

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 12th APRIL, 2012

Petition No.61 (C) of 2011

(M.A. No.s. 32, 99 & 15 of 2012)

Ambala Communication Network Pvt. Ltd. ...Petitioner

Vs.

MSM Discovery Pvt. Ltd. ...Respondent

BEFORE:

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

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

For Petitioner : Mr. Navin Chawla, Advocate
Ms. Nidhi Parashar, Advocate

For Respondent : Mr. A.C.Mishra, Advocate
Mr. Jasmeet Singh, Advocate

JUDGEMENT

Petitioner is a Multi Service Operator (MSO) operating in the town of Ambala. Respondent is a Content Aggregator of different channels of some Broadcasters. It is also a Broadcaster.

2. The parties hereto admittedly entered into an agreement on or about 7.7.2010, whereby and whereunder it was to pay a subscription amount of Rs.5,55,357/- per month exclusive of taxes, and with taxes

a sum of Rs.6,12,498. The channels Colors, MTV, Nickelodeon and VH1 left the bouquet of the Respondent on 13.7.2010; whereas Neo Sports channel joined the bouquet of Respondent on 01.9.2010.

3. According to the Petitioner, the said Neo Sports channel was thrust upon it although it was not interested therein which was communicated to the Respondent by a letter dated 11.9.2010.

NDTV group of channels also left the bouquet of Respondent on 14.12.2010. The Petitioner sought for reduction in the subscription amount on the aforementioned premise.

4. The agreement, however, expired on 31.12.2010. The Respondent issued a letter on the Petitioner on or about 30.12.2010 alongwith an invoice for the month of December, 2010 for renewal of the agreement which according to the Petitioner for the first time disclosed that a sum of Rs. 17, 86, 085/- was outstanding. It furthermore showed an increased amount of subscription fee being Rs.6,63,585/- from Rs.6,12,498/- purported to be on account of the NEO channels. Petitioner on or about 27.1.2011 informed the Respondent that a new MSO started operation in the area of the Petitioner.

A Notice under Clause 4.1 of the Regulation was issued by the Respondent on or about 08.11.2010.

5. The present petition was filed on 27.1.2011, praying *inter-alia* for the following reliefs:-

- “(a) Direct the Respondent to enter into a subscription agreement for the year 2011-12 with the Petitioner on such negotiated terms and conditions as per the Regulations after giving due reduction for the channels which have already left the bouquet of the Respondent.*
- (b) Direct the Respondent to reconcile the accounts of the Petitioner and give due credit for the channels which have already left the bouquet of the Respondent.*
- (c) Direct the Respondent to stop imposing channels more particularly the NEO Sports bouquet of channels on the Petitioner which the Petitioner does not require.*
- (d) Declare the invoice dated 07.12.2010 as unreasonable and not due from the Petitioner.*
- (e) Restrain the Respondent from in any manner interfering/disrupting or disconnecting the signal services being provided to the area of operation of the Petitioner until disposal of this petition.*
- (f) Pass an ad-interim ex-parte order in terms of prayer (e) made above.”*

6. The network of the Petitioner was disconnected on 30.1.2011. This petition was listed for preliminary hearing on 31.1.2011. A Public Notice of disconnection was issued by the Respondent on 22.12.2010 on the ground of piracy and non-payment of dues. The Petitioner filed an application for amendment contending that in the event it is granted the requisite down-gradation, in view of the fact that the large numbers of channels had left the bouquet of the Respondent, it may be held to have made over payments.

7. The Petitioner furthermore contended that no unauthorized cable casting has been caused by him as he had all along been operating within the Municipal limits of the town of Ambala.

8. The said application for amendment was allowed by an order dated 3.2.2011.

9. This Tribunal passed an interim order directing the Respondent to restore the supply of signals subject to the following conditions:-

“(a) The Petitioner’s depositing a sum of Rs.10lakhs in two installments of Rs.5.00lakhs each (i.e.) within two days and (ii) within a period of ten days from date.

(b) Payment of subscription fee regularly from the month of Feb, 2011 @ Rs.5.00lakhs per month inclusive of tax.

