

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated : May 30, 2011

Petition No.351(C) of 2010

Neelkanth Star Multiple Networks

...Petitioner

Vs.

STAR DEN Media Services Pvt. Ltd.

...Respondent

BEFORE:

HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON

For Petitioner : Mr.Vineet Bhagat, Advocate

For Respondent : Mr.Gaurav Juneja, Advocate

J U D G M E N T

The petitioner is a multi service operator operating in the areas of Bilaspur and Barmana in the State of Himachal Pradesh. The said two areas are distinct and separate areas being situate at a distance of 40 kilometers from each other.

The parties hereto entered into an agreement for supply of signals of the channels of respondent on or about 5.2.2010 in respect

of 8 areas; whereas areas 1 to 4 pertain to Bilaspur, items 5 to 8 mentioned therein pertain to Barmana.

They read as under:

“Gram Panchayat area of Berry only.
Gram Panchayat area of Pangaian only.
Gram Panchayat area of Dehar only.
Gram Panchayat area of Barmana only.”

The petitioner, however, contends that as there existed an apprehension of illegal cable cutting by others, a request was made for entering into a separate agreement for the areas pertaining to Barmana to which respondent agreed and another agreement was entered into on or about 15.2.2010.

The areas covered by the said agreement are:

“Gram Panchayat area of Khater only.
Gram Panchayat area of Barmana only.”

The grievance of the petitioner is that despite deletion of certain areas from the agreement dated 5.2.2010 and incorporation thereof in a subsequent agreement, respondent continued to charge the same subscription fee in respect of the said agreement dated 5.2.2010. The second grievance of the petitioner is that although on or about 1.4.2010, the Disney Group of channels went out of the bouquet of the respondent no discount therefor has been allowed. It is also alleged

that the annexures appended to the amended agreement were got signed by the petitioner in blank and manipulations were made in respect of the price vis-à-vis the subscriber base.

A list of channels has been mentioned in the amended agreement at annexure `A' therein.

From Annexure-C appended thereto it would appear that although the Disney channels were not mentioned therein, two Fox Channels were mentioned as a part of the bouquet for which no decoder was given.

The decoders supplied to the petitioner are admittedly mentioned in Annexure D to the said agreement.

The third grievance of the petitioner is that decoders supplied to it were not activated on the same day and in fact there was a time gap of about one month in the matter of activation of the decoders supplied for the Barmana area and the Bilaspur area. The petitioner, therefore, contends that the petitioner was entitled to a discount from the respondent in that behalf.

On the aforementioned premise the petitioner has filed this petition claiming, inter alia, the following reliefs:

“(i) Direct the Respondent to reconnect the supply the signals to the cable TV Network of the petitioner.

(ii) Direct the Respondent to maintain continuous and uninterrupted supply of its signals to the Cable TV Network of the Petitioner.

(iii) Direct the Petitioner to give adjustment for the channels which have been removed from the Bouquet of the Respondent and which have been subscribed by the Petitioner.

(iv) Direct the Respondent to raise regular invoices with the Petitioner.

(v) Direct the Respondent to reconcile the accounts with the Petitioner;

(vi) Award costs of the litigation;

(vii) Pass any other such order as this Tribunal may deem fit and proper in the facts/circumstances of the present case."

The contentions of the respondent, on the other hand, are:

- (i) Two cheques issued by the petitioner for sums of Rs.51,051/- and Rs.17,000/- bounced.
- (ii) It is incorrect to contend that the petitioner was not supplied with any annexures with the agreement.
- (iii) In fact the petitioner failed and/or neglected to make any payment both in respect of the agreement pertaining to the area of Bilaspur as also Barmana.
- (iv) The petitioner only in its rejoinder has made out a new case that the area of Barmana was also included in the agreement dated 5.2.2010 contrary to the

stand taken by it in the petition itself which would also be evident from the fact that no grievance was raised by the petitioner at any point of time prior to filing of the rejoinder, either in any of the correspondences or even in its legal notice.

