

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

DATED 3rd June, 2011

Petition No. 160 (C) of 2010

Thiruvannamalai Cable Network : Petitioner

Vs.

Sun Distribution Services Pvt. Ltd. & Anr. : 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. Ajay Kumar, Advocate

For Respondent No. 1 : Mr. Maninder Singh, Sr.
Advocate

Ms. Gauri Setia, Advocate

For Respondent No. 2 : Mr. Abhishek Malhotra,
Advocate

JUDGEMENT

S.B. Sinha

The petitioner is Multi Service Operator. Its proprietor, Shri P.K. Kalyansundaram had been carrying on business in cable TV

4. The petitioner, however, contends that a sum or Rs.6,29,676/- was also payable in terms of the said agreement. According to the petitioner the respondent no. 2 started its operation in the said town on and from 15th March, 2010 as a result whereof it lost about 80% of its subscriber base. It, therefore, by a letter dated 23rd March, 2010 requested the second respondent to the following effect: -

“You are aware that we are operating as an MSO in Thiruvannamalai. You have started your head end at Thiruvannamalai and rolled out the cable TV series recently. A bunch of operators have already switched over to your from our network. This is to inform you that those migrated operators owe us a huge outstanding.

It is a well settled law and practice that the new MSO shall insist on an NOC from the former one before giving link to the operator. However, you have not practiced the above for the best of reasons known to you.

We at this juncture request you to take steps to collect the outstanding and pay us the same. The detailed list of Operators and outstanding would follow”.

5. By a letter of the said date, the petitioner informed Respondent No.1 as under :-

“Sub: Reduction of subscriber base due to the entry of New MSO – reg.

We have been operating as an MSO in Thiruvannamalai town and surrounding areas, you are aware that a new MSO in the name and style of “Sree Communications” has entered by starting a head at Thiruvannamalai. By the way of predatory pricing they have attracted a huge number of operators to their side.

In view of the above development we have lost about 805 of our link cable operator to them and it is relevant to inform you that those migrated operators owe us a huge outstanding amount. The new MSO has given the connection to migrated operators without insisting an NOC or Nil outstanding memo from us.

At this juncture we herby request you to kindly

- (a) Reduce the connectivity by 80% of the present billing and alter the bill accordingly from the next bill.*
- (b) Collect the outstanding payable from us if any, through the new MSO from the migrated operators.*
- (c) Advice the new MSO to insist on NOC from us for the emigrating operators.*

Hope you would understand the situation and do the needful at the earliest”.

6. According to petitioner on the same date it issued letters to various other broadcasters including ESPN, MSM Discovery and Zee Turner as also respondent No.2 herein.

7. Whereas, the petitioner contends that the other broadcasters had allowed down-gradation, the first respondent did not. We may notice that petitioner in this connection contends that Mr. Samuel Rajan, Manager, Operations of respondent telephonically confirmed that petitioner had indeed lost 80% of its link operators and on that premise it was asked to pay only 20% of the billed amount. Pursuant thereto, it sent a cheque for a sum of Rs. 1,61,377/- upon deduction of a sum of Rs. 3,293/- towards TDS by way of 20% of the subscription amount.

8. The first respondent, however, inter alia on the premise that the petitioner has not paid a sum of Rs. 25 Lakhs issued a demand notice on or about 11th May, 2010. It also issued a public notice on or about 12th May, 2010 in terms of Regulation 4.3 of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004 (The Regulations).

9. This petition has been filed questioning inter alia the aforementioned notices. The petitioner so far as respondent No. 2 is concerned has prayed for the following relief :-

“Direct the Respondent No. 2 not to give signals to any Cable Operator presently affiliated with the Petitioner without due compliance with the Interconnect Regulations.”

10. On receipt of the said notice dated 11.5.2010, petitioner protested thereagainst by its letter dated 20th May, 2010 inter alia contending :-

“It is however clear vide your letter dated 11.05.2010 that you are back tracking from the commitment given to us and are now claiming the sum of Rs.25,86,498/-. We believe that the same is being done by you only to somehow disconnect our network and cause losses to us. We convey to your good office that we are ready and willing to pay an adhoc amount form the amount claimed by you to prove our bonafide, however the same is applicable only on your coming forward for a joint survey at first.