The network of the Petitioner may be reconnected on payment of the first installment as expeditiously as possible and preferably within 24 hours from the time of deposit.

The Director of the Petitioner shall affirm on affidavit undertaking to pay the balance sum of Rs.5.00 lakhs”

10. Respondent herein filed a Miscellaneous application which was marked as M.A. No. 99 of 2011 inter-alia contending that the Petitioner had been transgressing its area of operation by supplying signals in the rural areas which were not covered by the Municipal Corporation of Ambala.

11. The said Miscellaneous Application was heard and by an order dated 25.3.2011, the parties were directed to file a map delineating the area of Ambala Municipal Corporation. For the reasons best known to the parties, the said direction has not been complied with.

12. *Inter-alia* on the premise that the Respondent itself issued invoices for a sum of Rs.3,68,118.66p in stead and in place of Rs.5.00 lakhs as directed by this Tribunal, claiming reduction in the subscription fee, the Petitioner filed an application on or about 23.3.2011 which was marked as Miscellaneous Application No. 108 of 2011.

Re-conciliation of accounts of the parties were directed by this Tribunal. According to the parties, the settlement between them could not be arrived at on the premise that the area of operation for the new agreement could not be defined. It was directed that the parties may enter into an agreement within the territorial limits of Municipal of Ambala.

13. During pendency of this petition, the Petitioner supplied two SLRs to the Respondent; one in May, 2011 showing its connectivities at 7979 and another in June, 2011 showing connectivities at 6489.

On the said premise the Respondent expressed its readiness and willingness to enter into a subscription agreement on a subscriber base of 7979 which according to the Petitioner was not the correct basis as the same was its universe and not the subscriber base.

14. Before, however, proceeding in the matter, we may notice that by reason of an order dated 11.10.2011, the Petitioner was directed to pay a sum of Rs.3.70 lakhs on an ad-hoc basis to the Respondent.

15. By reason of an order dated 15.3.2011, the following issues were framed:-

“(a) Whether the Petitioner has committed any act of piracy?”

- (b) *Whether the Respondent was required to reconcile the accounts of the Petitioner?*
- (c) *Whether the Respondent, in terms of the extant Regulations, can impose any channel upon the Petitioner without his agreeing therefor and in particular NEO Sports bouquet of channels?*
- (d) *To what relief, if any, the Petitioner is entitled to?”*

16. At the outset that Mr. Mishra, learned counsel appearing on behalf of the Respondent contended that this Tribunal should determine the subscriber base of the Petitioner's network whereafter, the accounts between the parties could be directed to be reconciled by an officer of this Tribunal. Learned counsel would also contend that this offer was being made to bring an end to this litigation. Learned counsel also did not press the issue of piracy. So far as the supply of signals of Neo Sports channel is concerned, it was contended that the Respondent had billed the Petitioner for the period 01.9.2010 to 17.11.2010 as during the same, the Petitioner had re-transmitted the signals of the said channels to its subscribers in respect of three cricket series, namely, Newzealand series held in Bangladesh, (ii) Australia series and (iii) Bangladesh series.

17. Mr. Navin Chawla and Ms. Nidhi Parashar, learned counsel appearing on behalf of the Petitioner, however, submitted:-

- (i) Having regard to the admitted fact that a large number of channels went out of the bouquet of the Respondent, it was bound to provide down-gradation of the subscription fees, as admittedly a new LCO commonly known as Jai Maa Ambey Cable Network (Mahalakshmi Cable Network, as it was earlier known) had started its operation from January, 2011.
- (ii) The Petitioner has lost a large number of subscribers and, therefore, it was entitled to down-gradation of the subscription fee. The Petitioner having supplied the SLRs to the Respondent for two months, clearly showing that even the subscription fee in May, 2010, the Respondent ought to have down-graded the subscriber base to a reasonable figure from 3523 on the basis whereof the subscription amount of Rs.5,55,357/- per month was determined.
- (iii) The Respondent's witness having accepted that the parties arrived at the stipulated amount for the purpose of entering into a subscription agreement, and subscriber base was calculated by recourse to the process of reversing engineering, determination of subscriber base is irrelevant.