- (v) Despite directions of his Tribunal directing the petitioner to make payments in respect of both Bilaspur area and also Barmana area having regard to the fact that the supply of signals to the petitioner's network had already been disconnected, no payment was made in regard to the Bilaspur Network of the petitioner, the decoders have not been returned and, although some payments were made for the Barmana area, subsequently payments in relation thereto were also stopped and in that view of the matter the petitioner being in contempt of this Tribunal is not entitled to any relief.
- (vi) The petitioner has not raised any contention that it was made to pay twice over for the same area in the petition, it should not be permitted to raise such a contention before this Tribunal.

Before, however, we advert to the rival contentions of the parties, we may notice that admittedly supply of signals to the petitioner's network was discontinued by respondent much prior to the filing of the present petition before this Tribunal on 19.10.2010.

This Tribunal by reason of an order dated 20.10.2010 while noticing the principal contentions raised by the parties directed as under:

"Mr. Gaurav Juneja, the learned counsel appearing on behalf of the respondent, on instructions, submits that after the Disney Chanel went out of its bouquet, the respondent has entered into a separate agreement with the petitioner and has not been charging for the Disney Channel. However, according to Mr. Juneja, although in the notices dated 4.10.2010 which are on pages 75 and 77, a sum of Rs.27,106/- and Rs.18,190/- have been shown to be payable by the petitioner, the petitioner has, in fact, not paid the sum of Rs. 1,03,670/- for the network of Bilaspur and Rs.38,215/- for its network of Barmana is payable by the petitioner. In support of the said contention, Mr. Gaurav Juneja has placed before us certain documents including copies of the balance sheet of the aforementioned networks of the petitioner. Keeping in view the fact that the signals of the petitioner stood disconnected on and from 8.10.2010, we direct that in the event the petitioner makes payment of the said sum namely Rs.1,03,670/- for Bilaspur Network and Rs.38,215/- for its Barmana Network, the signals of the petitioner shall be restored within 48 hours from the date of payment. This interim order shall be without any prejudice to the rights and contentions of the parties at the time of final hearing.

The petitioner, on restoration of signals, must also pay the stipulated monthly payment to the

respondent regularly, wherefor the respondent shall issue the invoices.

This order shall, however, not come on the way of the parties to re-negotiate the terms as it is stated by Mr. Juneja that a few channels have since been left respondent's bouquet.

When it's attention was drawn to the fact that two cheques issued by the petitioner being for the sums of Rs.51,051/- and Rs.17,000/- were dishonoured, this Tribunal observed that for obtaining signals of the channels of respondent, petitioner must pay the entire amount of subscription for including the amounts covered by the bounced cheques. By reason of an order dated 16.11.2010 it was clarified:

"It is made clear that subject to payments of the entire amount, including the amount under the bounced cheques, the interim order shall come into effect. In the event, the petitioner makes payment in terms of the order of this Tribunal and the signals are stored, the petitioner shall continue to pay the monthly subscription charges."

Indisputably the petitioner did not clear off its dues in respect of its Bilaspur Network. A cheque for a sum of Rs.38,320/- in respect of Barmana Network was tendered only on 24.11.2010.

The petitioner was directed to make further payment of Rs.70,895/-.

The petitioner in support of its contention has examined its proprietor Shri Ajay Dwivedi.

He in his cross-examination admitted: -

1. Bilaspur Municipality and Barmana are two different areas.
2. No letter was issued to show that respondent was informed that it had been raising double charges for the area of Barmana.
3. No such statement even has been made in the petition.
4. Service tax is being paid on the basis of the input credit mentioned in the invoices raised by the respondent.
5. He has received the invoices till September, 2010.

Although before us two agreements namely the agreement dated 5.2.2010 covering both Bilaspur and Barmana and the agreement dated 15.2.2010 covering two villages of the Barmana area have been produced, petitioner in paragraph 5 of the petition has clearly admitted that he was required to pay a sum of Rs.59,966.34/- paise for the village of Bilaspur and its adjoining areas and a sum of Rs.15,4,27.80 paise for the village of Barmana and its adjoining areas which were the subject matter of two different agreements being dated 5.2.2010 and 15.2.2010.

