

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 28TH AUGUST 2012

Petition No.56 (C) of 2012

M/s. Kailash Cable Network Pvt. Ltd. ... Petitioner

Vs.

M/s. MSM Discovery Pvt. Ltd. ... Respondent

BEFORE:

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

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

For Petitioners : Mr. Vineet Bhagat, Advocate
Ms. Neha Jain, Advocate

For Respondent : Mr. Abhishek Malhotra, Advocate
Mr. Angad Singh Dugal, Advocate

J U D G E M E N T

The Petitioner is a Multi Service Operator having a large area of operation.

By this petition, it has inter-alia prayed for the following reliefs :-

“(i) Set aside the Public Notice dated 12.01.2012 and letter/ notice dated 02.01.2012 issued by the Respondent being illegal and actuated with malafide intention to arm-twist the Petitioner;

(ii) Direct the Respondent to enter into a fresh Subscription Agreement with the Petitioner on reasonable terms and conditions, after giving due adjustment on account of deletion of the Cable Operators who have left the petitioner which has been duly notified by the Petitioner in the updated SLR dated 7 Sep 2011;

(iii) Direct the Respondent to give adjustment in terms of monthly subscription fee, after giving adjustment for deletion of few of its Cable Operators from the SLR of the Petitioner and raise the updated Invoice in terms thereof;

(iv) Direct the Respondent to reconcile the Accounts with the Petitioner.”

2. The Petitioner contends that the purported Public Notice dated 12.01.2012 issued by the Respondent herein is bad in law and malafide.

The said Public Notice dated 12.01.2012 had been issued inter-alia on the ground of non-payment of the subscription fee. The Petitioner admittedly had been served with a notice dated 02.01.2012 by the Respondent herein inter-alia on the ground of non-payment of a sum of Rs.6,61,324/- whereby the Petitioner was called upon to make payments of the said amount within a period of three days.

The Public Notice, however, was issued on 12.01.2012.

By reason of a letter dated 20.01.2012 the Petitioner protested thereagainst inter-alia contending that from the month of August 2011, nine cable operators had left its concern.

3. Mr. Bhagat relying on or on the basis of the statements made by Mr. Alok Choudhary in his cross-examination would contend that as verification of the SLR submitted by the Petitioner used to be made by the said witness, so far as the cable operators operating in the area of the Petitioner is concerned, seven of them having been found to be not operating their business with the Petitioner herein; whereas one of them is said to have merged with it, it was entitled to down gradation.

The said witness with regard to the SLR of the Petitioner stated as under:-

“Q.9: Will I be right in saying that based on your reports, action is taken by the company?”

A: Based on my reports, we speak to the operators and get the same confirmed.

Q.17: Can you produce anything in writing by way of a report sent to your superior or any other document prepared by your superior based on which letters mentioned in para 14 to 16 of your affidavit has been sent?

A: Not now, but I can produce it later.

It is incorrect to suggest that the letters issued by the respondent mentioned in paras 14 to 16 of my affidavit are false and fabricated.

Q.18: Did you verify the deletion of 9 operators intimated by the petitioner through 9 separate letters dated 5.8.2011?

A: Firstly, we received these letters in February 2012. Once we received these letters, I have personally verified these 9 operators.

Q.19: What did you find out in your personal verification?

A: Out of 9 operators, one is still running signals of Kailash Cable, seven operators are merged with other MSOs 4-5 years back and one operator has sold out his network to the other MSO.”

4. Validation Form attached to the agreement clearly show the subscriber base of the Petitioner was stated in respect of the three bouquet of the Respondent, which reads as under :-

<i>Details</i>	<i>Rate</i>	<i>Number of Subscribers</i>	<i>Monthly Fee (Rs.)</i>
<i>BOUQUET -1 (Set Max, AXN, Discovery Channel, Animal Planet)</i>	<i>58.82</i>	<i>2775</i>	<i>163200</i>
<i>BOUQUET-2 (SAB, PIX, TLC, Animax, Aaj Tak, Headlines Today, Tez)</i>	<i>36.17</i>	<i>1433</i>	<i>51800</i>
<i>BOUQUET-3 (Aath, Discovery Science, Discovery Turbo, Neo Sports, Neo Cricket)</i>	<i>65.00</i>	<i>677</i>	<i>44000</i>

5. The area of operation of the Petitioner in terms of the said agreement is said to be as per attached SLR (parts of Howrah and Kolkata KMDA areas) only. Along with the said agreement, according to the Petitioner, a list of cable operators was furnished by him on 07.9.2011 containing the names of 25 cable operators and the same formed part of the agreement.

6. The Respondent, however, denies and disputes the same. It contended that in terms of the said agreement, the Petitioner was to pay a sum of Rs.2.59 lakhs per month; whereas the Petitioner claims down-gradation. The statement of accounts filed by the Respondent herein would, however, show that several cheques issued by the Petitioner bounced. The Petitioner in the month of August 2011 paid a sum of Rs.1,79,964/-; whereas in the month of September 2011 it paid only a sum of Rs.1,50,000/-. Cheque dated 30.9.2011 for a sum of Rs.1,29,964/- appears to have bounced. As would appear from the said statement of account, the Petitioner made payments of the said amount again by another cheque, but the same also bounced. However, the credit in respect of the said payment was given by the Respondent herein as would appear from the entry dated 10.11.2011.