18. The factors which are relevant for the purpose of determining the subscriber base at the time of first agreement are not and cannot be the same which are necessary to be taken into consideration at the time of renewal thereof.

19. Mr. A. C. Mishra, learned counsel appearing on behalf of the Respondent, on the other hand, would contend:-

- (i) It is incorrect to contend that the industry follows a practice of reverse engineering for the purpose of determining the subscriber base.
- (ii) Even assuming that in the year 2010, the Respondent had committed a mistake in the matter of determination of the correct subscriber base of the Petitioner, the same would not mean that having come to learn the true and correct subscriber base of the Petitioner, particularly, having regard to the fact that it has entered into a subscription agreement with the Star Den Ltd. on a subscriber base of 10,000, the same should not form the basis therefor.
- (iv) In view of the fact that admittedly the Petitioner has supplied SLR only for the months of May and June, 2011, wherefrom it would be evident that the number of subscribers decreased for the months of January to April, 2011.

- (v) Had an agreement been entered into in January, 2011, the subscriber base would have been higher.
- (vi) Keeping in view the Regulations framed by the TRAI, the subscription amount is required to be determined on the basis of the subscriber base and it is not the other way round.
- (vii) The purported reminder of the Petitioner dated 11.9.2010 with regard to disconnection of the NEO Sports channel was not received by the Respondent.

20. Determination of the subscriber base by the Tribunal is ordinarily not contemplated under the Regulations. The TRAI had framed the Telecommunications (Broadcasting & Cable Services) Interconnection Regulations, 2004, as amended from time to time hereinafter called and referred to for the sake of gravity as the said Regulations, for the purpose of regulating the Broadcasting & Cable Service business.

21. We may notice the definition of 'Subscriber Base' and 'Subscriber Line Report' as contained in Clauses 2(p) and 2 (q) of the Regulations, which read as under:-

*“2(p) **“subscriber base”** means the number of subscribers –*

(i) as agreed to by two service providers in a non-addressable system on the basis of which payments are made by one service provider to the other, or

(ii) as reflected by the Subscriber Management System, where addressable systems are employed.

*2(q) “**subscriber line report**” or “**SLR**” means a monthly statement wherein, in a non-addressable system, a multi system operator and a cable operator agree upon the subscriber base for that month.”*

22. In terms of the Clause 3.2 of the Regulations, distributor of TV channels is statutorily entitled to obtain the supply of signals of the channels of the Broadcasters on reasonable terms and on a non-discriminatory basis. We may notice that Clause 9.2 of the Regulations provides for determination of the subscriber base at the time of first agreement and Clause 11.2 provides for finalizing the subscriber base at the time of renewal of agreement between a Multi Service Operator and a Broadcaster.

23. Submissions of Mr. Chawla is that whereas SLR assumes importance at the time of entering into the agreement, it loses much significance at the time of renewal thereof as the factors laid down in both the aforementioned provisions are distinct and different in so far as, in the first instance, the parties are required to take into account the subscriber base of the cable operators; at the time of renewal, thereof, what is taken into account is the changes in the subscriber

base of the MSO over the past three years as well as the changes in subscriber base of other MSOs operating in the area.

24. The said submissions of Mr. Chawla, learned counsel, in our opinion, may not be correct in the facts and circumstances of this case.

Clause 12.1 mandates a MSO to furnish an updated list of Cable Operators along with its subscriber base to the Broadcasters on a monthly basis. The Petitioners in the month of May, 2011 supplied its total connectivities.

25. The Petitioner, therefore, did not comply with the requirements of Clause 12 of the Regulations. The agreement was operative till 31.12.2010.

Indisputably the Petitioner was entitled to down-gradation as some of the channels went out of the bouquet of the Respondent. According to the Respondent such down-gradations have been given in terms of the extant Regulations framed by the TRAI. So far as Neo channel is concerned, apart from the fact that Mr. Mishra himself has left the matter at the hands of this Tribunal, from the records it appears that the Respondent has not been able to prove the same.

26. The parties are at variance as to whether the Petitioner had availed the said signals. There is no evidence brought on record to

show that the Petitioner has availed the signals for a period of three months, i.e., 1.9.2010 to 17.11.2010.

