

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated : November 24, 2011

Petition No.334(C) of 2011

M/s. Ushodaya Enterprises Pvt. Ltd. ...Petitioner

Vs.

M/s Digicable Network (India) Pvt. Ltd. ...Respondent

BEFORE:

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

For Petitioner : Mr. Balaji Srinivasan, Advocate

For Respondent : Mr. Tejveer Singh Bhatia, Advocate

ORDER

S.B. Sinha

The petitioner who is a broadcaster entered into an agreement with the respondent herein which is a Multi Service Operator on or about 24.12.2009 operating in the town of Hyderabad.

In the said agreement it was stipulated:

- (i) The respondent was to receive the signals of the petitioner's channels and retransmit the same at a frequency 161.25 MHZ only at S-9 band.
- (ii) The said agreement was to remain operative for a period of five years i.e. from 9.12.2009 to 8.12.2014.
- (iii) The consideration therefor was fixed Rs.50.00 lakhs i.e. Rs.10.00 lakhs per year.
- (iv) The petitioner paid a sum of Rs.20.00 lakhs by way of a demand draft dated 22.12.2009 covering the period 21.12.2009 to 20.12.2011.

According to the petitioner, the said agreement did not contain any termination clause.

The respondent, however, contends that by a letter dated 24.12.2009, a termination clause was sought to be included in the agreement, which reads as under:

"Sub: Amendment of the Termination Clause in the Agreement dt.09-12-09

Respected Sir,

This is in reference to your agreement dated 09/12/2009, we would like to include the Termination Clause in the Channel Placement Agreement.

The said clause reads as under:

Termination:

- a) Either party on occurrence of any of the following events may terminate this agreement.

Two consecutive default in making payments as mentioned herein by USHODAYA.

Any party going into bankruptcy/liquidation and has had to make compositions with its creditors.

In the event UEPL chooses not to broadcast its services and notices DCSPL of its intentions.

By any party in the event of breach of any of the covenants or terms of this Agreement by the other party.

By either party in the event the Force Majeure condition for a period exceeding 60 days.

Mutually agreed between the parties in writing.

Upon the expiry of the tenure ending on 08/12/2011 from the effective date of this agreement.

- b) Upon Termination:

In any event of termination of the agreement at the behest of UEPL, DCSPL shall not be liable to refund all or any part of the advances and/or proportionate carriage fees to UEPL for the unexpired Term.

In any event of termination at the behest of DCSPL, DCSPL shall at or before the expiry of the notice period refund the advances and/or proportionate carriage fees to UEPL already received by DCSPL for the unexpired term.

You are requested to amend the same in the channel placement agreement."

However, there is nothing to show that the petitioner accepted the said suggestion.

By a letter dated 3.5.2011 the respondent called upon the petitioner to renegotiate the terms of agreement dated 24.12.2009, inter alia, on the premise that a huge growth in the petitioner's activities both in Kolkatta as also the other parts of West Bengal has taken place.

The petitioner, however, in reply to the aforementioned letter asked the respondent to meet its obligations under the agreement.

The respondent, however, by a letter dated 21.7.2011 stated thus:

"Ref: Your letter dated 21-07-2011

Dear Sir,

We are very surprised to find your response on 21/07/2011 against our letter dated 03/05/2011, which is exactly 77 days late.

Please note that we have already executed the termination clause and terminated the above contract for placement between Ushodaya Enterprises Pvt. Ltd. and Digi Cablecomm Services Pvt. Ltd."

The petitioner thereafter called upon the respondent to comply with the terms and conditions of the agreement by a letter dated 25.7.2011.

This petition was filed on 16.8.2011 praying, inter alia, for the following reliefs:

- a. Pending disposal of this petition, the respondent be directed not to disconnect or shift respective signals of ETV channels within the area mentioned within the respective band with and channel frequency as agreed;
- b. Respondent be directed to strictly comply with the terms and conditions of the agreement dated 24.12.2009, in particular clauses (3), (4), (6), (7) & (8);
- c. Respondent be directed to pay a sum of Rs.2 crores as damages caused by shifting the signals of ETV-Bangla channel from the agreed frequency."

It is not in dispute that the respondent has changed the frequency of the petitioner's channel from S-9 Band to Band S-32.

Mr. Balaji Srinivasan, learned counsel appearing on behalf of the petitioner would urge:

1. The respondent before discontinuing carriage of the petitioner's channel was bound to issue a notice in terms of Clause 4.2 of the Regulations.
2. The agreement in question clearly having not been containing any term of termination of the agreement and/or having specifically provided for Specific Performance of Contract, the respondent was bound to continue to carry the petitioner's channel in the stipulated frequency.

3. The public at large, unless an order of injunction is passed shall suffer irreparable injury as they would not be able to view the channel at the frequency to which they are used to.

