

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL  
New Delhi**

**Dated 18<sup>th</sup> July, 2011**

**Petition No. 166 (C) of 2009**

M/s. Nirman & Associates Pvt. Ltd. : Petitioner

Vs.

MSM Discovery 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. Navin Chawla, Advocate  
Mr. Yoginder Handoo,  
Advocate

For Respondent : Mr. Aditya Narain, Advocate

**JUDGEMENT**

**S.B. Sinha**

Although I agree that this petition should be dismissed, I intend to assign my own reasons in support of the aforementioned conclusion.

**Background Facts**

2. The petitioner is a multi service operator. The respondent is a content aggregator. A request was made by petitioner for supply

of signals to respondent. It having not acceded to the said request, the petitioner filed a petition before this Tribunal for an appropriate direction.

The said petition was marked as Petition No. 21 (C) of 2009.

3. By reason by an order dated 23<sup>rd</sup> April, 2009, the said petition was disposed of directing respondent to provide signals to its network subject to the following:

- (a) "The petitioner will make a deposit of three months' subscription fee as deposit on the basis of 1800 subscribers. This deposit will be, as already indicated, a permanent deposit to be maintained throughout the operation of the agreement.
- (b) The figure of 1800 is purely as an adhoc and interim measure and the actual figure will be arrived at through a joint survey. The joint survey will commence immediately.
- (c) The petitioner will strictly abide and confine itself to the areas indicated in the SLR dated 21.4.2009, a copy of which has been handed over to counsel for the respondent today and also submitted to us. Any addition to either cable operators or the area of operation of any cable operator will have to be only with the prior written permission of the respondent.
- (d) At the end of three months from the date of supply of signals, the subscriber figure will be revised, if warranted, by mutual negotiations between the two parties."

4. Admittedly the said order has been complied with by respondent as signals of its channels have been supplied to the petitioner.

5. However, the petitioner admittedly was having 9 local cable operators at the relevant point of time wherefor a SLR was furnished. On the premise that the respondent has not complied with the said order, an Execution Application was filed, which was disposed of by an order dated 29<sup>th</sup> May, 2009. The said cut off date was later on extended.

6. The respondent herein, interalia, on the premise that petitioner had, without its permission allowed new LCOs to join its network as also expanded its area of operation, issued a public notice on 24<sup>th</sup> July, 2009.

7. According to the petitioner, however, it has not added to its network any other cable operator. Reference in this behalf was made to various letters, receipt whereof the petitioner denies and disputes.

8. By a letter dated 14<sup>th</sup> July, 2009, the respondent called upon petitioner to desist from unauthorized cable casting, failing which it was threatened that appropriate legal proceedings including police action would be initiated. The petitioner, however, contends that even in its public notice, the respondent did not disclose the names of the cable operators as mentioned in the said notice dated 14<sup>th</sup> July, 2009.

9. This petition was filed on 4<sup>th</sup> August, 2009.
10. A response to the said notice of respondent was issued by petitioner on 31<sup>st</sup> July, 2009 wherein it was stated: -

“However, we once again reiterate that we are not supply your signals in areas other than the area mentioned in SLR dated 21.4.3009 in our analogue network and we request you to withdrew your notice on the said count. Your representatives had come to Guwahati on various dates however they had shown no interest in doing any survey whatsoever but only wanted us to agree at a figure of Rs. 10 lacs as monthly subscription fees without any basis. Your allegations that our subscriber base has increased to 25,000 subscribers in a short span of a month is totally misconceived, incorrect and are denied. Admittedly the signals were supplied to us only on 1.6.2009 and within a short span of 2 monthly the subscriber base catered by us even according to your submission before the Hon’ble TDSAT cannot grow to such an extent. We therefore request you to withdraw the present public notice and continue the supply of signals of TV channels to our network”.

11. Allegations were also made therein that the said public notice was issued at the instance of one Mr. Sanjeeve Narain of Guwahati Communication, that of the distributor of the respondent.

12. The respondent in its reply while reiterating its earlier stand also annexed an e-mail of the petitioner and an e-mail of its Manager (Legal) as also the one dated 23<sup>rd</sup> October, 2009, which reads as under:

"Please see this email. It has been send to us as late as 22.1.2010. Here he says that he had send this letter on 19.10.2009. This was never received by us and secondly he is taking two contradictory stands because in his reply to our petition he has stated that he had a bonafide belief that the local commissioner had shared the list with us. In his reply he does not mention this letter".

"Please refer to our earlier letter dated 23<sup>rd</sup> Oct, '09, along with which we had submitted the complete list of Operators, as on 19<sup>th</sup> Oct' 09. We are attaching the same for your ready reference.

Also we are submitting herewith the fresh/recent List of operators/subscriber base/LSR as on 21<sup>st</sup> Jan, 2010, which clearly mentions the name of operator, date of connectivity, area of operation etc. Please find herewith the attached copy of the same. This for your kind attention and necessary action please".

Thanking you,

Regards  
Rana Zaman  
Managing Director  
Nirman & Associates Pvt. Ltd.

