

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 12.10.2011

Petition No.228 (C)/2011
With MA No.199/2011

Nirman & Associates Pvt. Ltd.

... Petitioner

Vs.

Star Den Media Services Pvt. Ltd.

... Respondent

BEFORE:

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

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

For Petitioner

Mr.Yoginder Handoo, Advocate

For Respondents (Star Den)

Mr.Arjun Natarajan, Advocate

(Media Pro)

Mr.Saurav Srivastava, Advocate

J U D G M E N T

S.B. Sinha

The petitioner is a Multi Service Operator. It made a request to the respondent, which is a broadcaster, within the meaning of provisions of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004 as amended from time to time (the Regulations), for supply of signals of its channels in the towns of Tinsukia, Jorhat, Nalbari and Bibrugarh, by a letter dated 23.6.2010. This petition, however, is confined to supply of signals in the town of Tinsukia only. It is not in dispute that the petitioner had been carrying on its business in Cable TV services as a Multi Service Operator (MSO) in the town of Guwahati wherefor it had also been obtaining supply of signals of the channels of the respondent.

The petitioner, however, having not received any reply; sent another request to the respondent on or about 11.8.2010.

A postal registration certificate issued in favour of the petitioner by the Head Post Master Tinsukia has also been brought on record.

The respondent, however, inter alia on the premise that the petitioner is a defaulter, by its letter dated 26.8.2010 rejected the said request of the petitioner. It, however, allegedly sent an application form

and requested the petitioner to complete the same and send it to it to process its request. The petitioner was furthermore asked to furnish informations/documents in the following terms: -

- (a) "Postal Registration Certificate
- (b) Details of direct connections/ details of subscribers, Subscriber Line Report (SLR) and in case there is no SLR then please provide evidence to corroborate your subscriber base (including local survey).
- (c) List of cable operators who are/ will be getting signals from your network along with their subscriber base.
- (d) Copy of the latest monthly invoice showing the dues, if any, from the presently affiliated MSO, or from any agent/ any other intermediary to show that no payment are due.
- (e) Your exact area of operation.
- (f) Entertainment tax registration number and returns filed with entertainment tax authorities."

It was, however, stated that the said application would be considered only after the receipt of payments for the months of July and August for its network in Guwahati.

In response to the said letter, the petitioner by its letter dated 27.8.2010, supplied (a) postal registration certificate and; (b) the details of direct connection.

It, however, did not furnish any details of its direct connectivity of subscribers or the subscriber line report on the premise that it had no affiliate cable operators in Tinsukia but stated that, although, a few of them had expressed their willingness and as soon as it would obtain signals of the respondent's channels it would do the same. It also did not furnish the details of any affiliate cable operator in Tinsukia on the same premise.

Sofar as the demand of the respondent for supply of latest monthly invoices showing dues, if any, is concerned, it was stated that the same was not applicable as the area of operation was different stating that the supply of signals sought for was for the town of Tinsukia.

It also furnished the entertainment tax registration certificate. As the petitioner did not receive any response, by reason of an e-mail dated 16.2.2011, again a request was made with the said letter, however, a list of SLR, copy of the P&T license, address/ location of the Control Room and map of the area of operation were attached.

As no reply was received thereto, this petition has been filed on 26.4.2011, praying inter alia for the following reliefs :-

"(a) Direct the respondent to provide the signals of all its channels to the petitioner by way of decoders

for the areas of Tinsukia, Dibrugarh, Jorhat and Nalbari.

(b) Direct the respondent to enter into a subscription agreement with the petitioner for the areas as mentioned above on reasonable and nondiscriminatory basis."

The respondent in its reply, however, would contend :-

- (i) The petitioner is a defaulter;
- (ii) It has not furnished the requisite details as are necessary in terms of the Regulations.
- (iii) The petitioner has made underdeclaration inasmuch as it had not disclosed its subscriber base in respect of 33 LCOs at Guwahati for which also the petitioner is liable to make payments of subscription fees.
- (iv) The petitioner has not filed any application in the prescribed application form despite receipt thereof.
- (v) The petitioner in its e-mail dated 15.2.2011 has admitted that it had been supplying signals to other cable operators and in view of the said admission alone this petition should be dismissed.

