

**TELECOM DISPUTES SETTLEMENT & APPELLATE
TRIBUNAL**

NEW DELHI

DATED 18th JULY, 2011

Petition No. 269 (C) of 2008

**M/s.Indusind Media & Communication Ltd. Petitioner
Vs.
Star Broadband Services (I) Pvt. Ltd.Respondent**

ORDER

S B SINHA

In this matter although I agree with the ultimate conclusion, I intend to assign my separate reasons.

1. This petition, by a Multi Service Operator, filed against the respondent, another Multi Service Operator, raises, a question of some importance as regards raising and collection of bills in a CAS area.
2. The basic fact of the matter is not in dispute.
3. The Central Government in exercise of its power conferred upon it under Section 4 (A) of the Cable TV

Network Act, 1995 (1995 Act) declared a part of Delhi as CAS area w.e.f. 1st January 2007.

The respondent was permitted by the TRAI to operate its services in the CAS notified areas of Delhi by a letter dated 14.12.2005.

4. Whereas the petitioner being in possession of a large number of STBs as also a head-end was capable of distributing channels through digital mode and, could give effect to the said notification, the respondent was not.
5. Evidently, none of the parties hereto wanted their competitors to create any monopoly in the CAS area. The respondent, who is a distributor of TV Channels of various broadcasters on analogue platform had a large number of LCOs as its franchisees.
6. It had in total about 15,000 subscribers. It had been supplying signals not only through the cable operators but also to its subscribers directly.
7. On the anvil of the directions issued by the TRAI on or about 14.12.2006, in terms of the said Government of India notification issued under Section 4A of the 1995 Act, which had nothing to do with the applicability of Clause 3.2 of the Regulations, the parties hereto entered into a Memorandum of Understanding on 27.12.2006.

An agreement was also entered into by and between the parties hereto on 5.7.2007 which was given a retrospective effect and retroactive operation with effect from 1.1.2007.

8. Indisputably, a large number of Set Top Boxes (STBs) have been supplied by petitioner.
9. There is a controversy with regard to actual number thereof. According to the petitioner about 13,000 STBs were supplied. The Respondent, however, contends that only 10,000 STBs were supplied.
10. In terms of the MOU, rent for the STBs of more than 2,000 was payable, i.e. from 2001 to 4000 @ Rs. 25/- per month and thereover at the rate of Rs. 45/- per STB per month.
11. No rental was to be charged for 2,000 STBs. Indisputably, no payment towards the rental of STBs in terms of the said MOU, or the agreement has been made for 11 months, except for a sum of about Rs. Eleven Lakh and fifty thousands.
12. The petitioner in the aforementioned situation has also made a prayer for the return of the STBs supplied to respondent.
13. Another area of controversy in as regards the consequence, if any, of the breach of notification no. 16-

02/2006B of the year 2006 issued by the TRAI being dated 23.08.2006. Both the parties hereto claim to have performed their respective parts of the contract.

14. The agreement in question was beyond a normal arrangement. It is contended by petitioner that the Choice Selection forms were printed by respondent.
15. The respondent, for the first time by a letter dated 14.9.2007 inter alia contended that because of poor service on the part of petitioner, thousands of its subscribers have migrated; and a large number of the STBs have also been returned.
16. The respondent admittedly had been supplying Free to Air Channels. It had a direct link with the LCOs and the subscribers. The complaints, if any, were to be made to it or the LCOs by the subscribers. How the complaints, if any, were to be attended by petitioner independently has not been explained. No correspondence has been brought on record to show that there existed any problem with regard to the quality of supply of signals. By an E-Mail dated 14.09.2007, petitioner responded thereto. It dealt with the contentions of respondent with regard to the STBs. It's representative visited the office of respondent.
17. So far as pay channels are concerned, according to the respondent a sum of about Rs. 11 Lacs had been paid,

Rs. 5 Lacs each on two occasions on the demand of petitioner.