The petitioner even in its legal notice dated 12.10.2010 stated as under:

"We are concerned for our client, Neelkanth Star Multiple Networks, who is a MSO transmitting/retransmitting signals of TV Channels in the areas of Bilaspur and Barmana and having its office at Shop No.6, Gurudwara Market, Bilaspur, represented through one of its Partners Mr. Ajay Dwivedi, having valid Subscription Agreements for two of its Networks situated at Bilaspur and Barmana, who has placed in our hands the captioned letters, we hereby serve upon you with the following legal notice.

That in the captioned letters you have alleged that our client had an outstanding of Rs.78,157/- for Bilaspur Network as on 07.09.2010 and Rs.18,190/- for Barmana Network as on 07.09.2010."

It is, therefore, evident that although the villages of Barmana and others were the subject matter of the said agreement dated 5.2.2010, the parties hereto have understood clearly that the said agreement for all intent and purport had been amended by reason of the subsequent agreement dated 15.2.1010.

Moreover, admittedly the petitioner had been receiving invoices for those two areas separately indicating different amounts. Had the contention of the petitioner been that there had been double payments for the self sum area, it was expected, that a grievance in relation thereto would be raised either in its correspondences and/or the legal notice served upon respondent prior to filing of the petition or at least in the petition itself.

We, therefore, are of the opinion that it is not correct to contend that the petitioner had been making double payments for the Barmana areas.

So far as the contention raised by Mr. Bhagat that petitioner had not been given any credit despite the fact that Disney Group of Channels had gone out of the bouquet of the respondent is concerned, suffice it to notice that from Annexure-C appended to the agreement dated 5.2.2010, it would appear that Bouquet 3 consisted of three Disney group of channels namely, Hungama, the Disney channel and True Disney. The respondent by a letter dated 31.3.2010 clearly asked the petitioner to enter into an amended agreement effective from 1.4.2010, pursuant where to only the said amended agreement was entered into. In the amended Annexure-C, Disney Channel had not been mentioned. Even the stationary used by respondent in respect of Annexures-C to both the agreements are absolutely different.

Moreover, keeping in view the fact that the petitioner had admittedly been receiving invoices from respondent regularly, it is inconceivable that it was not aware of the fact that any over charging was being made by respondent for the said Disney Group of channels.

There cannot, however, be any doubt or dispute and as has now been admitted by the witness of respondent Shri Satinder Singh Sidhu

in his cross-examination that decoders in respect of Fox Channels had not been given to the petitioner.

The relevant part of the cross-examination of the said witness read as under:

“Q: Have you given the decoders of fox channels to the petitioner?

A: I will have to check the records. {The witness is asked to check the records}

They have not been given.

Q: Would it be correct now to say that the number of channels given to the petitioner have in fact reduced?

A: Yes.

Q: Would it be correct to say that after reduction of the bouquet rate for bouquet 2 the petitioner was entitled to reduction in his subscription fee?

A: Yes.

Q: Was the reduction given to the petitioner?

A: A fresh amended annexure was executed with the petitioner on 29th July, 2010 which was based on fresh negotiations held with the petitioner and which taken into account the migration of Disney channels and the subscriber base of the petitioner.”

Moreover when pointed, Mr.Gaurav Juneja, learned counsel appearing on behalf of the respondent very fairly stated that from a perusal of the list of decoders supplied to the petitioner, it does not appear that

the decoders in respect of the Fox Channels had been supplied to the petitioner.

So far as activation of the decoders is concerned, Mr. Bhagat has drawn the attention of this Tribunal to the following part of the cross-examination of Mr. Sidhu:

"{Witness is shown para 22 of his affidavit for refreshing his memory}

The witness admits that the signals were activated for the Bilaspur area on 11th February, 2010 and on 9th March, 2010 for Barmana.

Q: Have you placed on record any proof to show that in fact the decoder boxes of Bilaspur area were activated on 11th February, 2010 and on 9th March, 2010 for Barmana?

A: We have placed on record the statement of accounts which shows the billing from the respective dates.