13. Before, however, we advert to the contentions raised by the parties, it is necessary to notice an e-mail of the respondent dated 28.7.2009 wherein allegations were made against the petitioner that it had not been cooperating in holding a Joint Survey. It was stated that the officers of the respondent visited the office of the petitioner on a number of occasions in support of which contention, some air tickets and other documents have been annexed.

14. It may also be noticed that the respondent in support of its plea that the petitioner has been indulging in unauthorized cable casting, filed a CD containing video recordings as also three affidavits affirmed by Mr. Ajay Talukdar, Mr. Rakesh Surana and Mrs. Sushmita Das. Out of the aforementioned three deponents, only Mr. Ajay Talukdar has been examined before us.

### **The Issues**

15. On the aforementioned backdrop, the questions which arise for consideration are: -

- (i) Whether the purported notice dated 14.7.2009 and public noticed dated 24.7.2009 alleging unauthorized cable casting on the part of the petitioner are valid in law and/or whether the respondent has been able to justify the same?
- (ii) Whether upon taking into consideration, the subsequent events namely while complying with the order of this Tribunal by both the parties it was necessary for petitioner to obtain prior written permission of respondent for retransmission of supply of signals to any LCO other than the nine, it being admitted that some LCOs have joined petitioner's network from September 2009?

## **Submissions**

16. Mr. Naveen Chawla, learned counsel appearing on behalf of the appellant would contend: -

1. Expansion of an area of operation or joining of local cable operators by itself would not amount to piracy as prior permission of the broadcaster therefor was not necessary.
2. From the correspondences exchanged between the parties, it would be evident and that no allegation has been made by respondent that petitioner extended its area of operation.
3. The respondent, cannot be permitted to approbate and reprobate at the same time.
4. The order of this tribunal is capable of an interpretation that the subscriber base was to be treated at 1800 only for a period of three months and no addition was permissible only till a joint survey was conducted.

17. Mr. Aditya Narain, learned counsel appearing on behalf of the respondent, on the other hand, has taken as through the record and submitted:

1. The respondent has been able to establish that petitioner had expanded its area of operation and granted connection

to various LCOs other than the nine in regard where to the order dated 23.04.2009 was passed.

2. Mr. Mukesh Singh, in his evidence categorically stated of unauthorized retransmission of signals by proving the video recordings and the fact that the petitioner had inter alia supplied signals to Super Cable Network (Worldview) with effect from 1.7.2009 without obtaining any prior permission from the respondent virtually stands admitted.
3. Mr. Rana Sayed Zaman, the witness examined on behalf of the petitioner, having not been looking after the affairs of petitioner for a long time, no reliance should be placed on his evidence.
4. The petitioner, being guilty of suppression of material facts and having not approached this tribunal with clean hands must be held to have committed fraud and is, thus not entitled to any equitable relief.
5. The petitioner having sent some of its letters only under certificate of posting, no reliance should be placed thereupon.

### **The Miscellaneous Application**

18. We must however, at this juncture also place on record that the petitioner filed an application under Order XI Rules 12 and 14 of the

Code of Civil Procedure on or about 20th January 2010, which was marked as M.A. No. 27 of 2010.

19. The said Miscellaneous Application was directed to be considered with the final hearing.

**RE: Interpretation of the order dated 23.04.2009 passed in Petition No. 21 (C) of 2009**

20. The said petition was filed for a direction upon respondent to supply signals in terms of Clause 3.2 of the Regulations. During pendency of this proceeding, the parties held several meetings with regard to the area of operation and subscriber base.

21. On the date of passing of the said order, an offer was made by petitioner to the following effect:

- (i) as an interim measure, the subscriber base of petitioner should be treated as 1800, restricting its operation to retransmit signals only to 9 cable operators.
- (ii) it was agreed that a joint survey should be conducted immediately.
- (iii) the figure arrived at the joint survey was to be adopted as the subscriber base of petitioner.

- (iv) "in addition, the counsel for the petitioner also offered that at the end of three months the subscriber figure can be revised, if warranted"

22. It is in the aforementioned factual backdrop the said petition was disposed of.

23. Mr. Chawla, in our opinion, is not correct in contending that the said order was capable of two interpretations.

24. It was expected that both the parties would take recourse to joint survey immediately and till the negotiated subscriber base is arrived at on the basis of the subscriber base arrived at therein. As an interim measure the number of subscriber was fixed at 1800.

25. The area of operation was to be confined as per the SLR dated 21.04.2009, meaning thereby, the respective area of operation of the nine operators.

26. It is only in that context an order was passed that a cable operator can be added or area of operation of the petitioner can be expanded only with prior written permission of the respondent.

27. Subscriber figures could also be revised by the end of three months by mutual negotiation.

28. Mr. Chawla has strongly relied upon the second proviso appended to clause 10.2 of the Regulations.

29. There cannot be any doubt or dispute that parties to an agreement, being subject to the Regulations framed by TRAI, must consider the joining or leaving the network of multi service operator by a cable operator for additional charges or reduction thereof, as the case may be.