18. The petitioner, however, demanded a sum of Rs. 1.46 Crores in regard where to, respondent contended that it was for the petitioner to raise bills on the subscribers.
19. Indisputably, a meeting took place between the parties in presence of the LCOs in November 2007, wherein contentions were raised by the LCOs of the respondent that they were not able to collect any payment from the subscribers. The contract was terminated in November 2007. After termination of contract, respondent issued a letter on 22.11.2007 contending that no payment has been received from its franchisees.
20. It also replied to the notice of termination by its letter dated 22.1.2008 raising the following contentions:-
 - (i) No payment had been received from the franchisees.
 - (ii) There were a large number of anomalies in the bills.
 - (iii) The subscribers were those of the petitioner only and half of them had been paying to it regularly.
21. Whereas in support of its case, the petitioner has examined Shri V B Sharma and Shri Anil Malhotra, the respondent has examined Shri Gaurav Gupta, Shri

Rajender Sehgal and its Managing Director Shri Rajiv Bakshi.

22. The respondent, by a letter dated 4.10.2007 for the first time requested the petitioner to hand over the bills to their customers.
23. According to the respondent, however, the same was a non issue as it had been supplying signals to its customers also on an analogue platform apart from the digital one provided for by petitioner.
24. An agreement between the parties, and that too in writing, having been entered into and having been given retrospective effect and retroactive operation, it is difficult for me to conceive that the terms of the MOU had not been adhered to by petitioner. In view of the fact that according to respondent, petitioner had distributed the STBs only to enter the market keeping the terms and conditions thereof on the shelves, can it be said that respondent's job was only to assist the petitioner so as to enable it to collect the bill amounts?
25. Mr. Bakshi would submit that petitioner did not respond to the E Mail dated 20.10.2007, but within a few days thereafter 60,000 – 70,000 pages of bills were sent to it.
26. Our attention has also been drawn to the statement of Shri Anil Malhotra contending that the said witness

accepted that invoices were to be raised in terms of the TRAI circular. The said witness stated:-

“It is correct to suggest that the duly filled up forms by the subscribers is required to be preserved as an evidence for the purpose of billing and for obtaining the subscription fees.

Vol. In view of the above, we were asking for the duly filled up forms by the subscribers alongwith the ID from the respondent repeatedly.

It is correct to suggest that the set top box may receive any message and display it on the TV.

We however did not send any message to the subscribers that we are not having the requisite forms of their choices per channel to be kept on record.

I have to check whether we retained any photocopies of the subscriber forms before returning them to the respondent.

We have not taken any receipt while we returned the duly filled up forms back to the MSO.

All communication with the respondent was verbal communication in regard to the form.

It is incorrect to suggest that I have suppressed the actual requirement of the subscriber as filled up in the form in regard to the choice of channels and have raised inflated bills on the subscribers of our own.

It is incorrect to suggest that no invoices were raised prior to 6.11.2007.

Vol.-All the information as recorded in our electronic system was also forwarded in the form of mail to the MSO to apprise them about the channel choices of each subscriber as filled up by them in their respective form.

It is incorrect to suggest that since we have not raised invoices we have used this method as substitute for the invoice to the subscriber.

It is incorrect to suggest that bills were not issued prior to 06.11.2007 due to ulterior

motive and immediately thereafter the distributorship agreement was cancelled in order to disable from collecting the subscription from the subscribers.

Re-examination by Ms. Kanika Agnihotri, Advocate

The basis of relationship between the petitioner and respondent was the MOU and agreement.

Any payment made or received will be correctly reflected in the statement of account of the company.

The amounts reflected in para 24 may also reflect the 4.5 lakhs that have been referred to during cross examination.

It is possible to misuse the set top box for the purposes of piracy.

Further cross examination

Rs. 11.5 lakhs has been received by us as on account payment.”

27. Keeping in view the order proposed to be passed by me, I am of the opinion that it is not necessary to enter into the controversies between the parties in great details.
28. The fact remains that a distribution agreement was entered into. The terms and conditions of supply of signals on digital platform were reduced to writing. The parties subject to just exception would be bound thereby.
29. Any deviation or departure therefrom having regard to the provisions of Section 92 of the Indian Evidence Act were

to be made only in writing. No other evidence is admissible in law.