We are also enclosing our Subscriber Line Report showing the present connectivity along with the list supplied to you at the time of execution of our

agreement in May, 2009. As you are well aware that our subscription agreement had come to an end and a new agreement has to be entered between us, we therefore request you to come forward for a joint survey on any convenient date, with one day prior notice to us, so that we can verify the subscription base and accordingly enter into a fresh subscription agreement on that basis needless to state that the adhoc amount paid would be adjusted against the new subscription amount arrived at between the parties effective from 01.04.2010 – 31-03-2011.

We therefore request you to withdraw your public notice dated 12-5-2010 as the same is causing a lot of losses to us on the ground as the presently affiliated operators are threatening to move away to Sree Communications as they fear loss of collection of subscription amounts, due to the possibility of disconnection.”

11. Along with the said letter petitioner annexed SLRs; the first one containing the names of 172 cable operators who were said to be there with the petitioner upto February, 2010 with a subscriber base of 33581. The second SLR disclosed the name of 119 cable/link operators from March, 2001. The third SLR contained the names of those cable operators who are said to have migrated to respondent No. 2 having 20,096 connections.

12. The petitioner contends that it was all along ready and willing to pay a lump sum amount to the first respondent and go for a joint survey.

13. The respondent, however, in its reply stated : -

- A) The agreement had been entered into 10.11.2009 on a subscriber fee of Rs.7,53,667/- but petitioner was always erratic in making payments.
- B) A joint survey was conducted but the petitioner did not cooperate.

14. The respondent No. 2, however, in its reply did not raise any specific defence, although generally denied and disputed the allegations made in the petition.

15. The petitioner filed a rejoinder to the reply of the first respondent inter alia contending :-

- (i) that the said purported agreement dated 10.11.2009 is a forged and fabricated document as evidently RW- 1 Mr. Samuel Rajan had filled up the blanks;
- (ii) It has unilaterally added the channels 'Aditya' and 'Chutti' although on the relevant date i.e. 10.11.2009

the same being free to air channels, could not have been shown to be the pay channels.

- (iii) The parties had only agreed that petitioner shall pay subscription amount of Rs.6,68,985/- per month and furthermore agreed to reduce the charges for 'Udaya TV' bouquet to nil.
- (iv) The area of operation shown in the agreement as Thiruvannamalai town only should be construed as Municipal area of the said town.
- (v) The total number of household within the town being 27,472 only it is wholly unlikely that that petitioner will have 29300 subscribers for SUN TV.

It was stated:

“As far as loss of subscriber base is concerned, this is a ground reality and the same need no confirmation of the respondent. At the best the respondent could have inspected the same for verifying the genuineness of the petitioners claim. This deliberately was not done by the respondent No. 1. Hence, the respondent No. 1 once refused to verify the ground reality regarding loss of subscriber base, now cannot be allowed to take advantage of its own latches. As a result in migration of subscriber base, the petitioner has made similar demand of reduction of subscriber

base to other broadcaster which was acceded by them. To quote a few M/s. Star Den Media Services has reduced from 3685 to 1078 subscribers, M/s. Zee Turner Ltd. has made a down-gradation from 2600 to 850 subscribers for the same account and M/s. ESPN has reduced the base from 2165 to 550 subscribers with respect to Thiruvannamalai account. (A copy of agreement and statements of other broadcasters are herewith enclosed as ANNEXURE – H. The above said documents would reveal that the other broadcasters comprehending the ground reality and have reduced the Subscriber base.”

(vi) The respondent No. 1 also signed the revised statement in a joint meeting dated 22.5.2009 which would clearly go to show that the agreement had been entered into on or about the same date.”

16. This Tribunal by an order dated 01.10.2010 framed a large number of issues, which are as under :-

- “(i) Whether an agreement was executed on 01.11.2009 between the parties?*
- (ii) Whether was the fall in the subscriber base of the petitioner on the commencement of business by respondent No. 2?*
- (iii) Whether the petitioner has been providing signals*

of the respondent to a larger number of subscribers than what has been disclosed to the petitioner?

