

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 03.06.2011

Petition No. 367 (C) of 2010

(M.A.No.126 of 2011)

M/s Lakshma Reddy Cable Network

...Petitioner

Vs.

Channel Plus A.P & Anr.

...Respondent

BEFORE:

HON'BLE JUSTICE S.B. SINHA, CHAIRPERSON

HON'BLE MR. G. D. GAIHA, MEMBER

HON'BLE MR. P.K.RASTOGI, MEMBER

For Petitioner

: Mr. G. Tushar Rao, Advocate

For Respondent No.1

: Mr. Nitin Bhatia, Advocate

Mr. Abhishek Malhotra

For Respondent No.2

Mr. Philemon Nongbri, Advocate

Mr. B.S. Sai, Advocate

JUDGEMENT

S. B. Sinha

The petitioner is a Local Cable Operator. The first respondent is a content aggregator of the Sun group of channels. The respondent No.2 is a multi service operator.

The petitioner has entered into an agreement with a multi service operator for a part of the town of Guntur, commonly known as Guntur Vaari Thota.

The respondent No.2 has entered into an agreement with the first respondent herein on or about 15th October 2009 for the areas mentioned in Annexure 1 thereto. The said area of operation of the respondent admittedly does not extend to Guntur Vaari Thota.

Inter alia on the premise that second respondent has been illegally transmitting signals of the channels of first respondent in the said area, it made various complaints.

The same however, on the premise of having gone unheeded, this petition has been filed claiming interalia the following reliefs:

“(i) Direct the respondent no-2 M/s Raghavendra Cable Network to stop from illegally supplying the Gemini Bouquet along with other free to air channels by transgression into the authorised areas of the petitioner specified in the contract dated 1/6/2010 executed between the petitioner and the MSO under the Interconnect Regulations, 2004 and as amended from time to time and which is in force till 31st May, 2011 and pass a decree of injunction to that effect; (ii) direct the respondent no-1 M/s Channel Plus Communication Limited to uphold validating sanctity of the contract between the petitioner and the area MSO and thereby restrain the respondent no-2 from transgressing into the area of the petitioner and to supply signal only in the area in which respondent no-2 East authorised and;...”

The first respondent contends that in fact, second respondent had committed acts of piracy, which is denied and disputed by it. It, in the Reply contended:

“VI. It is most respectfully submitted that the Respondent No. 2 has at no point in time transgressed its area of operation and has at no point in time gone beyond its area of operation.

VII. Further, the respondent number two is willing and ready to state on affidavit on oath that the Respondent No. 2 will not supply the Sun TV channels beyond the areas as authorised by the Respondent No.1 broadcaster”

This Tribunal, by an interim order dated 24th number 2010 directed as under:

“It is stated by Mr. Nitin Bhatia, learned counsel appearing on behalf of the Respondent No. 1 that the Respondent No. 2 in fact had been indulging in commission of piracy wherefor it had also filed an application before this Hon’ble Tribunal, being M.A. No. 56 of 2010 in Petition No. 9(C) of 2010. Despite service of notice, the Respondent No. 2 does not appear. We, therefore, are of the opinion that the petitioner has established a prima facie case that the Respondent No. 2 has been indulging in unauthorized transmission of signals without entering into a valid agreement with the Respondent No.1 and as the said act of piracy is ex-facie unlawful, the Respondent No. 2 is directed not to resort to the unauthorized cable casting in the area of the petitioner Guntur Vaari Thota for which there is a subsisting agreement between the petitioner and the Respondent No.1.

Inter alia on the premise that second respondent has committed breach of the said interim order, petitioner has filed an application purported to be under Section

20 of the Telecom Regulatory Authority of India Act, 1997 (the Act) which has been marked as M.A No. 367 (C) 2010. By an order dated 12th May, 2011, having regard to the fact that the parties had already filed evidences in relation thereto, the said Miscellaneous Application was directed to be heard along with the main matter.

Before however, we advert to the respective contentions of the parties, it may be noticed that second respondent on the premise that it intended to enter into an agreement in respect of the expanded area of operation filed a petition before this Tribunal which was marked as Petition No. 9 (C) of 2010.