Moreover, only because a new channel joined the bouquet of the Respondent, the same cannot unilaterally be thrust upon an MSO and consequently raise bills although it had not been willing to subscribe the said channel. The Petitioner, therefore, is entitled to reduction of the amount so far as supply of signals of Neo Cricket channel is concerned for the period 1.9.2010 to 17.11.2010.

27. Before, however, proceeding to determine the legal questions raised at the bar, we may notice the materials brought on record by the parties.

Admittedly a new MSO started operations in the town of Ambala, according to the Respondent from September, 2010 but according to Petitioner from Jan, 2011.

Joining of a new MSO, therefore, could not have any effect on the payment of the amount specified in the subscription agreement dated 7.7.2010 for the year 2010. The Petitioner has been enjoying the supply of signals from 3.2.2011 as directed by the Tribunal although the same had disconnected on 30.1.2011.

28. The Respondent, therefore, would be entitled to the restitution of the benefit obtained by the Petitioner in terms of the said interim order.

It is for that purpose only this Tribunal has been called upon to determine the subscriber base which *stricto sensu* may not come within the purview of the Regulations.

29. Star is another popular channel.

PW/1, a Director of the Petitioner company, Shri Rakesh Kumar Sharma in his cross examination stated as under:-

“Q:1 I put it to you that you had under declared your subscriber base to the respondent and got the agreement signed for a meagre subscriber base of 3523 for the year 2010 however, you had declared subscriber base close to 10000 to Star in the same year.

A: There is no question of under declaration of subscriber base as what had been agreed to was that we would pay around Rs.6.2laks (inclusive of taxes) for entire Ambala Municipal Corporation.

As far as Star is concerned its subscriber base has always been higher as they had slashed their prices of the channels almost by half after 2003 an doubled the connectivity.

The subscriber base of Star has always been different for its different bouquets. Star had not reduced the prices only for us but for all over India.

Q: What was your agreed subscriber base with Star in the year 2010?

A: For the first bouquet it was around 10000 and for other bouquets it was much lesser, however, I don't remember the exact figures.”

30. It was furthermore stated:-

“It is incorrect to suggest that I have signed any agreement with Media Pro for a subscriber base of around 10000.

I have not signed any agreement with Media Pro for the year 2011.”

31. We may however, notice that in his affidavit the said witness stated:-

“20. I state that the Respondent is wrongly relying on the much higher subscriber base agreed to between the Petitioner and Star Den Media Pvt. Ltd. In this regard, I state that generally the agreements entered into with Star Den are always on a much higher subscriber base due to the low pricing of its bouquets. Even otherwise also, I state that even as compared to 2010, the Agreement entered into by the Petitioner with Star Den for the year 2011 was on the basis of the decreased subscriber base of as much as 1/3rd as compared to 2010 Agreement. Hence, if the Respondent chooses to rely upon the Agreement entered into by the Petitioner

with Star Den for the year 2011, then a similar decrease in the subscriber base should also be agreed to by the Respondent herein.”

32. The statement made by the witness in his cross examination is not wholly correct. If he had a subscriber base of 15000 so far as Star group of channels is concerned in the year 2010 its universe must be higher. In fact it had entered into a an agreement in the year 2011 on a subscriber base of 10000 with the Star Den.

33. The witness of the Respondent, Shri Siddharth Chaturvedi, who had been acting as the Territory Manager of the Respondent from December, 2007, in his affidavit stated:

“2. I say that prior to filling of the present petition, the Petitioner after due negotiations on its subscriber base, had agreed to pay a monthly subscription fee of Rs.6,12,521/- to the Respondent, in consideration to the supply of signals of the bouquet of channels of the Respondent. That thereafter, on account of certain changes in the bouquet of channels of the Respondent (including the addition of the NEO channel), the Respondent commenced to charge Rs.6,63,585/- from the Petitioner from December, 2010. Copy of the

invoice is exhibited as Exhibit RW/1 at page 31 of the paperback.