- (iv) Whether the Statement of Account annexed by the Respondent is correct?*
- (v) Whether the petitioner cooperated in the joint survey ordered by this Hon'ble Tribunal?*
- (vi) Whether the petitioner has connected any MSO and not disclosed the same to the respondent?*
- (vii) Whether the petitioner is liable to pay to the respondent any sum? If yes, how much?*
- (viii) If the answer to issue No.6 is in affirmative then is the petitioner entitled to the signals of the respondent?"*

17. Mr. Ajay Kumar the learned counsel appearing on behalf of the petitioner would urge : -

- (i) As on the entering into the business of the MSO by respondent No. 2, petitioner has suffered a loss in subscriber base, the later was bound to give effect thereto like all other broadcasters did.
- (ii) The first respondent having not seriously denied or disputed the fact that the petitioner has lost about 80% of its subscribers, it ought to have to allowed reduction in the subscriber base in terms of the 2nd Proviso appended to Clause 10.2 of the

(Telecommunications and Broadcasting & Cable Services), Interconnection Regulations, 2004 as amended from time to time.

- (iii) The first respondent having committed forgery is liable to be proceeded against in terms of Section 340 of the Code of Criminal Procedure, 1973.
- (iv) If the contention of first respondent that the payments made by petitioner were erratic in nature is correct, it was expected to make demands for the arrears but from the joint statement of accounts dated 22nd May it would be evident that a settlement was arrived at pursuant where to only, the agreement was entered into by and between the parties on the said date itself.
- (v) From the statement of accounts filed by the parties, it will appear that whereas the arrears in the subscriber base had been given effect to, the decreases therein were not.
- (vi) The town of Thiruvannamalai having a total number of household of 27,472 only, it is wholly unlikely that the petitioner will have 29,300 subscribers of SUN TV.

- (vii) On the evidence of RW-1 Shri Samuel Rajan it would appear that he had admitted that he had filled up all the blanks in the agreement including the channels 'Aditya' and 'Chutti', and, thus, must be held to have committed an act of forgery and should be proceeded as such.
- (viii) In terms of the Clause 3.3 of the Regulations, it was obligatory on the part of broadcaster to cause service of invoices upon the MSOs indicating the arrears and the same having not been complied with, the petition should be allowed.

18. Mr. Maninder Singh, learned senior counsel appearing on behalf of respondent, on the other hand, submitted as under :-

- (a) The controversy with regard to the date of the agreement takes a back seat as admittedly the same expired on 31st March, 2010.
- (b) The petitioner having not contended that there has been a decrease in the subscriber base immediately prior to 15.3.2010, it is difficult to accept that

such huge migration took place within a period of 15 days.

- (c) In view of the fact that the petitioner himself had paid a sum of Rs. 1,61,377/- after deducting a sum of Rs.3293/- by way of TDS, it would appear, that the said sum reflected 20% of the subscription amount namely Rs.8,23,420/-.
- (d) Although respondent could not prove service of the invoices, petitioner itself having annexed the same for the months of June and July, 2009 with its rejoinder, it must be held to have admitted its liability, as in the said invoices the number of connectivity of each of the channels as also the amount of subscription fee had specifically been mentioned.
- (e) From a bare perusal of the letter dated 02.3.2010 issued by petitioner it would be evident that by reason thereof, he having merely made a request to reduce the subscriber base, the statements made

in para 8 of the petition on the part of Shri Samuel Rajan, the witness examined on behalf of respondent that he had agreed for reduction of subscriber base to the extent of 80% must be held to be wholly incorrect.

- (f) It may be true that the channels 'Aditya' and 'Chutti' became pay channels on and from 17th November, 2009, but as has been explained by RW-1 in his re-examination, the said channels were included in the agreement on the premise that any transmission thereof would attract the subscription fee from the month in which the supply commences and as would appear from the invoices issued from November onwards that charges for the said channels had been made only for the said months and, thus, this Tribunal must arrive at the conclusion that the agreement in question is not a forged and fabricated document.