No oral evidence was adduced in this case.

The parties have relied upon the documents filed with their respective pleadings.

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

(a) Keeping in view the judgment of this Tribunal dated 8.7.2011 passed in Petition No.188 (C)/2010, the petitioner cannot be held to be a defaulter as the amount payable by it to the respondent is yet to be finally determined.

(b) In view of the directions contained in the aforementioned judgment, the parties may conduct a joint survey for the purpose of determining a subscriber base.

(c) Subject to compliance of the directions in respect of the Guwahati network of the petitioner, this Tribunal should issue the necessary directions for supply of signals of its channels as there has been substantial

compliance of the requirements of the Regulations.

Mr.Arjun Natrajan, learned counsel on behalf of the respondent, on the other hand, would urge: -

(i) The petitioner has made gross under declaration in its Subscriber Line Reports insofar as it has failed and/or neglected to give the details of the 33 LCOs, which it had owned to be belonging to its network in its e-mail dated 15.2.2011, in response to the cease and desist notice issued by the respondent to the said operators.

(ii) Proviso I appended to Regulation 3.2 would clearly show that the broadcaster cannot be directed to supply signals to a defaulter and in that view of the matter the petitioner's request must be held to have been justifiably rejected by the respondent in terms of its letter dated 26.8.2010.

(iii) The request made to the petitioner to furnish the details and/or file an application in the prescribed form was to be considered only when the petitioner clears its outstanding dues in respect of its Guwahati network.

(iv) The petitioner in any event was bound to furnish the last invoice of the broadcasters whose signals were being retransmitted by it not only in town of Tinsukia but also in the town of Guwahati.

(v) The onus of proof being on the petitioner and he having not adduced any evidence in this case cannot be shown any indulgence in terms of Clause 3.2 of the Regulations.

(vi) The petitioner in the facts and circumstances of the case must be held to have made under declaration.

This case to some extent has a chequered history.

A petition was filed before this Tribunal by the petitioner for a direction upon the respondent herein to provide decoders of its channels. The said petition, marked as Petition No.157 (C)/2009, was disposed of with a direction upon the respondent that subject to the conditions mentioned therein it should supply signals to the network of the petitioner provisionally on a subscriber base of 3000.

The parties thereafter met on several occasions. The respondent, however, issued a notice under Clause 4.1 of the Regulations and a public notice under Clause 4.3 thereof. Questioning the validity and/or legality of the notices, the petitioner filed another petition being Petition No.188 (C)/2010.

In that case the contention of the respondent amongst others was that the actual subscriber base had not been disclosed by the petitioner.

The said petition, however, was allowed by a judgment and order dated 8.7.2011, inter alia, directing: -

"2. The authorized representative of the parties should meet at the Kolkata office of respondent No. 1 within two weeks from date and hold negotiations on the subscriber base of the petitioner. Both parties shall be entitled to furnish such informations/evidences in support of their respective contentions, which would be taken into consideration by the other side.

8. It will be open to the parties to produce evidences so far as the subscriber base of the petitioner is concerned. If they cannot arrive at mutually negotiated subscriber base, a joint survey may be undertaken.

9. The petitioner shall continue to pay monthly subscription fee, albeit on an ad-hoc basis at the same rate, which it had been paying during pendency of this proceeding.

10. The respondent No.1, if so desires, may raise a demand on a provisional basis which should be divided into two parts namely one in terms of the order of this Tribunal and the other for the subsequent period."

It is not in dispute that the directions made in the aforementioned judgment are yet to be fully complied with and a demand is yet to be raised on the basis thereof.