6. I say that in terms of the order passed by this Hon'ble Tribunal dated 01.6.2011, the parties entered into negotiations in the month of June 2011 wherein the subscriber base as well as the area of operation could not be finalized on account of the fact that the Petitioner was not willing to execute the Agreement even for a subscriber base as per the SLR supplied by the Petitioner himself. The Petitioner had supplied an SLR to the Respondent on 24.5.2011 showing the subscriber base of 7979. The Respondent has repeatedly requested the Petitioner to execute the subscription agreement on the correct and true subscriber base, however, the Petitioner was not willing to execute the Affiliation Agreement, even for a subscriber base as per the SLR dated 24.5.2011 supplied by the Petitioner himself. Petitioner was further not willing to disclose the accurate area of operation of the Petitioner in order to enable itself from cablecasting the channels of the Respondent in unauthorized areas. The SLR supplied by the Petitioner to the Respondent for the month of May,

2011 is exhibited herewith as Exhibit RW/2 at page No.9-10 of the reply to additional affidavit.

7. I say that during the course of the various meetings, the Respondent had also brought to the notice of the Petitioner that the Petitioner has entered into subscription agreement with other broadcasters at a much higher subscriber base. The copy of the invoice-cum-notice dated 3.12.2010 issued by STAR DEN Media Pvt. Ltd to the Petitioner herein is exhibited herewith as Exhibit RW/3 at page 21 of the reply to additional affidavit.”

34. The said witness admits that Mahalakshmi Network, another MSO has also entered into an agreement with the Respondent in the Month of September, 2010.

We have noticed heretobefore that according to the Petitioner it had entered into the business from January, 2011 which did not affect the interest of the Petitioner.

In his cross examination, the said witness stated:-

“Q: In the event of the another MSO having started its operations in the area of the petitioner, will it be correct to say that the petitioner is entitled to due reductions from the respondent?”

A: It is incorrect.

Vol. Ambala Communication Network was already under declared as compared to other broadcasters.

Q: Which broadcaster are you talking about?

A: Star Den.

Q: Is it correct that the agreements with Star Den have always been on a higher subscriber base?

A: I am not aware.

Q: Is it correct that the negotiations between the parties have always been amount based irrespective of subscriber base?

A: It is incorrect.

Q: Can you produce all the agreements prior to 2010 that you have entered into with the petitioner?

A: Yes. (Of my tenure only.)

Q: Is it correct that all the agreements entered into between the parties since 2001 are a part of office record?

A: I will have to check.

(Ld. Counsel for the petitioner calls upon the witness to produce the agreements of his tenure and others prior to his tenure upon due verification being done by him.)”

“Q: Is it correct to state that as per TDSAT norms, negotiations have to be conducted on the SLR submitted by an MSO to the broadcaster?”

(Ld. Counsel for the respondent objects that the question is of legal nature.)

A: I am not fully aware.

Vol. As per sales, we negotiate the agreement keeping in mind the subscriber base of competition broadcasters, the market information and revenue paid to other broadcasters. SLRs provided by the MSOs are generally under declared.

Q: Do you mean to say that no negotiations is done on the basis of the SLR given by the MSO to the respondent?

A: No.

Vol. We consider the SLR as the minimum declaration as they are usually under declared

Q: Do you conduct any verification to find out the actual subscriber base of the MSO in order to facilitate you to effectively negotiate with the MSO?

A: as mentioned, we rely upon market information, other broadcasters declaration and census reports to facilitate us for effective negotiations.”

35. As regards supply of SLRs, he stated:-

“Q: Is it correct that the petitioner has supplied you with regular SLRs till date?

A: It is incorrect.

Vol. Just twice after moving to TDSAT. Never prior to that.

Q: Have you written any letter to the petitioner in this regard asking for the SLRs?

A: Yes.

Q: Have you placed the same on the record?

A: No as the same was not required in the present case.

Vol. Can be provided, if required.

Q: I put it to you that the petitioner has infact been supplying you with regular monthly SLRs and you are deposing falsely?

A: It is incorrect.”

36. The Petitioner, as a Multi Service Operator, was required to maintain its books of accounts. It must have with it a list of operators. For the purpose of renewal of the agreement as provided for under Clause 8.1, the negotiations should have started from the Month of November, 2010. For the above mentioned purposes also not only the SLRs of the last three years but also the SLRs of the other MSOs were important.

