

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 22nd SEPTEMBER, 2011

Petition No.94 (C) of 2011

Subhodaya Communications Pvt. Ltd. ...Petitioner

Vs.

ESPN Software India Pvt. Ltd. ...Respondent

BEFORE:

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

For Petitioner : Mr. Yoginder Handoo, Advocate

For Respondent : Mr. N. Ganpathy, Advocate

JUDGEMENT

S.B.SINHA

The petitioner, a Multi System Operator has filed this petition against the respondent, which is a broadcaster of the channels of the ESPN Star Sports and Star Cricket service.

2. The parties entered into a service contract on or about 14.9.2009 for supply of signals in the town of Jeedimetla. According to the petitioner although in the said agreement, the area of operation was mentioned only as Jeedimetla, in fact a list of operators was handed over to the representative of the respondent showing that its

cable operators had network in different Mandals and Villages where they had been operating.

The said agreement having expired, the parties entered into another agreement on or about 1.9.2010 which was valid upto 31.1.2011. The area of operation mentioned therein was up to Toopran situated within the district of Medak.

A similar contention that in fact the area of operation of the petitioner remained the same despite it having been mentioned as 'Toopran' only in the agreement, has also been raised.

3. *Inter-alia* on the premise that petitioner had committed acts of piracy in the areas of Kompalli and Doolapalli, a notice in terms of Clause 4.1 of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations was issued.

A public notice was also published in two newspapers, stating:-

“Carrying on Cable TV business in the areas of Rangareddy District excluding Hyderabad and Secunderabad Twin Cities, Vanasthatipuram, Toopran & Mandapeta respectively, that the ESPN, STAR sports & STAR Cricket Services being provided to above said networks are liable for deactivation on account of providing their signals beyond the permissible area(s) thus amounting to breach of respective contracts

between the above said parties & ESPN Software India Pvt. Ltd. The subscribers of above mentioned cable TV networks may not be able to view the ESPN, STAR sports & STAR Cricket Channels on their television sets after the expiry of 21 days from this publication.

As a result of this, the viewers are likely to miss the following forthcoming events on our channels ICC World Cup 2011.”

4. By reason of a telegram dated 21.6.2011, the petitioner while denying and disputing the said allegations expressed its readiness and willingness to negotiate with the respondent for entering into a new or renewed subscription agreement in respect of its entire area of operation.

5. It now appears that the parties met on 15.2.2011 in respect whereof the following minutes of meeting were drawn up:-

“a) M/s Subhodaya Communications have given the fresh SLR copy. As per the SLR the total area served is mentioned, for which the subs are coming to 1753 under 37 distributors. The same is subject to verification.

b) As per the SLR provided today, there are multiple feeds but the signals are exclusive of M/s Subhodaya Communications.

- c) *M/s Subhodaya Communications have been asking for the C& S home from their cable operators, but the same have not been provided by Subhodaya Cable Operators.*
- d) *M/s Subhodaya Communication to provide their agreement copies with the distributor.*
- e) *Maximum subs incurred as per the above declared subs are 60 and the minimum is 40. The maximum revenue incurred out of the maximum subs Rs.1,05,180/-.*
- f) *Present agreement has expired on 31st Jan 2011. M/s Subhodaya Communication is agreed to sign the agreement for Toopran and the rest of areas as per the SLR provided today but the same is subject to verification.*
- g) *ESPN Software India Pvt. Ltd., required a week's time for verification of the SLR submitted by M/s Subhodaya Communication."*

6. This petition was filed on or about 19.1.2011.

Principal contention of the petitioner is that the respondent at all material times was and still is aware of the fact that the petitioner had been operating not only in the district of Medak but also in the, neighbouring districts, including the district of Rangareddy.

It was stated:-

“As a matter of fact, the service contract bearing No.305610 dated 14.9.2009 for the period 1st August 2009 to 31st July 2010 was also got printed with only one area Jeedimetla and even during the execution of the said agreement also, a separate list of areas was collected by the respondent or furnished by the petitioner and the same was acknowledged by the respondent. Therefore the allegation of the respondent that, the petitioner has added the said areas unilaterally or that the petitioner misrepresented the facts relating to their areas of operation at the time of execution of the service contract is vehemently denied by the petitioner and as a matter of fact, respondent is guilty of exploiting the contractual relationship with the MSO’s alleging transgression and extracting greater, unreasonable, unjust and unfair subscription amounts by harassing the MSO’s as and when sports events are scheduled on their channels. This list of areas covered by the petitioner submitted to the respondent even at the time of execution of the service contract dated 14.9.2009 being acknowledged by the representative of the respondent alongwith the said service contract is annexed hereto.”