Mr. Tejveer Singh Bhatia, learned counsel appearing on behalf of the respondent, on the other hand, submitted:

1. Clauses 4.2 and 4.3 of the Telecommunications (Broadcasting and Cable Services) Regulations, 2004 as amended from time to time (The Regulations) will have no application in the instant case.
2. The Regulator in paragraph 17 of the Explanatory Memorandum having categorically stated that carriage fee does not come within the purview of the Regulations, the contract between the parties must be held to be governed only by the terms of agreement dated 24.12.2009 and not in terms of a statute.
3. Clauses 4.1 and 4.3 of the Regulations will have no application in the instant case as the respondent has been continuing to carry the channel of the petitioner in an appropriate frequency and thus neither the petitioner nor the public at large have been suffering any irreparable loss and injury.

The petitioner has prayed for passing of an order of injunction in mandatory form. It was, therefore, required to establish a strong prima face case.

We will assume that the agreement does not contain any termination clause. We may furthermore assume that in any event the conditions laid down in the respondent's letter dated 24.12.2009 are not attracted.

There cannot further be any doubt or dispute that the respondent has not brought on record any letter terminating the said agreement.

Mr. Bhatia, however, would contend that the termination of the agreement in the facts and circumstance of this case may be held to have done in terms of the letter dated 21.7.2011.

The petitioner in this petition accepted that its channel had been transmitted only at S-32 band from 26.7.2011 wherefor it intends to place reliance upon a compact disc recorded in that behalf. The respondent, therefore, has committed a breach of contract at least on and from that date.

Even if the respondent has committed gross breach of contract, in the facts and circumstances of this case, the petitioner would only be entitled to damages, having not approached this Tribunal immediately thereafter.

Section 14(1)(a) read with Section 41(1)(e) of the Specific Relief Act, 1963 clearly prohibit grant of an order of injunction in a case of this nature. This Tribunal's jurisdiction is, therefore, clearly circumscribed by the aforementioned provisions.

Even otherwise we are of the opinion that the remedy of the respondent lies in praying for a decree for damages.

In fact prayer 'C' of the petitioner relates to a decree for damages.

Only because the agreement dated 24.12.2009 does not provide for a termination clause or that the agreement has not been validly terminated, in absence of any negative covenant between the parties cannot by itself be a ground for passing an order of injunction in mandatory form.

The petitioner, therefore, in our opinion has not been able to establish a prima facie case.

We may in this behalf notice the decision of this Tribunal dated 13.4.2011 passed in Kansan News Pvt. Ltd. vs. M/s Fastway Transmission Pvt. Ltd. & Ors. wherein upon consideration of a large number of authorities it was held:

"20. We would assume that the termination of contract was malafide, but therefor the petitioner may be held to be entitled to damages and not an order of injunction. This case rests only on issues arising out of a contract qua contract.

The matter might have been different if the contract was governed by a statute. The matter might have been different if there was a negative covenant which could have been invoked for the purpose of obtaining an order of injunction."

Mr. Srinivasan, however, would rely upon an order dated 3.12.2009 passed by this Tribunal in Petition No.261(C) of 2009 Ushodaya Enterprise Pvt. Ltd. vs. Sree Devi Master Media System Pvt. Ltd., wherein it was observed:

"7. It is furthermore in dispute whether the petitioner has received notice under clause 4.2 of the Regulation. The petitioner is, even otherwise, in our opinion, in law, entitled to the protection till the expiry of 21 days of the service of notice under clause 4.2 and publication of the public notice in terms of 4.3 of the Regulation. The balance of convenience also lies in favour of grant of injunction as not only the petitioner but ultimately the consumers would have difficulties in finding out the channels which are stated to be popular channels in the state of Andhra Pradesh if the frequencies in which the transmission are carried out is disclosed.

8. Keeping in view the public interest involved in the matter, we are also satisfied that the petitioner shall suffer irreparable injury which cannot be compensated in monetary terms if the order prayed for by the petitioner is not granted. We, therefore, till further orders, direct the respondent to place the channels in the frequencies noted herein. We also make it clear that this order however will come to an end on the expiry of the period of 21 days from the service of the notice under 4.2 of the Regulation and the publication of the public notice under 4.3 of the Regulation, whichever is later."

It may, however, be placed on record that apart from the fact that the decision of this Tribunal in Kansan News (supra) is a larger Bench decision, even recently a majority of the Bench in Petition No.17(C) of 2011 entitled Media Worldwide Pvt. Ltd. vs. Prasar Bharti disposed ofn 28.7.2011 has clearly held that the broadcaster cannot claim a legal right as regards carriage of channels.

In that view of the matter no order of injunction, as has been prayed for, can be passed.

The prayer for interim relief is, therefore, rejected.

We, however place on record that Mr. Bhatia, on instructions stated that the respondent shall refund the amount of carriage fee for five months to the petitioner proportionately.

It may do so without prejudice to the rights and contentions of the parties and subject to any other or further order that may be passed by this Tribunal.

(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

November 24, 2011
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