In view of an offer made by first respondent herein that the parties may enter into negotiations for renewal of the existing agreement as also for considering its request for expansion of the area and the said offer having been accepted by petitioner, the said petition was disposed of directing:

“The petitioner may also supply details of its subscriber base in the expanded area including the information as to whether it proposes to serve any local cable operator and/or the subscribers of the local cable operators as also the numbers of direct connectivity with the sufficient particulars of the subscribers. Other requisite details which are usually required to be furnished may also be furnished. However, in the event the negotiations between the parties do not fructify into a settlement for reason whatsoever, the respondent shall serve fresh notice upon the petitioner under clause 4.3 of the Interconnect Regulations.

In view of the aforementioned agreement between the parties and subject to the leave granted to them to approach this Tribunal if any fresh cause of action arises, I am of the opinion that interest of Justice would be subserved if this petition is disposed of on the above terms”

By an order dated 10 February 2011, interalia the following issues were framed:

“(i) Whether respondent no.2 is indulging in unauthorized cable casting in the area of the petitioner in FTA channels of respondent no.1?

(ii) Whether Guntur Vaari Thota is covered in the agreement between respondent no.1 and 2?

(iii) Whether respondent no.1 has taken any action against unauthorized cable casting by respondent no.2 in the areas of the petitioner?”

In support of its case, the petitioner has examined three witnesses viz. Shri. A. Srinivasa Reddy, its proprietor, Shri Kalyanam Narayanarao, the videographer and Shri. Avula Srinivasareddy, the manager of the petitioner who has translated the conversation recorded in the video CD from Telugu to English.

The said witnesses have been cross-examined by counsel for respondents. Respondent No.2, in support of its case has examined T. Madhusudan Rao, the proprietor of the firm. Respondent No. 1 has, however not examined any witness.

Mr. Tushar Rao, learned counsel appearing on behalf of petitioner, would contend that the area of operation so far as distribution of channels of first

respondent is concerned having been earmarked, second respondent could not have transgressed its area of operation and was bound to keep its area of operation specified in the agreement.

According to learned counsel, second respondent must be held to be bound by its statements made in its reply.

In any event, from the CD proved by Mr Kalyanam Narayan Rao, it is evident that the fingerprints of the viewing cards of respondent No.2 has been recorded so far as transmission of 'Gemini' channel is concerned within the area of operation of petitioner.

Mr Nitin Bhatia, learned counsel appearing on behalf of first respondent would contend that it took all steps to stop the acts of piracy on the part of second respondent and in fact terminated the agreement on the said ground wherefor only it had filed the aforementioned Petition No. 9 (C) of 2010.

Mr. Philemon Nongbri, learned counsel appearing on behalf of the respondent No.2 would submit that:

- (a) the petitioner has no locus to file the present petition
- (b) CD filed by it is not admissible in evidence

(c) In that view of the matter, this tribunal should not consider the video recording which is said to have taken place in January, 2011. The CD in fact is a manufactured one.

(d) From the evidence of PW-2 it would appear that the video was recorded in a cassette but petitioner has produced a CD, which would clearly go to prove that the same is a manufactured one.

Second respondent, as noticed heretofore, has admitted that it has not entered into any contract with first respondent in respect of the area in question. It, furthermore contended that neither it has not nor in future, shall, without any authority, carry on operations of distribution of TV channels of the respondent No. 1 in that area.

In view of the aforementioned statements made by or on behalf of the said respondent, in our opinion, no further direction need be issued except making the interim order absolute.

We may however, hasten to add that neither petitioner claims any exclusivity nor the Regulations framed by the Regulator in exercise of its power under section 11(1)(b) of the Act, envisages the same.

The Act contemplates competition. The competition on the part of the players in the field must, however be a fair one. The broadcasters are required to distribute

its channels to distributors of TV channels on a non-discriminatory basis as envisaged under Clause 3.2 of the Regulations.

In various decisions, this tribunal has opined that the area of operation of a distributor of a TV channel plays an important role.

See *Wire and Wireless (India) Ltd. vs. MSM Discovery Pvt. Ltd. and Anr.* Petition No. 29 (c) of 2010 decided on 16.12.2010

Tamizhaa Cable Network v. Sun Distribution Services, Petition No.31(C) of 2010 decided on 6th January 2011

In that view of the matter, whether for expansion of the agreed area or for a new area, an agreement has to be entered into by and between a broadcaster and the distributor of TV channels.

It, however, appears that no such agreement despite the aforementioned order dated 17 February 2011 passed in petition number 9 (C) of 2010 has yet been entered into by and between respondents inter se.