We have a system which is called MQS system where in we maintain the activation records of the subscribers.

Q: Is your MQS system connected with your satellite transmission system?

A: It is a technical question I am not well versed with technical aspect.

It is incorrect to suggest that MQS system is only an accounting system and does not show the activation of decoder boxes.

I am not aware whether an SMS report is generated on activation of decoder boxes of a subscriber.

I have been involved in this cable and broadcasting industry for the last 10 years.

It is incorrect to suggest that I am aware that SMS report is generated on activation of decoder boxes and that I am concealing this information.

It is incorrect to suggest that the decoder boxes of the petitioner for Bilaspur area were activated sometime in mid March, 2010 and not on 11th February, 2010.

It is incorrect to suggest that the decoder boxes of the petitioner for Barmana were activated sometime in April, 2010 and not on 9th March, 2010.

It is incorrect to suggest that we have wrongly billed the petitioner even for the time when his decoder boxes were not activated."

The other witness of the respondent Shri Ajay Dwivedi in his cross-examination stated:

"Q: How do you say that the signals were activated on a particular date?

A: The Finance Deptt. activates the signals based on the agreements received in the Finance Deptt.

Q: Do you have any record to show that the signals were activated on that particular date?

A: Our statement of accounts shows the date of the activation of the signals.

Q: Apart from your statement of accounts is there any other record to show the date of activation of the signals?

A: Our accounting system can be inspected for the purpose.

Q: How do you activate the signals?

A: Based on the agreement received we update the parameters such as subscriber numbers, bouquet opted in the system and we activate the signals.

Q: Is there any SMS system involved while activation of signals?

A: No.

Volunteers: No other system other than MQS is involved in activation of services.

It is incorrect to suggest that the signals for Bilaspur network were not activated on 11th February, 2010 but on the later date."

Mr. Bhagat would contend that the SMS is only a foolproof instrument wherefrom the actual activation of the decoders would appear. However, when questioned, Mr. Bhagat very fairly stated that the areas in question namely Bilaspur and Barmana of Himachal Pradesh have not been declared as CAS areas. Only when complete addressability is achieved, SMS instruments are put in place and not otherwise.

In that view of the matter this Tribunal is unable to accept the submission of Mr. Bhagat that respondent has deliberately and intentionally withheld best evidence.

If the respondent has been able to prove from the other system which is being used by it for the purpose of showing activation of the IRD boxes, the same should be accepted to be correct.

Our attention has also been drawn to the evidence of Shri Ajay Dwivedi to show that no invoice for the period April, to July, 2010 has been raised. During those particular months having regard to the absence of amended annexures invoices might have been raised but it now stands admitted by the petitioner himself that it has received all the invoices.

The petitioner has not made any payment pursuant to the interim order of this Tribunal in respect of its Bilaspur Network. The Bilaspur Network was deactivated on 25.10.2010.

According to the respondent a sum of Rs.1,55,721/- was owing and due from it. So far as the Barmana Network is concerned, we have noticed heretobefore that the petitioner has paid a sum of Rs.38,215/- and a further sum of Rs.17,000/- and odd pursuant to the orders of this Tribunal. Admittedly it has stopped further payments towards monthly subscription charges which in view of our orders aforementioned should have been paid. The Barmana Network was deactivated on 27.4.2011, although it was reconnected immediately after the payments were made.

According to the respondent a sum of Rs.80,488/- is payable by petitioner in respect of its Barmana Network.

There cannot, however, be any doubt or dispute that some reconciliation of account is necessary. The petitioner has been overcharged in respect of the Fox channels for which no IRD Boxes were supplied. If that be so, the petitioner cannot be made to pay any amount towards Fox Channels. In the event, however, the petitioner is ready and willing to pay the balance amount upon reconciliation, the respondent may consider the desirability of entering into a fresh agreement with petitioner in respect of the said networks.

This petition is dismissed subject to the aforementioned observations, as no other or further relief can be granted to the petitioner. However, in the facts and circumstances of the case there shall be no order as to costs.

(S.B. Sinha)
Chairperson

May 30, 2011
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