Mr.Natrajan, however, submitted that a demand had been made on the petitioner and he should have paid the amount. Indisputably the said demand has been set aside by this Tribunal in terms of its aforementioned judgment dated 8.7.2011. In that view of the matter the petitioner cannot be said to be a defaulter within the meaning of the Explanation appended to Clause 3.2 of the Regulations.

We may notice the relevant provisions of the said Regulations :-

"3.2 Every broadcaster shall provide on request signals of its TV channels on non-discriminatory

terms to all distributors of TV channels, which may include, but be not limited to a cable operator, direct to home operator, multi system operator, head ends in the sky operator; Multi system operators shall also on request re-transmit signals received from a broadcaster, on a non-discriminatory basis to cable operators.

Provided that this provision shall not apply in the case of a distributor of TV channels having defaulted in payment.

Provided further that any imposition of terms which are unreasonable shall be deemed to constitute a denial of request.

9.1 In non-addressable systems, while executing an interconnection agreement for the first time between a multi system operator and a cable operator, the parties to the agreement shall take into account the subscriber base of the cable operator on the basis of the Subscriber Line Report (SLR) where such SLR exists. Where such SLR does not exist, this shall be negotiated on the basis of the evidence provided by the two parties on the subscriber base, including the subscriber base of similarly placed cable operators and local survey.

Explanation

The Subscriber Line Report (SLR) is only an indicative basis for arriving at the subscriber base and the subscriber base as mutually agreed by the two parties could be more than or less than the number indicated by the SLR.

9.2 In non-addressable systems, while executing an interconnection agreement for the first time between a multi system operator and a broadcaster, the multi system operator shall furnish a list of the cable operators who will be getting signals from its network along with their subscriber base. The parties to the agreement shall take into account the subscriber base of cable operators connected to the multi system operator while negotiating the

subscriber base of the multi system operator. For the consumers proposed to be directly served by the multi system operator, the procedure as laid down in sub-clause 9.1 of this regulation shall be followed.”

The basic requirements to enforce the statutory duty of a broadcaster to supply signals of its channels, therefore, would depend upon compliance of the said Regulations, namely :-

- (i) The signal seeker should not be a defaulter;
- (ii) It has furnished the details of the LCOs who are likely to join its network and/or details of the subscribers to whom it would supply its signals directly.

There cannot, however, be any doubt or dispute that the Broadcaster has a right to verify the declaration of the signal seeker as regard its subscriber base and/or capacity of the MSO to distribute signals including the fact as to whether he has set up an appropriate head end or not. A broadcaster may also seek other requisite informations which may be necessary for the purpose of supply of signals on reasonable terms and on a non-discriminatory basis.

The question as to whether the petitioner is a defaulter on the premise that it has not truthfully declared its subscriber base in

respect of its Guwahati network is the subject matter of the decision of this Tribunal dated 4.7.2011 passed in the aforementioned Petition No.188 (C)/2010.

In that view of the matter as at present advised it is not possible for this Tribunal to declare that the petitioner is a defaulter or has made any under declaration in respect of its Guwahati Network.

It is true that the respondent had issued a cease and desist notice to various broadcasters and it is in that context only the petitioner's e-mail dated 15.3.2011 must be construed. The petitioner issued the said e-mail in continuation of its earlier e-mail.

The petitioner has reminded the respondent that it had made a total payment of Rs.80 lakhs while urging that it had not been acting in a fair manner in the matter of issuance of the bills.

It made a passing reference that some of its operators have received letters to the effect that they had illegally or unauthorisedly been transmitting their channels in some areas of Guwahati city i.e. Kamrup Metro/Rural district.

At that point of time the aforementioned petition being Petition No.188 (C)/2010 was pending. In the aforementioned petition the parties had adduced evidences.

Mr.Natrajan had made feeble attempts to draw our attention to the statements made in the cross-examination of the witnesses in the aforementioned case.

However, we are of the opinion that having regard to the fact that no oral evidence has been led by any of the parties in these proceedings and thus the requirements of Section 145 of the Indian Evidence Act having not been complied with, the same is not very relevant.