19. Although a large number of issues have been framed by this Tribunal, the principal issues between the parties are as under : -

- (i) Whether the petitioner has made out a case for reduction of the subscriber base.
- (ii) Whether the first respondent has made out any case for issuance of the impugned notices dated 11th May, 2010 and 12th May, 2010.
- (iii) Whether in the facts and circumstances of the case any relief can be granted as against the respondent no. 2.

20. Before however, advertng to the rival contentions of the parties, we may notice that by reason of an order dated 28th May, 2010, petitioner was asked to deposit a sum of Rs. 20 Lakhs within a period of four weeks on compliance whereof respondents were asked not to give effect to the public notice. It appears that petitioner has deposited the said amount. The first respondent herein in its notice under Regulation 4.1 being dated 11th May, 2010 had contended that a sum of Rs. 25,86,498/- is owing and due from it.

21. We may, furthermore, notice that on petitioner's own showing some of the local cable operators have migrated to the network of

respondent No. 2. As the term of the agreement had already expired, this Tribunal in absence of the local cable operators having been impleaded as parties would not be in a position to give any relief to petitioner vis-à-vis respondent No.2.

We, therefore, are of the opinion that it may not be possible to do so.

22. The matter relating to reduction in the subscription fee during currency of the agreement is governed by Clause 10.2 of the Regulations. It reads as under: -

“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.”

A multi service operator may, thus, be held to be entitled to the relief by way of down gradation of subscriber base only in terms of the 2nd proviso appended thereto and not by reason of the main provision as also the first proviso.

23. The parties had taken resource to a joint survey.

The respondent in its reply inter alia contended as under: -

“It is stated that the survey was not conducted fully on account of non-cooperation by the Petitioner. However, even to the extent the survey was done, the respondent has discovered additional 1209 points, which have been malafide concealed by the petitioner and not filed alongwith the SLR annexed with letter dated 20.05.2010. The extra points as revealed by the Joint Survey are as follows :-

Name of Operator	Area	Points as per Joint Survey
N.D. Venkatesh	Part of Vengikal	602
N. Sundara	Deepam Nagar	79
R. Palani	Vengikal Pudur	96
K. Elumalai	Pai Gopuram	432
Total		1209

It is also submitted that in the Joint Survey, the Answering Respondent also discovered discrepancies with regard to seven operators in the SLR submitted by the Petitioner. It is submitted that from the Joint Survey, it has come to light that the Petitioner has concealed 729 points for these seven operators. The details are as follows:-

S. No.	Name of Operator	Area	Subscriber base as per the petitioner	Subscriber base discovered in Joint Survey
1.	Ramesh Nandha	Omsakthi Nagar	450	655
2.	Ravi	Vengikal	76	78
3.	Kumar V.O.C.	V.O.C. Nagar	200	171
4.	Vijay	Nachipattu	107	120
5.	Suganthi	LGGS	125	129
6.	Seenu & Seenu	Nehru Nagar	75	327
7.	Sundara Vadivel	Thearpalayam	125	407
		Total	1158	1887

It is further submitted that Petitioner has connected Shri Karpaga Vinayaga Star Vision, one of the Answering Respondent's

customer, without approval from the Answering Respondent since March, 2009. It is submitted that the affidavit of Shri M. Balamurugan, proprietor of Karpaga Vinayaga Star Vision, wherein he said that he was connected by the Petitioner since March, 2009 and paid a sum of Rs.3,80,000/- for March, 2009 to April, 2010 to Petitioner. A copy of the affidavit of Mr. Balamurgan dated 20.07.2010 is annexed herein as Annexure – R4. A copy of the joint survey report conducted from 17.06.2010 to 10.07.2010 is annexed hereto as ANNEXURE R-5.”

24. According to respondent, petitioner did not cooperate in the matter of conducting of the joint survey. Even the discrepancies pointed out in the aforementioned paragraphs would be deducible from the partial survey which was held.