7. Mr. Handoo, learned counsel appearing on behalf of petitioner would contend:-

- 1) The service contract entered into by and between the parties hereto having shown a fixed amount of subscription fees payable by the petitioner, namely, Rs.37,950/- per month and the respondent being aware of petitioner's actual area of operation, it is incorrect to contend that it had committed any act of piracy.
- 2) The respondent having not traversed the allegations made in the petition as regards its actual area of operation must be deemed to have admitted the same.
- 3) Despite service of notice under Clause 4.1 of the Regulations and even during the pendency of the petition the parties having met and the petitioner admittedly having furnished a copy of its SLR, the respondent in the interest of justice should be directed to enter into a fresh agreement on a negotiated subscriber base for the areas covered thereunder.
- 4) The petitioner has all along been and still is ready and willing to negotiate with the respondent for obtaining supply of signals of its channels on reasonable terms and on a non-discriminatory basis.

8. Mr. Ganpathy, learned counsel appearing on behalf of the respondent, on the other hand, urged:-

- 1) The petitioner admittedly committed acts of piracy and, thus, the petition should be dismissed.
- 2) It is wholly incorrect to contend that the area of operation of the petitioner was any place other than Medak.
- 3) The petitioner has been supplying signals to the local cable operators operating in different fields without paying due subscription charges in respect thereof.
- 4) The petitioner's conduct is such which dis-entitles him for obtaining an equitable relief.

9. From a perusal of the prayers made by the petitioner, it is evident that it had not only being supplying signals to various local cable operators in different areas mentioned in prayer B of the petition, but also intended to extend its area of operation to various other places such as 'rural and urban areas of Sangareddy (Medak district) and areas Ghatkesar and Kesara Mandals falling in Ranga Reddy district'.

10. The petitioner has prayed for an interim order. By an order dated 28.3.2011, it was directed to confine its area of operation within the town of Toopran only.

11. It is stated by Mr. Handoo that petitioner has complied with the said direction.

12. The proprietor of the petitioner Shri M. Subhash Reddy, who examined himself to prove the case of the petitioner in his cross-examination, stated that Toopran is a Mandal in Medak district. He further stated as under:-

“Attention of the witness is drawn to Page No.38 of evidence folder.

It is incorrect that the list at pages 38 and 39 along with my affidavit by way of evidence was typed in my office.

The signature circled as ‘X’ at page No.39 of evidence folder is the signature of representative of ESPN, namely, Mr. Praveen.

The list at Page No.38 does not bear the signature of Mr.Praveen.

Volunteers: At the bottom of page No.38 there is signature of Mr. Praveen. Since the matter pertains to the year 2009, I am not able to recollect.

The list at Page No.38 of evidence folder was prepared in the year 2009.”

13. So far as its area of operation is concerned, Mr. Reddy stated that Kesara and Ghatkesar come within the district of Ranga Reddy, whereas Kompalli and Doolapalli fall in Qutbullapur Mandal.

14. In his cross examination he denied the suggestion that he had been serving only in the areas falling within Medak district but according to him he had been serving in the area of Jeedimetla as well as in Kesar and Ghatkesar falling within Ranga Reddy district.

15. On a query made as to for which areas the petitioner got himself registered in terms of the provisions of Section 3 of the Cable TV Networks Act, attention of this Tribunal has been drawn to a Registration Certificate dated 2.12.2010 issued for 'Toopran' by the Head Post Master of Medak town and Post Master of Secunderabad, showing the following:-

“M/s Subhodaya Communications (P) Ltd, Hyderabad is registered as a cable operator (Individual/Firm/Company/Association of persons or body of individuals) for running cable television network at the following address: H. No. Plot No.71, Spring Field Colony, Jeedimetla, Hyderabad-500 055 in the city/town of Hyderabad is renewed w.e.f 29.11.2010 for period of one year. His/their Registration No. 218.”

16. No document, therefore, has been brought on record to show that the petitioner is a registered operator for any district other than Medak and the town Jeedimetla.

