

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated : 30.11.2011

M.A. No.273 of 2011 in Petition No.97(C) of 2009

M/s Variety Entertainment Private Limited ...Petitioner

Vs.

M/s ESPN Software India Pvt. Ltd. & Anr. ...Respondents

BEFORE:

**HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON
HON'BLE MR.P.K. RASTOGI, MEMBER**

For Petitioner : Mr.Balaji Srinivasan, Mr. Prabhat Ranjan,
Advocates

For Respondents : Mr. N. Ganpathy, Advocate

J U D G M E N T

The Miscellaneous Application has been filed by the original petitioner for recall of our order dated 8.6.2011.

The petitioner is a Multi Service Operator. The respondent is a producer of some sports channels and thus a broadcaster within the meaning of the provisions of The Telecommunication (Broadcasting & Cable Services) Interconnection Regulations, 2004 (13 of 2004) as amended from time to time (The Regulations)

In the original petition, the Applicant herein had inter alia prayed for a direction upon the respondent to provide decoders of its channels ESPN, Star Sports and Star Cricket to its network.

The principal dispute between the parties was the subscriber base of the petitioner.

By reason of an interim order, an Advocate Commissioner was appointed for carrying out a survey for the purpose of ascertaining the Universe of the Petitioner.

A report was filed by the said learned Commissioner, inter alia, opining that the total connections of the petitioner were 4476.

An application for setting aside the said report was filed. By reason of an order dated 6.8.2010, the said report was set aside.

The matter thereafter was heard on merit.

By reason of the aforementioned order dated 8.6.2011 it was directed:

"7. The petitioner submitted that they have written a letter to the respondent on 11.4.2011 in compliance of the order dated 25.3.2011 for three petitions, i.e., Petition No. 196 (C) of 2009, Petition No. 177 (C) of 2009 and Petition No.276 (C) of 2009 by which they have provided the current franchisee list and the subscriber base to the said broadcasters, respectively which also includes the latest franchisees who have joined since 25.2.2011, 28.2.2011, 2.3.2011 and 4.3.2011. They have also invited the broadcasters in the above petition by this letter for negotiating the subscriber base for signing the subscription agreement on a mutually agreed subscriber base on non-discriminatory basis as per

the prevailing market position. The copy of the same SLR has been given to use when this case was mentioned on 27.5.2011. This SLR consists of 42 Cable Operators in the city of Bhubaneswar and mentions the number of subscribers as well as the date(s) of joining of the cable operators in the network of the petitioner in the recent past. As per this SLR, we find the figure of subscriber base as admitted by the petitioner as 9760/- upto 24.2.2011 and an addition of 785 more subscribers from 25.2.2011 till 4.3.2011.

8. In that view of the matter, we are of the opinion that interest of justice would be subserved, if the respondent is directed to hold negotiations with petitioner on the basis of the said SLR so as to enable the parties to arrive on mutual terms on the basis whereof an agreement can be executed.

9. We, furthermore, are of the opinion that subject to such negotiations and subject to arriving at a consensus on the subscriber base, the agreement may be signed. In the meantime, we are of the opinion that purely as an interim measure, the petitioner may pay to the respondent on the basis of 5000 subscribers w.e.f 01.01.2011. The final adjustments may be made as per the figure arrived at in the agreement."

This application for recall was filed on 3.10.2011.

In support of this application, Mr. Balaji Srinivasan, learned counsel appearing on behalf of the Applicant would contend that although the `universe' of the applicant is about 10,545, in the event, it has to pay the subscription fee to the respondent on subscriber base of 5000 as directed, the same would be wholly unviable and uneconomical. It was contended that on a hypothetical basis if the

petitioner has to pay the stipulated tariff to the broadcasters for 10000 subscribers, it would have to pay a sum of Rs.420.15 per subscriber to the broadcasters although in terms of the Regulations made by the Telecom Regulatory Authority of India, the maximum amount which can be charged from the local cable operators is only Rs.435/- out of which Rs.80/- is to be retained by the LCOs and petitioner's share therein would come to about Rs.25/- as the balance amount has to be paid to the broadcasters in respect of supply of about 41 pay channels. According to the Applicant, the total revenue generated by it would only be Rs.12,80,000/-; whereas a sum of Rs.42,01,500/- would be required to be paid to the broadcasters alone, which would lead to payment of a sum of Rs.31,219/- per channel per month and the respondent having three channels it has to pay three times the said amount.