25. In a case of this nature, the conduct of the parties plays an important role.

Although petitioner denies and disputes the receipt of the invoices, along with its rejoinder, it itself has annexed two invoices being for the month of June and July, 2009.

In the said invoices, the number of subscribers has been stated. One of the said invoices reads as under : -

Channel Plus – T.N.4, Norton Road, Mandavali, Chennai – 600 025
Tel. 044- 2464 8181 Fax 044 – 2464 8275**Channel Plus – T.N.**
(A Unit of Kal Comm Pvt. Ltd.)**INVOICE**

Bill Date 05/06/2009

P.V. Kalyanasundaram THIRUVANNAMALAI CABLE NETWORK 117, Kattabomman Street, Tiruvannamalai Thiruvannamali Tamil Nadu 606601	Account No.	Invoice No.	Billing Cycle
			01/06/2009
	10009100	B1-422491	30/06/2009
Payment Due Date: IMMEDIATE			

S. No.	Particulars	No. of Subs.	Rate Rs.		Amount (Rs.)
	Gemini Bouquet				
	– 1	7375	10.40		76,700.00
	KTV Bouquet	19645	15.60		306,462.00
	Sun TV	29300	12.40		363,320.00
				ADD Service Tax 10%	74,648.2
				ADD Education Cess 2%	1,492.56
				ADD Secondary & Higher Education Cess 1%	746.48
				Net Amount	823,369.64
Balance B/F	Payments/Other Credits		Adjustments (+/-)	Current Bill	Amount Due (Rs.)
876,234.00	-806,409.00		0.00	823,369.64	893,194.64

The amount of subscription fee stated therein is Rs.8,23,369.64/-. On a bare comparison of the said figures with the one contained in the agreement dated 10th November, 2009, it will be evident that the same tally with each other.

26. It, however, stands admitted that as on 10th November, 2009 the channels 'Aditya' and 'Chutti' were 'free to air' channels. In the agreement the connectivity of the said channels were stated to be 196 each wherefor a sum of Rs.6,185/- was payable.

Mr. Samuel Rajan RW-1 in his cross examination categorically admitted that except the marked portion 'D' which was filled up by some office clerk, the portions marked A, B, C, E and F of the agreement were in his own hand writing. He, furthermore, admitted that the aforementioned channels as on 10th November, 2009 were 'free to air channels'. He also admitted that those channels became 'pay channels' w.e.f 17th November, 2009. He, however, denied and disputed that the said agreement was forged and fabricated.

27. He was re-examined on 3rd December, 2010. He, in his re-examination, stated as under: -

“Q. If Aditya and Chutti TV Channels became pay channels on 17.11.2009, then why did you include them in your Agreement dated 10.11.2009?”

A: Since there were only seven days, the Petitioner and the Respondent, mutually agreed to enter these two channels into the Agreement and bill for the same for the month.

(This question was objected to by the Counsel for the petitioner for the reason that this has been put in the mouth of the witness during lunch break just to fill up the gaps in the story of the respondent.)”

It is possible, as noticed hereinbefore, that the witness might have considered its earlier answers and got himself re-examined but the fact remains that he has given an explanation.

28. The petitioner’s counsel could have cross examined him on the said point. He did not choose to do so. It is not disputed that the portion marked (D) of the agreement was written by some office clerk whose name RW-1 could not recollect.

He, however, very fairly stated that most of the other blanks have been filed up by himself in his own pen.

We would, however, assume that the agreement was served upon petitioner at a later date. Would that have any effect on the notices issued by the first respondent is the question?

We have noticed heretofore that in the invoices issued for the months of June and July 2009, not only the number of connectivity was mentioned but also the amount payable by petitioner has been mentioned. It is also beyond any doubt or dispute that the agreement in question was given a retrospective effect.

29. Whereas according to respondent, the amount of subscription fee was Rs.7,52,667/- per month, petitioner contended that the same was only Rs.6,29,676/-. On what basis such a figure was given by petitioner is not clear.

30. Admittedly the agreement was to come to an end on and from 31st March, 2010. There is nothing on record to show that petitioner had started negotiations for renewal of the agreement from January, 2010. We would, however, even assume that in favour of petitioner.