37. The new operator started its operation only in January, 2011. For starting the negotiation process, what was, thus, relevant was the universe of the Petitioner.

The subscriber base, vis-à-vis, the quantum of the subscription amount could not have been determined only on the said basis.

38. It is one thing to say that the Petitioner is entitled to the proportionate adjustment because of leaving of several Broadcasters in the bouquet of the Respondent but it is another thing to say that thereby the Petitioner's subscriber base has substantially eroded.

On its own showing another MSO entered into the field only in January, 2011. Even that be so only from January onwards there might have been some decrease in the subscriber base of the Petitioner.

39. The Petitioner according to the Respondent issued a Notice under Clause 4.1 and the Public Notice on 22.12.2010 *inter-alia* on the ground of non-payment of dues. The present Petition was filed on 21.1.2011 and on the same day, the Petitioner informed the Respondent that a new MSO had entered the area.

There cannot be any doubt or dispute that if the Petitioner have been over-billed or made payments which had not been taken into consideration by the Respondent in its account, reconciliation would be necessary but such reconciliation would not be for loss in subscriber base till 2010, therefore, the petitioner was bound to pay the subscription fee at the agreed rate.

40. So far as the year 2011 is concerned, again, the Petitioner must take its share of blame. Having regard to its claim of down-gradation it not only should have supplied the list of local cable operators who have left its network but also their respective subscriber bases to show the extent of erosion in its subscriber base. Had that exercise been carried out, it could have called upon the Broadcaster to show as to whether the said local cable operators have joined the network of the new MSO

and if so from the date which would have shown the *bonafide* on part of the Petitioner.

41. Even in the year 2010 according to the petitioner the subscriber base was 3523 so far as the Respondent is concerned, it on own showing had shown 15000 subscriber base in respect of the Star group of channels.

We would assume that even the Star group of channels have given down gradation to the Petitioner in its subscriber base by entering into an agreement on a subscriber base of 10000, but the same would not automatically follow that the Petitioner thereby became entitled to down gradation of subscriber base from 3523 to the 2/3rd thereof.

42. We have not been informed as to on what basis the Star has reduced its subscriber base, if at all. The Regulator mandates that the agreement should be entered into on a subscriber base being a negotiated figure.

There cannot be any doubt or dispute that such negotiated figure should be calculated having regard to the universe disclosed by the Petitioner.

43. The figure may not be hundred per cent correct but there is hardly any controversy that the subscriber base would be determined keeping in view the popularity of channel.

The Petitioner states that the Star channels were more popular but its witness ought to have said so in the clearest possible terms. He could not have kept mum.

There is, however, one aspect of the matter which we cannot ignore.

During pendency of the present petition an invoice was issued in the month of August 2011. The said invoice was for a sum of Rs.410976/- inclusive of taxes. As a question arose that the said invoice included the amount of subscription fee payable for supply of signals of Neo Sports channel, we determined the figure at 3.70 lakhs on an ad-hoc basis.

44. The Respondent's witness was called upon to produce certain documents but for one reason or the other he did not do so. It is, therefore, evident that both sides have withheld their best evidences. It must also be borne in mind that whereas the Petitioner might have lost some LCOs, there is also a tremendous growth of the industry. There is nothing on record to show that Petitioner had suffered any loss by reason of the supply of signals by the DTH operators.

The Petitioner's area of operation is the entire town of Ambala which is a cosmopolitan town and, thus, viewers must have their own preference of the TV channels.

45. It may be true that the subscription fees charged by the Broadcasters as also the fees charged by MSO from a cable operator cannot be increased at their sweet will, keeping in view the Regulations of the TRAI as the increase in the subscription fees has to be determined having regard to the increase in the subscriber base of a Multi Service Operator.

46. We, keeping in view the facts and circumstances of the case and keeping in view the fact that the Petitioner had entered into an agreement with the Star group of channels at a subscriber base of 10000, we feel that end of justice will be sub-served if we determine the subscriber base of Petitioner at 6000.

The parties may reconcile their accounts on the aforementioned basis.

This petition is disposed of on the above terms without any order as to costs.

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

.....
(P.K. Rastogi)
Member

HKC/