On what premise the petitioner had been operating in the district of Ranga Reddy is not known. Area of operation having regard to the provisions of the Regulations as also the Explanatory Memorandum of TRAI appended thereto plays an important role.

It has been so held in M/s Lakshma Reddy Cable Network Vs. Channel Plus A.P. & Anr. in Petition No.367 (C) of 2010 disposed on 3.6.2011 in the following terms:-

“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.”

17. It is difficult to agree with this contention of Mr. Handoo for more than one reason that the petitioner has been able to show that the area of operation mentioned in the agreements of the years 2009 and 2010 were not correct.

As noticed hereto before, the area of operation plays an important role so far as an agreement involving supply of signals of the channels of the broadcaster is concerned.

Moreover Section 91 and 92 of the Indian Evidence Act precludes adduction of oral evidence contrary to or inconsistent with the terms of a contract in writing. Section 91 bars adduction of evidence in proof of a term of the contract except the document itself or secondary evidence of its content. The present case does not fall within the purview of any of the exceptions contained therein. Section 92 provides for exclusion of any such document in a case where the terms of a contract are required by law to be reduced to a form of the document and the same has been proved.

In terms of Clause 4 A of the Regulations, a subscription agreement is required to be reduced to the form of a document.

18. Mr. Handoo would contend that having regard to an admission made by the respondent itself, the fifth proviso appended to Section 92 is attracted. It reads as under:-

“92. Proviso (5) – Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved:

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.”

19. The said proviso in the opinion of this Tribunal has no application to the fact of the present case.

20. Our attention, however, has been drawn to the statements made in para 7 of the reply which reads as:-

“The contents of Paragraph 7 as stated are denied. The services contract are mutually agreed and signed by the petitioner based on the connectivity and transmission of signals in the area of Toopran as disclosed by the petitioner. The monthly billing amount inclusive of service tax was arrived at an amount of Rs.41,859/- based on the mutual understanding. The amount and the area (Toopran) was agreed and arrived at by the parties. Having signed the service contract it is unfair for the petitioner to transmit signals to areas other than Toopran. The respondent was ready for negotiation and the petitioner did not agree to negotiate an increase of subscription fee to cover the larger area of coverage. Respondent never write anything with Pen in agreements as mentioned by petitioner. Respondent never indulge in malpractice by giving only one or two names; can produce agreements having multiple areas of operations printed in agreements. The respondent has various contracts in which the area contains a large number of areas and it is incorrect to say that since in

the place meant for filling up under area there was insufficient space, the petitioner filled up the name in extra sheets of paper. The respondent is willing to produce the Hon'ble Tribunal any number of agreements where, in the space provided for Area, plenty of areas are named/provided without resorting to extra sheets. The reference to Jeedimetla which was an area of operation agreed to in a previous contract between the parties will not help the petitioner in the present petition. Such reference is misconceived."

21. To the same effect is the evidence of the respondent's witness Shri Manoj Kumar Dubey who apart from the statements made in para 7 of the reply, stated:-

"It would also be relevant to mention that the representative of the petitioner has not signed pages 37 and 38 and nor was pages 37 and 38 are part of the Service Contract dated September 1, 2010."

22. In SCOD 18 Networking Pvt. Ltd Vs. United Cable Services, Petition No.267 (C) of 2010 disposed on 11.7.2011 it was observed:-

"In terms of Sections 91 and 92 of the Indian Evidence Act, therefore, no evidence is admissible for the purpose of contradicting, varying, adding to or subtracting from its terms.

Strong reliance has been placed by Mr.Kathpalia on a decision of the Apex Court in Bai Hira Devi and Ors. vs. Official Assignee of Bombay reported in 1958 Ind Law

SC 23 wherein upon considering the said provisions, it has been held :-

“... The two sections, however, differ in some material particulars. Section 91 applies to all documents, whether they purport to dispose of rights or not, whereas s. 92 applies to documents which can be described as dispositive. Section 91 applies to documents which are both bilateral and unilateral, unlike s. 92 the application of which is confined only to bilateral documents. Section 91 lays down the rule of universal application and is not confined to the executant or executants of the documents. Section 92, on the other hand, applies only between the parties to the instrument or their representatives in interest. There is no doubt that s. 92 does not apply to strangers who are not bound or affected by the terms of the document. Persons other than those who are parties to the document are not precluded from giving extrinsic evidence to contradict, vary, add to or subtract from the terms of the document. It is only where a question arises about the effect of the document as between the parties or their representatives in interest that the rule enunciated by s. 92 about the exclusion of oral agreement can be invoked. This position is made absolutely clear by the provisions of s. 99 itself. Section 99 provides that "persons who are not parties to a document or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.”