Despite such assumption, it is difficult for us to accept that the extent of exodus of the cable operators from the network of petitioner to the network of respondent No. 2 would take place within a few days.

The first respondent supplied the decoders to respondent No.2 only on 15th March. The first letter of petitioner is dated 23rd march, 2010. It said to have served upon a notices to the same effect on some other broadcasters with whom it had entered into agreement on a reduced subscriber base. A letter was also written to respondent No. 2.

It's in the aforementioned backdrop that the said letter should be construed. By reason of the said letter petitioner has made a request for reduction. It was, therefore, not correct for it to contend having regard to the contents of the said letter that reduction in the subscriber base had already taken place. The petitioner paid a sum of Rs.1,61,377/- by way of 1/5th of the subscription amount.

31. The forwarding letter of petitioner being dated 30th April 2010, reads as under: -

*“Sub: Payment for reduced subscription based for
Thiruvannamalai*

Reg : Our letter dated 23.03.2010

*Vide our letter dated 23.03.2010
we have informed you about the migration
of majority of our operator to new MSO M/s.
Sree Communications. In the said letter we
have asked to reduce our subscriber base to
80%.*

*We herewith enclosed a cheque for
Rs.1,61,377/- (One Lakh sixty One
Thousand Three Hundred Three Hundred
Seventy Seven after deducting TDS of
Rs.32931-. towards the existing subscriber
base i.e 20% and request you to kindly mute
the changes in your subsequent bills with
retrospective effect from 01.03.10.”*

On a bare comparison of the said forwarding letter with the statement made in paragraph 9 of the petition, it would appear that the contentions made in the pleadings are not correct. From the statement of account filed by petitioner, it is evident he had been making payments on an ad-hoc basis; receipt of such payments being not in question.

32. The change in the story, however, starts with petitioner's letter dated 20th May, 2010, when notice under Regulation 4.1 as also the public notice were issued.

33. Evidently in the said letter petitioner had asked for a joint survey. It had sent a cheque along with the said letter. According to respondent in the joint survey it was found that some of the operators mentioned in the SLR were not there and some of the operators had a larger subscriber base.

The first respondent contends that the story set up by petitioner that Mr. Karpaga Vinayaga was a direct subscriber of first respondent for Sun TV, although it had been taking supply of signals of the other channels from petitioner cannot be accepted as it being a Multi Service Operator, in absence of evidence to the contrary, it was not possible for it to segregate the number of channels.

We may also notice that petitioner itself has relied upon its statement of account dated 22.5.2009 from a perusal whereof it would appear that from March, 2008, subscription fee had been reduced to Rs.6,29,676/-. It may not, thus, be correct to contend that respondent had never agreed to reduce the subscription fee.

34. In this case respondent No. 2 admittedly had received decoders on and from 15th March, 2010.

35. Mr. Maninder Singh may be correct in contending that within period of 15 days nothing much can be done for reduction of subscriber base. But arriving at a correct subscriber base would have relevance for the purpose of renewal of the agreement. Pursuant to or in furtherance of an interim order passed by this Tribunal, petitioner had been supplying signals to its own customers. It has not been denied or disputed that it has been operating as a MSO in as many as 18 circles. The petitioner had already renewed the agreement with respondent No. 1 in respect of 14 out of 18 circles.

36. A joint survey was undertaken. As indicated heretobefore, respondent points out some discrepancies therein. According to it, the additional number of subscribers would be 13,485 in addition to what has been disclosed by petitioner.

37. We, however, think that having regard to the provisions contained in the 2nd Proviso appended to Clause 10.2 of the Regulations, firstly an attempt should be made for reconciliation of accounts of the parties.

The respondent No. 2 being a new MSO and having admittedly started its operation w.e.f. 15th March 2010 only, the number of local cable operators joining was not only known to respondent No. 2 but respondent No. 1 as well.

To the said extent, having regard to the provision contained in 2nd Proviso appended to Clause 10.2 of the Regulations, petitioner may be entitled to deduction. If such an exercise is carried out, in our opinion, neither of the parties would be prejudiced.

