

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

Dated 23rd December, 2011

**Petition No.132(C) of 2009
(With M.A.No.193 of 2010 & M.A.No.74 of 2011)**

Indusind Media & Communications Ltd. ...Petitioner
Vs.
Home Cable Network Pvt. Ltd. ...Respondent

BEFORE:

**HON'BLE MR. JUSTICE S.B.SINHA, CHAIRPERSON
HON'BLE MR. P.K.RASTOGI, MEMBER**

For Petitioner : Mr.Kailash Vasdev,Senior Advocate
Mr.Sanjay K. Shandilya,Advocate

For Respondent : Mr.K.K.Rai,Senior Advocate with
Mr.Gaurang Kanth
Ms.Anshul Singh, Advocates

ORDER

P.K.Rastogi, Member

This Tribunal vide its order dated 28.05.2010 had directed that a Commissioner shall be appointed to determine the amount payable by the respondent herein to the petitioner. Pursuant to the said order, Mr. D. Arvind was appointed as Commissioner. He submitted his report on 01.02.2011. The respondent has filed an objection to the report of the local commissioner.

2. The respondent in its objection petition has submitted that the Commissioner had conducted the hearing on 29.11.2010 and the following documents were supplied by the respondent to him:

- a. Balance Sheet for the year 2006-2007
- b. Balance sheet for the year 2007-2008
- c. Goods receipts notes
- d. Invoices showing the payment made by the respondent directly to the broadcasters from the year 2008

Thereafter, vide emails dated 13.11.2010 and 22.11.2010 the respondent answered the queries raised by the learned commissioner.

However, no other documents and accounts were sought for by the Learned Commissioner thereafter from the respondent.

3. The respondent further submitted that the report of the learned commissioner was incorrect and the same contained conclusions contrary to the evidence/documents filed by the parties.

The respondent was not supplied even the copies of the documents filed by the petitioner. The principle of natural justice was not followed during the proceedings and no opportunity was given by the learned Commissioner to the respondent to even see and rebut the documents filed and submissions made by the petitioner despite requests.

4. With reference to the rent for STBs supplied, it was submitted that the respondent was not liable to pay any amount under the said heading as the petitioner had been raising the bills/invoices to the customers/subscribers directly for the subscription fee and STB rental and was getting the payment from the customers/subscribers itself.

5. According to the respondent, the calculations done by the learned commissioner were totally incorrect, vague, ambiguous and contrary to the record. The learned commissioner calculated the amount from January 2007 till January 2011 which was totally wrong and incorrect. The petitioner terminated the agreement on 08.04.2009, thus STB's rental could not have been beyond the period of the agreement. The respondent had started its own head-end from the year March 2008 and had installed its own STB's, thus the calculation done by the learned commissioner under this head was totally misconceived, incorrect and contrary to the evidence/ documents and the same deserves outright rejection.

The learned Commissioner failed to consider that as per the agreement, from total subscription charges, 45% was to be paid to the broadcaster, 25% to the cable operator and 30% to the petitioner and the petitioner was liable to pay 5% to the respondent.

6. The commissioner in his report has stated that 3879 STB's are to be returned by the respondent to the petitioner. As per order dated 28.05.2010 of this Tribunal the respondent was directed to pay the value of 1664 number of STBs i.e. $5343 - 3679 = 1664$. However, the commissioner has calculated the number of STBs not only contrary to the order dated 28.05.2010 but also the record of the case. The learned Commissioner did not take into consideration the expenses to the tune of Rs. 2,77,980/- incurred by the respondent in repairing the STBs, power adopters and remotes.

7. In view of the above, the respondent prayed this Tribunal to reject the report dated 01.02.2011 filed by the learned Commissioner.

8. In reply, the petitioner stated that as per the orders of this Tribunal, the parties were directed to file their documents which according to them were of relevance in support of their respective pleas/claims before the learned Commissioner. The parties admittedly supplied the documents and accounts on which they were relying to the Commissioner.

9. The petitioner further stated that the parties appeared before the Ld. Commissioner without any demur and did not raise any

contention before the Learned Commissioner that the proceedings were violative of the principles of natural justice nor were any other allegations made as alleged in the objection under reply.

10. The petitioner submitted that the plea of the respondent that since the Agreement was terminated on 08.04.2009, the STB's rental cannot be beyond the period of Agreement was untenable because the respondent did not return the STB's to the petitioner immediately after the said termination to which it was entitled to. The petitioner was entitled to rental of the STB's till the time the same was retained by the respondent in their custody. The calculation of the Ld. Commissioner under the head of "Rent for STB's supplied" was correct and does not merit interference.