The question as to whether the petitioner is a defaulter or not must be determined on the basis of the exercises which were required to be carried out by the parties hereto in terms of the aforementioned judgment dated 8.7.2011.

The contents of the said e-mail are not in dispute. In absence of any clear and explicit admission, it is not possible for this Tribunal to pass a judgment against the petitioner at this stage relying on or the basis of a stray sentence made in the said e-mail.

Mr.Natrajan would contend that the petitioner in its rejoinder having not transversed specifically the contentions raised in para 10 of the reply containing the text that the aforementioned e-mail dated 15.3.2011 in its rejoinder, must be held to have admitted the same.

As noticed heretobefore the contents of the said e-mail are not in dispute. A trivial issue has been raised by Mr.Natrajan that the petitioner has not proved non-receipt of the application form, although, the said contention has been raised in the rejoinder. Making a request in a prescribed form is not imperative in character.

A broadcaster having regard to the language used in Clause 3.2 of the Regulations wherein no form has been prescribed, making of a request in a form prescribed by the Broadcaster cannot be held to be imperative in character. Substantial compliance of the provisions of the Regulations, therefore, in our opinion shall subserve the purposes.

Mr.Natrajan would contend that the petitioner being a holder of a registration certificate under the Entertainment Tax Act must be held to have been supplying signals directly to the subscribers. In absence of any statute relating to payment of entertainment tax as applicable to the State of Assam having been brought to our notice, we are not in a position to subscribe to the said view.

Mr.Natarajan has relied upon a decision of this Tribunal dated 21.5.2010 in Hathway Cable and Datacom v/s Star Den Media Services Pvt. Ltd. being petition No.26 (C)/2010 wherein it has been held as under: -

“ TRAI, presumably while making its regulations, in respect of the default as envisaged in the Proviso to clause 3.2 of the ‘Regulation’ has also taken into consideration this aspect of the matter. If the petitioner is guilty of piracy in respect of a very large area, it was bound to pay increased subscription charges as also damages. Even in that sense the petitioner would be a defaulter.”

It is not the case of the respondent that the petitioner is guilty of any act of piracy.

The sole issue raised by the respondent was one of subscriber base which it will bear repetition to state, is subject to compliance of the directions of this Tribunal by the parties hereto.

Our attention has also been drawn to a decision of this Tribunal dated 18.7.2011 in Eswara Communications (S. Channel) vs. Maa Television Network Ltd. being Petition No.395 (C)/2010 wherein it was opined :-

“In terms of the aforementioned provision, a broadcaster is statutorily obligated to supply signals of its channels on demand of a distributor of T.V. channels subject to the fulfillment of the conditions laid down therein.”

There cannot be any doubt or dispute about the proposition of law laid down therein.

In that case also, this Tribunal while directing the parties to hold negotiations for determining the subscriber base within the meaning of provisions of Clause 2 (p) of the Regulations directed that on provisional basis the broadcaster would supply signals to the petitioner therein on a subscriber base of 7500.

For the reasons aforementioned, we are of the opinion that this petition may be disposed of with the following directions: -

For the reasons aforementioned, we are of the opinion that interest of justice would be sub-served, if the following interim directions are issued to the parties for compliance:

(a) The petitioner shall supply details of the LCOs proposed to be served by the petitioner alongwith their addresses, area of operation, contact numbers and subscriber base within a period of one week.

(b) The respondent will verify the data submitted by the petitioner within a period of two weeks.

Within the same period the respondent may inspect the head-end of the petitioner at Tinsukia.

(c) Thereafter, negotiations may be made between the parties within one week and in the event of settlement between the parties, a subscription agreement may be entered into subject to such terms and conditions which would be reasonable and non-discriminatory.

(d) In case no settlement is arrived at, the position of each party may be put up in form of minutes of meeting and should be submitted to this Tribunal within a period of six weeks.

This petition be posted "for directions" after six weeks on 25.11.2011. In the meantime, if settlement is arrived at, liberty is granted to mention.

(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

October 12, 2011/`ns'