38. The matter may, however, be different if petitioner, in the meanwhile, has increased its subscriber base in the area. We, for the said reasons, are of the opinion that a joint survey may be carried out. But before the same is undertaken, at first the reconciliation of accounts may be carried out so as to enable first respondent to continue to supply signals to the network of petitioner on that basis.

39. We have, however, no doubt in our mind that petitioner had entered into an agreement with respondent No. 1 with its eyes wide open. It has also been receiving signals and its subscriber base was

also the same as had been shown in the invoices vis-à-vis the agreement.

40. So far as the 'Aditya' and 'Chutti' channels are concerned, we are satisfied that the bills for the said channel having been made from the November, 2009, the explanation offered by Mr. Samuel Rajan in his re-examination is correct. It may be true that in his cross examination he admitted that the 'Aditya' and 'Chutti' channels became 'pay channels' only from 17th November, 2009 whereas the agreement entered into on 10th November, 2009. We also accept the explanation offered by Mr. Maninder Singh that a MSO is required to pay the subscription fee for the channels or the whole month even if he takes it for the amount for a fraction thereof and, thus, it is possible that the said two channels with a limited subscriber base involving the subscription fee more than 6000 might have been inserted.

41. However, the agreement between the parties in respect of other channels in relation where to there is no dispute particularly in view of the fact that petitioner had been receiving invoices and having been making payments accordingly the bills submitted to it must be held to be correct.

The invoices served upon petitioner by respondent from time to time clearly go to show that the subscriber base had always been kept in mind.

42. We, in the facts and circumstances of the case are also of the opinion that the contention of respondent No.1 to the effect that the agreement had in fact been entered into on 10th November, 2009 and not in May 2009 is correct.

43. If that be so, petitioner was liable to pay the subscription fee from 1.4.2010 to 31.3.2010 and, thus, there was no interference in the subscription base as on 15.3.2010, cannot be disputed.

44. The action of petitioner in trying to deposit only 20% of the entire subscription fee also clearly goes to show that petitioner was aware of the exact amount of the subscription fee. It is of some significance to notice that according to petitioner the agreement with regard to the reduction of the subscription fee on the part of Mr. Samuel Rajan arose not out of a conscious decision of the parties hereto but by reason of a legal fiction.

We may, in this behalf, notice two of its letters.

“To

*M/s. Sun Distribution Services Collection A/c
No. 4 Norton Road, Mandaveli,
Chennai.*

Dear Sir,

*Subject: Payment for reduced subscription based for
Thiruvannamalai.*

Reg: Our letter dated 23.03.2010

*Vide our letter dated 23.03.2010, we have informed you
about the migration of majority of our operator to new
MSO M/s. Sree Communications. In the said letter we
have asked to reduce our subscriber base to 80%.*

*We herewith enclosed a cheque for Rs.1,61,377/- (One
Lakh Sixty Thousand Three Hundred Seventy Seven only)
after deducting TDS of Rs.3293/- towards the existing
subscriber base i.e. 20% and request you to kindly mute
the changes in your subsequent bills with retrospective
effect from 01.03.10.*

Thanking you

Yours truly

*For Thiruvannamalai Cable Network
Authorized Signatory”*

“To

*M/s. Sun Distribution Services,
No. 4, Norton road,
Mandaiavelli,
Chennai - 28.*

Sir,

*Sub: your public notice in Dinakaran dated
12.05.2010 regarding Tiruvannamalai area.*

*Ref: our letter dated 23.03.10 addressed to m/s.
channel plus.*

*We are surprised to see your aforesaid notice for
disconnection. We would like to state as follows.*

*You are aware that a new MSO by the name “Sree
Communications” is operating at Thiruvannamalai from
March, 2010 with your signals. The fact remains that
80% of our operators got migrated to the new network
which was informed to your by a letter dated
23.03.2010. In the said letter we have asked you to
reduce our billing by 80% subsequently our telephonic
reminders to you has gone vain in getting any response
from you. Since you have not replied to our request
even after 2 months, our request for reduction of 80%
shall be deemed to be admitted by you.*

You are aware that we have no outstanding up to February, 2010.

