

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**

**NEW DELHI**

**Dated : September 22, 2011**

**Petition No.210(C) of 2010**

M/s Jeevan Telecasting Corporation Ltd. ...Petitioner

Vs.

Asianet Satellite Communications Ltd. ...Respondent

**BEFORE:**

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

For Petitioner : Mr. Maninder Singh, Sr.Advocate with  
Mr. Bobby Augustine, Advocate

For Respondent : Ms. Shirin Khajuria, Advocate

**J U D G M E N T**

**S.B. Sinha**

The petitioner is a broadcaster. The respondent is a Multi Service Operator.

The parties hereto entered into an agreement for carriage of the channels of the petitioner since 1999. The respondent, however, had not been charging any carriage fees for the aforementioned purpose.

In April, 2009 the parties agreed that for carriage of the petitioner's channel a sum of Rs.30,00,000/- per annum would be payable, out of which cash of advertisement for the value of Rs.6,00,000/- were to be adjusted. Admittedly the said agreement was for a period of one year commencing from 1.5.2009 and renewable for another year on such terms and conditions as may be mutually accepted.

By an e-mail dated 20.5.2010 addressed by the respondent to Mr. Sankaranarayana of the petitioner, it was stated :

"As we have been discussing for the last couple of months, in view of drastic increases in the cost of operations of Cable TV and the huge investments we have made in the Head end and network, we have increased the carriage fee to Rs.1.35 Crores p.a. for the period under renewal after allowing very low fees in the earlier years as per your requests.

However in view of your request for reduction as well as our long term association, we have considered you request favourably and reduced the rates to Rs.1.2 cr. And further to Rs.1 crore and finally we have communicated our final offer

of Rs.95 Lakhs p.a. beyond which we can not reduce further.

Kindly confirm your acceptance to renew the agreement.

You are also requested to arrange the old dues which is long outstanding today itself. Ramanathan will send the statement of accounts today."

The parties however, had been negotiating on the quantum of carriage fee and at the Bar we were told that the respondent has agreed for payment of carriage fee upto Rs.75,00,000/-.

This petition was filed on or about 7.7.2010 on the premise that the respondent intended to switch off the carriage placement of the TV channel of the petitioner.

In this petition the petitioner, inter alia, has prayed for the following reliefs:

- (a) "To issue an order of permanent / perpetual injunction /direction prohibiting the respondent from demanding carriage fee from the petitioner for carriage of signals of Jeevan TV channel on its cable TV platform beyond Rs.36 lakhs per annum.
- (b) To issue an order of permanent/ perpetual injunction / direction prohibiting the respondent from discontinuing the carriage of Jeevan TV channel of the petitioner on its cable TV platform and further the respondent would not cause any distortion or obstruction in any manner,

whatsoever, in the telecast/retransmission to the viewers; and”

An interim prayer was also sought for directing the respondent not to discontinue the carriage of the TV channel of the petitioner on its cable TV platform and furthermore it should not cause any distortion or obstruction in any manner whatsoever in the telecast/retransmission to the viewers.

By an order dated 8.7.2010, this Tribunal directed the parties to maintain status quo on the premise that whereas according to the respondent it had discontinued carriage of the channel of the petitioner on and from 3.7.2010, Mr. Maninder Singh disputed the same.

Learned counsel for the respondent would submit that in fact disconnections of the analogue platform of the carriage of the petitioner had been effected in the State of Kerala except in Trivendrum from all the analogue networks w.e.f. 3.7.2010. However, having regard to the order of status quo passed by this Tribunal on 8.7.2010 the respondent was advised that the signals be restored.

Ms. Shirin Khajuria, the learned counsel appearing on behalf of the respondent would contend that the said connections

were restored on or about 2.8.2010 without prejudice to the rights and contentions of the parties.

A contention has been raised on behalf of the respondent that this petition is not maintainable. In support of the said contention Ms. Khajuria urged that the matter relating to contract of carriage and placement of channel being not governed by any Regulation and in fact the Telecom Regulatory Authority of India (the TRAI) even in the Regulations made on or about 21.7.2010 which has been filed before the Supreme Court of India, has proposed forbearance and, thus, this Tribunal has no jurisdiction to grant any relief in favour of the petitioner.

Mr. Maninder Singh, the learned counsel appearing on behalf of the petitioner, on the other hand, urged that although there exists a distinction between `a must carry' clause and a `must provide' clause, this Tribunal even in a situation of this nature would be entitled to determine as to what should be the reasonable amount for carrying of a broadcaster's channel on the analogue and digital platform by a Multi Service Operator. Drawing our attention to clause 8 and 8.1 of the Memorandum of understanding, the learned counsel would submit that this

Tribunal has jurisdiction, in a situation of this nature even to direct specific performance of contract.