There cannot, however, be any doubt or dispute that despite this order, respondents may enter into negotiations so as to enable second respondent to retransmit the channels of first respondent.

Mr. Tushar Rao, however would urge that in view of the evidences brought on record, a strong case has been made out for initiating a proceeding against second respondent under Section 20 of the Act.

For the aforementioned purpose, we may notice the related background facts. The petitioner made an allegation of piracy on the part of the second respondent in January 2010. However, it made a complaint to its MSO in relation thereto only in March 2010.

This petition has been filed on 01.11.2010. It had filed applications for interventions. It furthermore filed an application for hearing both the petitions analogously which was marked as M.A No. 350 of 2010. The said application was rejected.

First respondent also filed two applications in the said Petition No. 9(C) of 2010 which were marked as M.A Nos. 56 and 237 of 2010 alleging piracy and craving leave of this Tribunal to file certain documents and CDs alleged to have been recorded by first respondent. The said applications were dismissed by an order dated 22.10.2010.

The first respondent has not referred to the said order in its reply. We have noticed heretofore the offer made by first respondent in the said petition, which was recorded by the Tribunal in its order dated 24th November, 2010.

The petitioner filed the MA only on 08.04.2011. Sri Srinivasa Reddy, however, filed his evidence on 23.02.2011 wherein the following statement was made:

"I further submit that despite the restraint order dated 24/11/2010 passed by this Hon'ble Tribunal against the respondent no.2, the unauthorised cable casting is still being continued blatantly."

The respondent No.2 filed its reply on 10.02.2011. As indicated heretofore, Mr. Kalyanam Narayanarao has prepared a video recording only on 19.01.2011 which according to second respondent has been manufactured.

Mr. Tushar Rao on a query made by us as to whether the said CD has been proved in accordance in terms of the provisions contained in Sections 65-B of the Indian Evidence Act very fairly stated that, no certificate has been proved as is required thereunder.

Apart from other objections raised by second respondent as regards admissibility of the said CD, there cannot be any doubt or dispute that in absence of any certificate as envisaged under Section 65B of the Indian Evidence Act, the CD cannot be said to have been proved. It is, thus, inadmissible in evidence.

Mr. Tushar Rao would, however, urge that we may despite the same look into the affidavit and cross-examination of the videographer, Mr. Kalyanam Narayanarao.

The said witness, in his evidence stated:

"I do not know how to use software like Photoshop and other software relating to photography.

Q: Have you made and prepared the CD Ex. PW-1/6?

A: Yes

Vol. After shooting the sequence in the video cassette High Court and downloaded on to computer and then prepared the CD at my friend's shop and the CD, EX. PW-1/6 bears my signature in red on the CD.

Q: have you produced the equipment or the camera?

A: I have not brought/produced the equipment or the camera with which I shot the sequence.

Q: Have you produced the video cassette?

A: No

Vol. Once is the original recording is downloaded on to a CD, the master cassette is reused for next customer.

Q: Is it correct that this CD is a copy of the cassette?

A: it is an original copy of the cassette.

Q: How do you know Mr A Srinivasa Reddy?

A: I met him in a marriage where I was shooting. Mr Reddy ask me if I can shoot for him.

(Ld. Counsel for the respondent requests for running the CD on the system)

Q: Is it correct that starting of the CD, your camera was already fixed in the room?

A: yes

Q: Is it correct that about 2-3 minutes except for the screen you can not see anything?

A: Yes, it is correct.

It is correct to state that most of the time the camera is focusing only on the TV screen.”

The CD which has been produced, is evidently not the original.

If it is a copy from a Cassette, how the contents of the said cassette had been transferred to the said CD has not been explained. Why the original cassette has not been produced has also not been fully explained.

We, therefore, have no hesitation in coming to the conclusion that neither the said CD is admissible in evidence nor can the same be said to have been proved in accordance with law.

No action relying on or on the basis of the said CD, therefore, is possible to be taken against the second respondent in terms of Section 20 of the Act.

Even otherwise, keeping in view the nature of the materials produced before us, no such case has been made out.

The said Miscellaneous Application, is, therefore dismissed.

The Petition, however, is disposed of on the above terms without any order as to costs.

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

.....
(G. D. Gaiha)
Member

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

//Shree//
03.06.2011