It was furthermore submitted that as the joint survey could not be completed despite order of this Tribunal, it has become exceedingly difficult for the Applicant to pay the subscription fee on the subscriber base of 5000.

The respondent, on the other hand, contends, that the petitioner owes it a sum of Rs.32,02,942/- towards the balance amount of subscription fee from August, 2009 till October, 2011 as out of the billed amount of 76,66,622/- on the sum of Rs.44,63,680/- has been

paid by the Applicant. It was furthermore submitted that the petitioner having not disclosed any legal provision on the basis whereof the application for recall has been filed, the same should be dismissed.

At the outset we may mention that a similar question with regard to determination of the subscription fee having regard to the provisions of the Regulations was urged by the Applicant in Petition No.276(C) of 2009 and the same has been rejected by reason of an order dated 17.11.2011.

Mr. Balaji Srinivasan would, however, submit that keeping in view the order passed in Petition No. 196(C) of 2009, Petition No.177(C) of 2009, this Tribunal having directed the Applicant to pay subscription fee to Zee Turner Ltd. and MSM Discovery Ltd. on a subscriber base of 4000 only, it is inconceivable that the subscriber base of the petitioner for a sports channel should be determined at 5000.

Mr. Ganpathy, however, submitted that 18 MSOs who have been operating in various parts of the country disclosed their subscriber base more than the General Entertainment Channels. In support of the said contention the following table has been appended to its reply:

| SL.NO. | NETWORK NAME | PLACE | STATE | STAR'S MONTHLY PAYOUT | ESPN MONTHLY PAYOUT |
|--------|---|--------------|---------------|-----------------------|---------------------|
| 1. | 1stv (Information Service Television Network) | IMPHAL | MONIPUR | 100000 | 125941 |
| 2. | Multi Channel System | KOHIMA | NAGALAND | 15000 | 19206 |
| 3. | IPS VISION PRODUCTION | AIZAWL | MIZORAM | 100000 | 142830 |
| 4. | City Cable Network | DIMAPUR | NAGALAND | 140000 | 159937 |
| 5. | Basudev Communication | DHARMANAGAR | TRIPURA | 18000 | 22763 |
| 6. | Pearl's Cable TV Network | SHILLONG | MEGHALAYA | 220286 | 274958 |
| 7. | Roibha Cable TV Network | MAWNGAP | MEGHALAYA | 12000 | 15167 |
| 8. | SKY Cable Network | DIPHU | ASSAM | 12000 | 19206 |
| 9. | Zonet Cable Tv Network | AIZAWL | MIZORAM | 80000 | 124994 |
| 10. | R. L. Cable Network | LAWNGTLAI | MIZORAM | 8000 | 13788 |
| 11. | Chigring Cable Network | TURA | MEGHALAYA | 12000 | 19206 |
| 12. | Multichannel Network | NAHARLAGUN | A.P | 18000 | 26293 |
| 13. | MANTHAN BROADBAND A/C- LUMDING | LUMDING | ASSAM | 20000 | 26293 |
| 14. | Cable Vision | KARUR | TAMIL NADU | 263177 | 274812 |
| 15. | Cable Vision | TIRUVARUR | TAMIL NADU | 2,69,959 | 3,20,675 |
| 16. | CABLE OPERATORS COMMUNICATION NETWORK (P) LTD | MANGALORE | KARNATAKA | 38,111 | 72,870 |
| 17. | R K Cable Network | YAMUNA NAGAR | HARYANA | 1,50,000 | 2,91,483 |
| 18. | Shivom Cable | Sitapur | Uttar Pradesh | 39,044 | 47,319 |

The original petition as noticed heretobefore, was disposed of on or about 8.6.2011. The subscriber base of 5000 was determined by way of an interim measure.

