the seekers thereof within a period of 60 days from the date of receipt of such request.

The Regulations, thus, mandate a broadcaster to supply signals subject of course to the MSO of not being a defaulter and its furnishing its subscriber base as envisaged under Clause 9 of the Regulations.

The terms `Subscriber Base' and `Subscriber Line Report' have been defined in Clauses 2(p) and 2(q) of the Regulations, which read as under:

“2(p) **“subscriber base”** means the number of subscribers –

(i) as agreed to by two service providers in a non-addressable system on the basis of which payments are made by one service provider to the other, or

(ii) as reflected by the Subscriber Management System, where addressable systems are employed.

2(q) **“subscriber line report”** or **“SLR”** means a monthly statement wherein, in a non-addressable system, a multi system operator and a cable operator agree upon the subscriber base for that month.”

Clause 9 of the Regulations provide for finalisation of subscriber base at the time of the first agreement. It is in two parts.

It reads as under:

“9. Finalising Subscriber Base at the time of first agreement

First agreement between Multi System Operator and Cable Operator

9.1 In non-addressable systems, while executing an interconnection agreement for the first time between a multi system operator and a cable operator, the parties to the agreement shall take into account the subscriber base of the cable operator on the basis of the Subscriber Line Report (SLR) where such SLR exists. Where such SLR does not exist, this shall be negotiated on the basis of the evidence provided by the two parties on the subscriber base, including the subscriber base of similarly placed cable operators and local survey.

Explanation

The Subscriber Line Report (SLR) is only an indicative basis for arriving at the subscriber base and the subscriber base as mutually agreed by the two parties could be more than or less than the number indicated by the SLR.
First agreement between Multi System Operator and Broadcaster.

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.

The aforementioned provisions, therefore, take care of both the situations namely where the MSO would retransmit the signals of the broadcaster to the local cable operators as also to the subscribers directly. Whereas by reason of the first part, in the absence of the `Subscriber Line Report' the `subscriber base' would have to be negotiated on the basis of evidence provided by both the parties in regard thereto including the subscribers base of similarly placed cable operators or local survey; in terms of the second part the MSOs are required only to furnish a list of cable operators who would be getting signals from its network along with their subscriber base.

The term `Subscriber Base' having been defined, it is difficult to accept the submissions of Mr. Mishra that in terms of the provisions of the said Regulations, the MSOs were bound to disclose their entire Universe. When a Multi Service Operator retransmits signals through the local cable operator, they enter into negotiations for determining the subscriber base. The MSO

is statutorily obligated only to disclose the subscriber base as negotiated and not the details of all the subscribers of LCOs.

In this case the petitioner has not only furnished the list of the local cable operators but also their addresses and area of operation as also the details of its direct connectivities. So far as the direct connectivity is concerned, according to the petitioner, it has 1,000 subscribers. Their details including house numbers sectorwise have been disclosed. Each sector of the town of Chandigarh are divided into four subsectors. Even the details of the same have been provided.

It is, therefore, difficult to accept the submission of Mr. Mishra that a verifiable SLR was not furnished by petitioner. The petitioner furthermore has supplied a map showing its area of operation being Chandigarh, Mohali Industrial area, Manimazara and Panchkula. It has also some connections, as it appears, in some of the neighbouring areas in the States of Punjab and Haryana.

But the area of operation of petitioner can very well be found out from the said map.

The area of operation indisputably plays an important role in determining the subscriber base as has been stated by the Regulator in paragraph 11 of the Explanatory Memorandum appended to the Regulation.

Paragraph 10 of the Explanatory Memorandum, however, to which our attention has been drawn by Mr. Mishra, has no relevance.

We may, however, notice the said paragraph:

“Area of operation and Subscriber base

10. The term subscriber base is rather vague in the absence of addressability, as it is impossible to know the real number of subscribers being served by a service provider in non-CAS areas. Thus, it is not possible to have agreements based on the actual subscriber base. Hence, the negotiations for fixation of subscriber base for an interconnect agreement depend crucially on area proposed to be served by the distributor of TV channels. However, the actual number of subscribers is reflected by the Subscriber Management System (SMS) wherever addressable systems are deployed. Thus, the subscriber base in such a situation is accurately reflected by the SMS.

As mentioned in para 8 above, the TDSAT judgment in the case of Sea TV Network Ltd. has been challenged before the Supreme Court of India and the matter regarding determination of subscriber base of cable operators and MSOs has been raised in the appeal before the Supreme Court. However, the Supreme Court vide its interim order dated 2.3.2006 had specifically permitted the Authority to proceed with its exercise on devising a system for ascertaining the subscriber base of distributors of TV channels. The Supreme Court had observed that: -

"... Further, pendency of these matters shall not stand on the way of the Central Government if it so chooses, to implement the CAS or of the TRAI in devising any system to identify and arrive at the correct number of subscribers of each distributor of TV channels.... "

In view of this observation of the Hon'ble Supreme Court the Authority has proceeded to lay down a system to identify and arrive at the correct number of subscribers of each distributor of TV channels.

The Authority had recognized in its recommendations on issues relating to Broadcasting and Distribution of TV channels dated 1.10.2004 that a gradual transition to addressability is a must and that it cannot be done immediately throughout the country. In these recommendations, the Authority had recommended mandating a register of subscribers to be maintained by the cable operators and multi system operators. The Authority had recommended that: -

"...All cable operators and multi system operators shall maintain a register of subscribers containing the names of the

subscriber, address, monthly fee charged and number of channels received. The register shall be furnished for inspection to the Authorised Officer whenever he considers it expedient to inspect such register to find out if there has been a violation of any regulation..."

In the absence of addressability and register of subscribers, it is very difficult to ascertain the number of subscribers of a distributor of TV channels. In spite of this limitation, the Authority has provided a methodology to arrive at the subscriber base of each distributor of TV channels."

The said paragraph mainly deals with the recommendations of the Regulator to shift to the addressable system, in absence whereof it has been observed that the real number of subscriber being served by a service provider in its areas cannot be verified.

It is only for that purpose that emphasis has been laid on the area of operation.

It is not necessary to reiterate this well known principle governing the importance of area of operation as the same has been discussed by this Tribunal in various decisions.

Suffice it to say that the broadcasters having regard to the provisions of the Regulations including Clauses 11 and 12

thereof are, as the law stands now, not entitled to insist upon furnishing of the complete details of the subscribers who were attached to the network of the local cable operators.

So far as supply of an illegible copy of the map is concerned, we may place on record the statement by Mr. Bhagat that a legible copy has been supplied to respondent. Another legible copy has been handed over to Mr. Mishra today.

In this view of the matter I am of the opinion that the respondent should be directed to enter into a subscription agreement with petitioner at an early date and preferably within a period of two weeks from date, on a subscriber base of 3000 as offered by it in its application for affiliation.

It is made clear that as and when the petitioner enters into agreement with any other LCOs within its aforementioned areas of operation and/or the subscriber base is increased, the same would be notified to respondent in terms of clauses 11 and 12 of the Regulations.

Such furnishing of informations relating to subscriber base, in the opinion of this Tribunal, shall protect the interests of respondent.

However, in my opinion, no case has been made out for awarding any damages as has been prayed, for as no evidence in that behalf has been led.

This petition is allowed in part and to the extent mentioned hereinbefore.

But in the facts and circumstances of this case, there shall be no order as to costs.

(S.B. Sinha)
Chairperson

August 4, 2011
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