We herewith enclose a cheque for Rs.1,76,377/- (One Lakh sixty seven thousand three hundred and seventy seven only)towards the total outstanding payable to you.

We have already paid the subscription amount for the month of April, 2010 for Rs.1,67,377/- (Connectivity Charges) vide Cheque No. 0008094 dated 30-04-2010 drawn on HDFC bank, Thiruvannamalai branch. The same was deposited by you and credited to your account on 5-5-2010 without any objection from you. Inter alia the only due payable by us is for the month of March, 2010.

Since we have paid the outstanding they said disconnection notice would go infructuous.

In the said situation we here by request you to immediately on receipt by this letter withdraw your disconnection notice dated 12.05.10.

Thanking you

Yours truly”

45. An agreement cannot be an outcome of a legal fiction. In a situation of the present nature, for the purpose of novation of contract it was obligatory that the parties had intended to substantially alter/modify the commercial terms of the agreement.

An agreement in writing should ordinarily be varied and modified by another agreement in writing.

According to petitioner, however, the terms of the agreement had been altered orally and that too on phone. The telephonic conversation by and between petitioner and Mr. Samuel Rajan has not been proved.

The petitioner has introduced the story of the oral agreement.

It is also not disputed that petitioner had been paying at the rate of Rs.1,61,000/- and odd, before filing of this petition. We may, however, mention that there is a controversy with regard to the subscriber base in respect of Star Vision of Mr. M. Balamurugan.

46 Mr. Samuel Rajan in his deposition stated as under :-

“Q: Is it correct that Mr. M. Balamurugan is a MSO in its own capacity and getting the signals of Sun TV directly from you?”

A: Yes.”

The statement that he had been taking supply of the SUN TV directly would not mean that the same was being done for all the

periods. To a pointed query as to whether it is possible to segregate one channel from the other channels by petitioner while transmitting the signals through the cable to the subscribers was not assumed.

47. We also do not find any substance in the contention of Mr. Ajay Kumar that the statement of account is full of inconsistencies.

We have seen the statements of account vis-à-vis the invoices and we do not find any inconsistency therein.

48. For the reasons aforementioned, this petition is disposed of with the following directions :-

- 1) The parties must meet within one week from date with their respective statements of accounts so as to enable them to reconcile their own statements vis-à-vis the amount of subscribers lost by petitioner and gained by Respondent No. 2 herein and consequent difference in the subscription fee payable.
- 2) From the month of April, 2010 till a new agreement is arrived at including the period during which this petition remained pending, petitioner shall pay the amount of subscription fee to

first respondent herein for obtaining supply of signals despite expiry of the agreement on 31st March, 2010, on the basis thereof.

- 3) A joint survey shall be conducted only in respect of the additions of the subscribers, if any, wherefor petitioner must submit its SLR beginning from April, 2010 till January, 2011 within one week.
- 4) The SLRs submitted by petitioner shall be subject to verification by Respondent No.1 and may be subjected to furnishing of evidence in that behalf by it as well as the joint survey, if any, the parties intend to carry out.
- 5) The result of the joint survey shall be the basis for increase or decrease in the payment of the amount of the subscription fee in terms of this Tribunal's order i.e. upon entering into negotiation with regard to the subscriber base.

49. In the event the parties enter into an agreement, for the years for the 1st April, 2010 to 31.3.2011 and onwards, a copy thereof should be handed over immediately to the petitioner.

The first respondent, it is expected, keeping in view the old relationship shall enter into negotiation with petitioner with an open mind.

Even for the said purpose, the agreement may be entered into in the Chennai office of the respondent.

50. There cannot be any doubt or dispute that petitioner will continue to pay the subscription fee in terms of the agreement. However in the event no payment being made, Respondent No. 1 shall be at liberty to discontinue the supply of signals of its channel upon service of a notice in terms of Clause 4.3 of the Regulations.

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

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(S.B. Sinha)
Chairperson

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(G.D. Gaiha)
Member

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

/NS/rkc