23. In M/s Hathway Space Vision Vs. Vivekanand Rao, Petition No. 220 (C) of 2009, it was stated as under:-

“In Dinkerrai Lalit Kumar v. Sukhdayal Rambilas reported in AIR 1947 Bom 293, wherein it has been held as under:

“3. Once the parties reduce the terms of their contract into writing, the Court can only look at the writing alone in order to construe what the terms of the contract were. It is hardly necessary to say that what the terms of the contract between the parties were cannot be ascertained by allowing parole evidence as to what transpired antecedent to the contract or what the parties did subsequent to the contract.”

In Motilal Singh and Ors. v. Mt. Fulia and Ors. reported in AIR 1958 Pat 68, whereupon again Mr Kathpalia places reliance it is stated:

“It is clear that under proviso (1) evidence may be adduced to prove want or failure of consideration. This is, however, totally distinct from the amount of consideration. If in fact the amount of consideration also could be proved by oral evidence to be otherwise than what was stated in the document, there was no reason why the legislature omitted this from proviso (1). A statement in a document that a consideration has been paid is really a recital in a deed and does not constitute one of the terms of the contract, But the amount of consideration is obviously a term of the sale deed and, therefore, it is not open to a party to prove a variation in, the amount of consideration.”

The said decisions referred to a decision of the Privy Council in Maung Kyin v. Ma Shwe Law reported in AIR 1917 PC 207, wherein also a similar law as been laid down.”

24. We may furthermore notice that Mr. Subhash Reddy in his evidence could not give any convincing explanation as to whether the purported list of cable operators bore the initials of Mr. Praveen, said to be the representative of the respondent.

His evidence in tht regard reads as under:-

- a) It does not bear the signatures of Mr. Praveen.*
- b) At the bottom of Page 38, there is a signature of Mr. Praveen that he was not able to recollect since the matter pertains to the year 2009.*
- c) List at page 38 of the evidence folder was prepared in the year 2009.*

25. Mr. Handoo however, will draw our attention to the following questions and answers of the said witness:-

“Q: What proof is there that the list at pages 38 and 39 of the evidence folder was handed over to ESPN at the time of execution of agreement dated 01.9.2010?”

A: When the agreement was signed in my office, this list was collected by Mr.Praveen along with agreement.”

It appears that the agreement in question was executed by Mr. Manish Jaitley on behalf of the respondent. Mr. Reddy, however, in his cross examination stated that he was not aware thereof. It is in any event not the case of the petitioner that Mr. Praveen Kumar signed the other pages of the agreement. If that be so, why Mr. Praveen signed only two pages of the agreement, i.e., pages 37 and 38 has not been explained.

26. If we read the statement made in para 7 of the petition, vis-à-vis para 7 of the reply filed by respondent, it is evident that the later for all intent and purport has denied that the same formed part of the agreement. The agreement does not show that the said list was to form its part. It was also not described as an annexure to the agreement. The purported business custom and usage mentioned by Mr. Handoo, thus, would have no application to the fact of the present case.

27. Moreover, Mr. Reddy in his deposition having categorically admitted that the petitioner had been operating in the areas which were not the subject matter of agreement, is therefore, clearly guilty of acts of piracy.

28. We must, however, place on record that Mr. Ganpathy very fairly stated that if the petitioner complies with the requirements

contained in the minutes of meeting dated 15.2.2011, the respondent may consider the desirability of entering into an agreement with it.

29. Mr. Reddy in his deposition, as has been pointed out by Mr. Ganpathy *inter-alia* stated that he was to check his records as to whether he had furnished to respondent the agreement copies with the distributor as per the said MoM. No case, therefore, has been made out to interfere.

30. The respondent thus, shall be at liberty to take such steps as it thinks fit and proper, if according to it any other or further amount is due from the petitioner.

This petition is dismissed with the aforementioned observations with costs. Advocate fees assessed at Rs.25,000/-.

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

HKC/