There is no doubt or dispute that having regard to the recommendations of TRAI, the matter relating to carriage or placement is governed by the agreement between the parties and not by any Act or Regulation.

We may notice that the TRAI in its recommendations dated 21.7.2010 submitted to the Supreme Court of India in CA No.829-833 of 2009 proposed as under:

“4.23: As for linking the fee to a formula based on some parameters, again, based on the stakeholder comments received, the Authority feels it is amply clear that the non-addressable nature of the analogue cable market makes it infeasible to arrive at verifiable reach of market serviced by the distributor in terms of subscriber numbers which is the logical primary determinant of the quantum of carriage/placement fee charged. Besides, carriage and placement fee is a multi dimensional transaction, not amenable to generalized formulations. As pointed out by several stakeholders, it can vary from place to place, from network to network, from market to market... implementing a standardized model for payments of carriage and placement fee will lead to micro management of business models and may adversely impact efficiency in the market.

4.28: The Authority has also looked at the international experience in controlling or capping carriage fee. Carriage fee in international

markets is viewed as a matter of commercial negotiations and is based on relative bargaining power and market strength of players. In all the countries studied, there is no incidence of direct intervention in placement and carriage fee.

4.30: Finally, it is observed that carriage fee in India is largely driven by the advertising potential of various markets. This is demonstrated by the fact that carriage fee is only paid in markets covered by the viewership agency TAM – as large advertisers allocate a majority of their marketing spend according to ratings published by TAM. Thus it can be argued that carriage fee should not be regulated if there are no controls on advertising revenue. This point has been made by a large number of stakeholders.

4.31: The Authority is of the view that the root cause of the escalation in carriage and placement fees lies in the supply-demand mismatch – where the number of channels present in the market far exceeds the capacity of the analog transmission mode. As this gap has widened, carriage and placement fee has risen to reflect the scarcity of frequencies and the growing premium for the owner of this scarce commodity – the MSO. The Authority is of the view that an increase in capacity, through digitization, is the only sustainable way of addressing the carriage fee issue. In the long term, as alternative revenue streams and uptake of digital distribution allows greater room for broadcasting business model to grow, this factor coupled with the high costs of distribution on analog, is likely to provide an impetus for content to move towards digital, addressable systems. This will lead to automatic resolution of the carriage and placement fee issue.”

It has not been shown before us as to how and in what manner the matter relating to carriage and placement is regulated. If it is not, prima facie we are of the opinion that the petitioner would be entitled to only damages, in the event, the parties fail to arrive at a negotiated price for the purpose of carriage of the channel of the broadcaster by the MSOs on either Analogue platform or Digital platform or both.

If damages is the only remedy available to a contracting party having regard to Section 14(1)(a) of the Specific Relief Act, 1963 read with Section 41(e) thereof no order of injunction can be granted.

However what would be the quantum of damages and as to whether therefor the petitioner would amend the petition having regard to the provisions contained in the Section 40 of the Specific Relief Act is a matter which need not be dilated upon at this stage.

It is, however, well settled that if a contract cannot be directed to the specifically enforced, no injunction can also be granted having regard to section 41 (e) of the Specific Relief Act, 1963.

We have, however, keeping in view the fact that the parties had been negotiating for arriving at a settlement with regard to the amount of carriage fees asked the learned counsel for the petitioner as to whether petitioner is ready or willing to give an undertaking before us that in the event that this petition is ultimately dismissed, it will pay to the respondent the amount it had been demanding for carriage of its channels. On instructions, learned counsel declined to do so. In that view of the matter we have vacated the order of status quo passed by us on 8.7.2010.

The reasons are being assigned as directed in the order of the Tribunal.

Before, however, we part with this order we may notice that Ms. Khajuria had sought for a direction upon the petitioner to pay the amount of carriage fee at the enhanced rate. We cannot do so in view of the fact that according to the respondent itself it had ceased to carry the channels of the petitioner from 3.7.2010.

The order of status quo was granted in view of the aforementioned statements made before us. It had, indisputably, restored the signals of its own w.e.f 2.8.2010. If it was correct in

its statement before us that it had discontinued carriage of the petitioner's channels, it could have continued to do so.

We, however, direct the petitioner to pay the admitted amount of carriage fees for the period the respondent had carried its channels on its analogue as also on the digital platform namely at the rate of Rs.30 lakhs per annum, if not already paid.

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

**September 22, 2011**  
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