The Applicant has not filed any application for review of the said order. Recalling of said order has been sought for inter alia on the premise that the same is unviable.

Determination of subscriber base having regard to the definition thereof as also the term 'Subscriber Line Report' as contained in Clauses 2(p) and 2(k) of the Regulations would depend upon the agreement entered into by and between the parties thereto but the same would ordinarily be preceded by negotiations.

Other evidences can also form the basis for negotiation, when no Subscriber Line Report is available.

In our opinion sufficient reasons have been assigned as to why the joint survey could not be concluded.

In any event the parties hereto could carry out negotiations on the basis of the SLRs furnished by the petitioner.

Level playing field, fairness and reasonableness should be the bedrock of negotiations. It must take care of ground realities. A broadcaster cannot in terms of the Regulations adopt a discriminatory attitude, while fixing the subscriber base, which would depend on the viewership of the channel. Viewership of different genere of channels would also vary from place to place.

This Tribunal except in some exceptional cases may decline to determine the actual subscriber base.

This Tribunal directed the parties to enter into negotiations. On what terms of such negotiations would be held was for the parties to decide.

This Tribunal would exercise its jurisdiction under Section 14 of the TRAI Act, 1997 inter alia in the event it is found that the offer made by the Broadcaster is unreasonable or otherwise discriminatory in nature.

The statutory right of a distributor of a TV channel in terms of Clause 3.2 of the Regulations is to obtain supply of signals of the channels of a broadcaster.

The Regulations do not provide for the mode and manner in which the dispute between a Broadcaster and a Multi Service Operator if any, as regards the subscriber base, should be determined.

It may, however, be true that while considering a question as to whether the offer of the Broadcaster is unreasonable or discriminatory in nature, having regard to the regulatory scheme and in absence of a 'Subscriber Line Report', a direction can be issued to hold negotiations on the basis of the evidence provided by the two parties on the subscriber base including that of the similarly based cable operators/MSOs and local survey.

When this Tribunal issued the aforementioned order, it was for the parties hereto to negotiate, inter alia, on the aforementioned premise.

In this case it is accepted that apart from the Applicant, another big Multi Service Operator has been operating in the town of Bhubneshwar.

It is said to have a larger market share than the Applicant herein. The percentage of the universe of the said Multi Service

Operator vis a vis its universe and/or the subscription fee payable by it may be a relevant factor.

Mr. Ganpathy appearing on behalf of the respondent had offered to place the requisite figures and/or a copy of the agreement in a sealed cover before us. For one reason or the other, the respondent did not do so.

Mr. Ganpathy would contend that keeping in view the subsequent event namely the order passed in the cases of Zee and MSM, this Tribunal may fix the subscriber base of the petitioner between 4000 and 5000.

However, keeping in view the subsequent events as also the order passed by this Tribunal in Petition No.276(C) of 2009, whereby the subscriber base in respect of regional TV viewership which to our mind would be much higher than a sports channel, we are of the opinion that for the present the subscriber base of the petitioner should be determined at 4000.

The parties must hold negotiations in terms of Regulations and complete the same keeping in view the observations made hereinbefore as expeditiously as possible and preferably within four weeks from date.

The order dated 8.6.2011 is modified accordingly. The applicant, however, must pay the subscription fee at the subscriber base of 5000 from the date of passing of the said order till October, 2011.

They are furthermore directed to comply with the Tribunal's order dated 8.6.2011.

This application is disposed of with the aforementioned observations and directions without any order as to costs.

The parties, however, in the event no agreement is arrived at should conduct a joint survey on the basis of the SLR furnished by the petitioner.

(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

November 30, 2011
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