30. However, the Second Proviso appended to Clause 10.2 of the Regulations would not be attracted in this case as an order was passed by this Tribunal, having regard to the peculiar facts and circumstances of this case. The parties were bound to give due effect thereto.

31. If, according to petitioner, the order of this tribunal did not satisfy the requirements of the Regulations, it could have brought the same to its notice or asked for modification of the said order. It having accepted the said order and having taken advantage out of the same, now cannot be permitted to turn round and question the

correctness thereof collaterally in a fresh proceeding, which has been initiated as a new cause of action arose therefor. Moreover, the Regulations do not prohibit such an ad hoc arrangement. Such interim arrangements are not subject to any statutory interdict.

On the other hand, determination of subscriber base even in terms of the Regulations may be based on joint survey and other evidences.

### **Appreciation of Evidence**

32. The petitioner furnished various SLRs. The first SLR was submitted on 14<sup>th</sup> February, 2009 showing that nine cable operators were in its network and the declared subscriber base was 710, to which, however, 1800 subscribers were added by filing an SLR of nine more cable operators on 21.04.2009.

33. The petitioner has sent an e-mail on 22.1.2010 wherein reference was made to a list of operators as on 19.10.2009 purported to be under the order of the Local Commissioner.

34. Although in the body of the said letter, various modes of service had been indicated, the same was sent only under the Certificate of Posting.

35. A list of cable operators was sent on 21.1.2010, wherein names of 17 cable operators having a subscriber base of 2128 have been shown, and inter alia stating that the contents of the e-mail dated 22.01.2010 were totally contrary to its earlier e-mails dated 21<sup>st</sup>, 23<sup>rd</sup>, 25<sup>th</sup> and 27<sup>th</sup> January 2010.

36. It was furthermore contended:-

“You have not provided/disclosed till date any document to support your claim of the subscriber base of the added operators. Further as is already evident – you have been indulging in rampant piracy and have dishonestly caused unlawful gain for yourself and a substantial loss to us. Further it is disheartening to note that you have acted in total violation of the order of the Hon’ble TDSAT which is not in our business interest nor yours”.

37. These SLRs, in our opinion, sufficiently indicate that the petitioner had been supplying signals to various LCOs. It is not its case that the number of LCOs were added and consequently the area of operation was expanded with the prior consent of the respondent.

38. If the petitioner has violated the order of this tribunal, as we are inclined to hold, it may not be stricto sensu legal and for all intent and purport it would amount to piracy as is understood in the general sense of the term.

39. Area of operation in a business of cable casting on an analogue platform plays an important role.

40. Mr. Rana, in his evidence sought to explain the subscriber base of the petitioner stating that the number of subscribers on HITS platform was around 400 to 500 but he was not sure of the number of subscribers on HITS platform after June 2009.

41. He, however admitted that supply of signals on HITS platform on an all India basis, came to an end on 31st of March 2010. According to the said witness, although no documentary evidence has been brought on record that before October 2009, no new cable operator was added on the analogue system. If that be so, there is no satisfactory explanation as to why the names of so many local cable operators who are said to have been taking supply of signals on HITS platform were mentioned in the SLR.

42. In regard to one ZR Vision, he made out a new story that as on 21.04.2009, although it was still with Meetu Vision, but merely expressed its desire of joining the petitioner.

43. It is difficult to understand, if Mr. Hazarika was looking after the entire business, and Mr. Zaman was not; as to how he was competent to depose on behalf of the petitioner.

44. So far as the mode of sending the letter dated 23.10.2009 is concerned, he has not produced any proof of service thereof through other modes other than the certificate of posting.

45. We may notice the following questions and answers from the cross examination of Mr. Zaman:-

“Q: Reference may be made to para 11 of the petition at page 5 where it is stated that the petitioner was strictly adhering to the undertaking given to the Hon’ble Tribunal. Please clarify whether this statement is correct or your above statement that the petitioner was giving signals to only 2 out of the 9 cable operators.

A: Both the statements are correct.

Q: Kindly show the names of cable operators at Sr. No. 3 to 9 of SLR dated 21.4.2009 in the list of subscribers filed by you on page 52 to 79?

A: In the list at pages 52 to 79, there is no column for name of cable operators.

It is correct that the Validation Form dated 02.07.2009 has been signed by me (page no. 217 of the paper book)

I have entered into a written agreement with the cable operators shown at Sr. No. 1 and 2 of SLR dated 21.04.2009. As far as I can recollect the said agreements have been filed in Petition No. 21 (C)/09.”

46. On the aforementioned findings of mine, it must be held that petitioner could not have inducted any other cable operator without obtaining prior consent of respondent nor thereby could it extend its area of operation.

47. The question in the factual matrix of this case being the interpretation of the order of this tribunal, no other question need be gone into. For the said purpose even the alleged subsequent event may not be considered as respondent has justified its action so far issuance of the public notice is concerned.

48. In any event, the petitioner admittedly has joined some LCOs after September, 2011.

### **Conclusion**

49. For the reasons aforementioned, this petition is dismissed. This order shall however not stand in the way of the parties to hold fresh negotiations on the basis of the materials which may be brought to the notice of the other side.

50. There shall be no order as to costs.

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

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