11. By our judgment dated 28.05.2010, we had, interalia, issued the following directions:

"a. We therefore, are of the opinion that it is a fit case where a preliminary decree for accounts should be passed for the period January, 2007 to July 2007 and April 2008 to April 2009. It would be open to the parties to produce their books of accounts and other documents including invoices before the learned commissioner who may be appointed in this behalf. Keeping in view the nature of jurisdiction, this Tribunal possesses, we are entitled to mould the relief."

"b. While it criticized non-production of the documents by the petitioner should not produce the documents itself is the question. How much amount it expended towards purchase of adopters or remote controllers have not been disclosed. Why it had not complied with the order of the Tribunal has also not been explained. It has also not explained the admission made by it before this Tribunal as also the number of Set Top Boxes received by it. It had contractual obligations. Admittedly it has been using the equipments supplied to it by the petitioner. It was, therefore, for it to file its books of accounts. Therefore, we while directing the respondent to pay the value of the number of Set Top Boxes which are with it namely $5343 - 3679 = 1664$.

However, we would also direct that the depreciated value of the said Set Top Boxes may also be taken into consideration by the learned Commissioner."

"c. We make it clear that the parties shall be entitled to produce their books of accounts only for the relevant period. However, they shall not adduce any oral evidence except with the leave of this Tribunal. Learned Commissioner is requested to submit a report within a period of 4 months."

12. The learned Commissioner has submitted its report on 01.02.2011. We have perused the report. We find that the learned Commissioner has not followed the directions of this Tribunal while preparing its report. In fact, the learned Commissioner has given his own finding whether a particular amount is admissible or not.

13. In our direction, we had issued a decree for account for a period from January 2007 to July 2007 and April 2008 to April 2009. The learned Commissioner's report in this regard reads as under :

"11. Pay Channel Subscriptions

11.6 in their application before the Hon'ble Tribunal, the petitioner had sought Rs. 61,21,989/- towards pay channel subscriptions. It is determined that for the period from January 2007 till March 2009 Rs. 44,84,915/- is payable towards pay channel subscriptions. Details are given in "Annexure B" attached to and forming part of this report"

Contrary to our directions for the account for the period from January 2007 to July 2007 and April 2008 to April 2009, the learned Commissioner has made calculations for the entire period from January 2007 to April 2009.

It, however, appears from Annexure A appended to the report that for the period May 2009 to December 2011, no calculation of accounts has been carried out.

14. Similarly, we had asked the learned Commissioner to calculate the depreciated value of 1664 STBs but the Commissioner calculated the cost of 3879 STBs. The relevant portion of the report may be read as :

"12. Cost of STBs not returned

12.1 It was determined that 3879 STBs are to returned by the respondent to the petitioner.

12.2 The cost of per STB is determined to be Rs. 2931/-.

12.3 The Set Top Boxes are depreciated over a period of 5 years. TRAI in its order and rules used similar period to

determine the useful life of such equipment.

12.4 The petitioner had invoiced for pay channel subscriptions from January 2007 till March 2009. Depreciation has been provided for this period while considering the value of STBs not returned.

12.5 The cost of STB not returned is determined to be Rs. 59,19,936/-. The working is given in "Annexure c" attached to and forming part of this report."

The learned Commissioner had gone beyond the directions of this Tribunal. The learned Commissioner should have worked out the depreciated value of the 1664 STBs only.

15. In view of aforementioned reasons, the report of the learned Commissioner is set aside and the Learned Commissioner is requested to re-work the report after examining the books of accounts of both the parties. While examining books of accounts of the parties de-novo, the respondent shall produce before the Commissioner showing his books of accounts the details of the Set Top Boxes received by it, supplied to the subscribers containing the dates of such receipt and supply and amount of rent collected from the subscribers. Similarly, the respondent shall submit all the accounts showing the subscription amount collected from the subscribers relating to the pay channels for which feed was supplied by the petitioner. The petitioner will also submit books of accounts so that the learned Commissioner can

examine whether any amount of the subscription has been collected by it directly from the subscribers.

The learned Commissioner may call for any other record from the parties as required by him to prepare his report.

While calculating the rent of the STBs, the Commissioner will also examine as to how many boxes were activated out of the total supply. Further, the learned Commissioner should also re-examine the aspect of depreciation. The Set Top Boxes were purchased in 2003 and supplied to the respondent in 2007. Whether depreciation will start in the year 2003 or in 2007 specially keeping in view of the aspect of continuous reduction in the prices of electronics products may also be considered.

16. Therefore, in view of our observations mentioned above, we set aside the report of the learned Commissioner and the matter is remanded back to him for de-novo exercise in terms of our judgment dated 28.05.2010 and aforementioned directions. The report may be submitted within a period of two months.

17. The matter may be posted for further directions on 29.02.2012.

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

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

/NC/