30. The respondent had been able to collect some amount if not the entire which would be apparent from the statement of Mr. Bakshi to the following effect:- “As any money which was to be paid by the subscribers through us, but because the petitioner was unable to issue invoice so we are unable to collect most of the amount”.
31. Some amount was, thus, admittedly collected. Allegedly some amount was given to petitioner and some were returned to the subscribers when they returned the STBs.
32. It is difficult for this Tribunal to accept the contention of respondent that it had not been able to collect any subscription amount whatever and the entire collected amount had been paid either to petitioner or returned to the subscribers. No evidence to that effect has been produced.
33. The respondent is a company registered under the Indian Companies Act, 1956.
34. Mr. Bakshi in his evidence clearly admitted (which is even otherwise statutorily necessary) that the respondent maintains books of account and it has records to show as

to how much amount was collected by it towards STBs and how much was paid to petitioner.

35. Apart from the fact that admittedly it had collected some amount on account of Free to Air channels, Mr. Bakshi volunteered that respondent had not collected any amount prior to November 2007.
36. Correspondences were exchanged between the parties. One of them is an E Mail from Mr. Sharma dated 16.10.2007 wherein respondent was asked to release a minimum amount of Rs. 25 Lacs against the outstanding as no amount has been paid either on account of the hardware or any pay channel.
37. Mr. Bakshi in reply to the question as to whether the said E Mail has been responded to, referred to an E Mail dated 20.10.2007.
38. We have noticed heretofore that therein, a case had been made out by the respondent contrary to and inconsistent with the terms of the agreement.
39. If the parties consciously or otherwise deviated or departed from performing their parts of contract which they were required to do in terms of the MOU and/or agreement, the same was required to be pleaded. It was

expected that a specific case in that behalf would be made out not only in the correspondences exchanged between the parties within a reasonable time of the alleged breach and/or departure of the terms and not after the differences between the parties arose and/or after the contract was terminated.

40. The respondent has failed to discharge the onus which was on it.
41. Receipt of some payments of the amount collected from the subscribers stands accepted. It is accepted that the same was reflected in its books of accounts. How much amount was collected by it from the subscribers and/or the link operators was within its special knowledge as envisaged under Section 106 of the Indian Evidence Act.
42. Moreover, different stands taken by respondent at different stages are contrary to and inconsistent with each other.
43. On the one hand, its LCOS have raised a contention that they have, in the absence of the invoices not been raising any bill whatsoever, Mr. Bakshi, on the other hand, admitted that some amount have been realised but either paid to the petitioner or returned to the customers.

44. The respondent in the aforementioned situation was obligated to prove as to how much amount was collected from the subscribers/LCOs towards the STBs, how many STBs were received by it from petitioner and distributed to the customers and/or returned to it.
45. The respondent has not produced its books of accounts, for reasons best known to it. The situation appears to be a bit anomolous.
46. If the contention of the respondent is to be accepted, (1) on the one hand, the petitioner distributed thousands of STBs free of cost which have not been returned to it, (2) it had received only some amount towards the rental of STBs (3) although it had to maintain a huge establishment and had to pay to broadcasters, including towards share of respondent's subscribers, it has not received any payment, whatsoever, from respondent, as a result of which it must have suffered huge losses.
47. If even the respondent and/or its link operators had not been able to recover their dues from their customers, they also must have suffered huge losses as they were also required to maintain its head-end, staff and other infrastructure. According to it, it had all along been ready and willing not only to perform its part of contract but also to see that the quality of supply of signals is maintained by

attending to the complaints, and/or in any event by supplying the STBs for which it had been receiving only paltry sums.

48. We, in the aforementioned fact situation, are of the opinion that interest of justice would be subserved if a preliminary decree is passed directing the parties hereto to submit their respective accounts before an independent 'Accountant' who should be appointed, as a Commissioner. The costs and charges of the said 'Commissioner' shall be borne by the parties hereto in equal proportions.
49. The Learned Commissioner shall be entitled to scrutinise the books of accounts of both the parties, call for explanations from each of them, if any anomaly is found in their books of accounts and/or other primary evidence which may be adduced and shall for the aforementioned purpose may call upon either of the parties to produce the other or further documents in support of the respective entries made in their books of accounts.
50. Let a preliminary decree on the above terms, be drawn up not only in respect of the STBs but also in respect of the subscription charges.

51. This Tribunal shall consider the question of the rate of interest and/or other costs borne by the parties at the stage of passing the final decree of the proceeding.
52. The Registry is directed to prepare a preliminary decree to the aforementioned effect.

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(S.B.Sinha)
Chairperson

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