The Petitioner again paid a sum of Rs.2 lakhs by cheque on 30.11.2011 which also bounced. The Petitioner issued another cheque on 19.12.2011, which was, however, encashed.

7. Mr. Abhishek Malhotra, learned counsel appearing on behalf of the Respondent would contend that from the nature of payment made by the Petitioner, it would be evident that it had been maintaining the monthly subscription amount in the vicinity of Rs.1.26 lakhs. In this connection, our attention has been drawn to a letter dated 05.8.2011. The Petitioner, in support of its contention that it had all along been keeping the Respondent informed as regards its subscriber base, appears to have issued various letters showing the names of the operators who had been leaving its network.

8. One of the said letters is dated 05.8.2011 whereby and whereunder the Petitioner purported to have informed the Respondent about a franchisee switching over to another network. Nine such letters were said to have been issued in this regard. The Petitioner, however, did not bring on record any evidence to show that the same had been sent and/or served on the Petitioner.

9. According to the Respondent, it never received the said purported letter. It appears that the letters are identical in nature. According to the Respondent, a large number of operators have joined the network of the Petitioner which was found on a verification made by RW-1, Shri Alok Choudhary.

However as regards the said nine operators, the said witness in his cross-examination stated as under :-

“Q.18: Did you verify the deletion of 9 operators intimated by the petitioner through 9 separate letters dated 5.8.2011?”

A: Firstly, we received these letters in February 2012. Once we received these letters, I have personally verified these 9 operators.

Q.19: What did you find out in your personal verification?”

A: Out of 9 operators, one is still running signals of Kailash Cable, seven operators are merged with other MSOs 4-5 years back and one operator has sold out his network to the other MSO.”

10. It is true that the Petitioner has also filed a statement of account. However, the said statements do not show that some of the cheques issued by it had bounced.

The relevant questions and answers in respect of the said operators by RW-1 are as under :-

“Q.37: I put it to you that after the 9 operators having left the petitioner, this SLR dated 7.9.2011 was supplied to you by the petitioner?”

A: SLR dated 7.9.2011 was supplied to us in the month of February 2012 with the deletion letters.

It is incorrect to suggest that this SLR dated 7.9.2011 was supplied to us by the petitioner in September 2011.

Q.38: I put it to you that the petitioner has been approaching you to negotiate and sign the subscription agreement for the year 2012 but

you have been stone walling his attempts by illegally demanding subscription for the 9 operators who have left the petitioner?

A: It is incorrect.

(Witness produces copy of letter dated 21.3.2012 sent to the petitioner and the same is marked as document X.)

Vol.: Petitioner was supposed to reach my office at 11 am on 26.3.2012 in my office but he gave me a call at around 12'o clock and confirmed that he could not come at 11 am and would be coming at 4'o clock in the evening. I waited for him whole day in the office but he never reached our office or never confirmed anything."

11. The agreement expired on or about 01.01.2012. There is nothing on record to show that the Petitioner made any attempt to enter into the process of negotiations with the Respondent for renewal of the agreement.

On the other hand, the Respondent has issued several letters being dated 25.10.2011, 08.12.2011 and 21.02.2012 to show that the Respondent had all along been ready and willing to hold negotiation with the Petitioner for entering into an agreement for a fresh term.

The Respondent has further brought on record a document, which was produced by its witness and marked as letter 'X' for identification. It should be taken as evidence having been proved by the said witness.

The said letter dated 21.3.2012 which has been produced by Shri Alok Choudhary, reads as under :-

“We are in receipt of your letter dated March 16, 2012, issued in response to our e-mail dated February 27, 2012 and our letters dated March 5, 2012, March 9, 2012 and March 12, 2012.

At the outset, it is stated that the contents of your reply dated March 16, 2012 are denied and the contents of our letters and e-mails (captioned) are reiterated.

We once again request you to come forward for negotiating the terms and thereafter executing a fresh agreement with our Company for 2012-2013, as we have requested earlier as well.

Accordingly, we request you to come to our office at Kolkata on March 26, 2012 at 11.00 a.m. for a meeting to discuss all pending issues between the parties and also to negotiate the terms for a fresh agreement.

We once again request you to furnish the true and correct SLR and a true and correct list of the LCO’s taking signals from you, directly or indirectly, especially in view of the findings set out in our e-mails dated 27th February, 5th March, 9th March & 12th March 2012. We request you to furnish the said documents to us prior to the meeting on the date mentioned hereinabove, to enable us to verify the same.

We look forward to receiving the documents sought by us and meeting you on March 26, 2012 at our office to discuss all pending issues between the parties and also to negotiate the terms for a fresh agreement.”

It is accepted that the proposed meeting did not take place.

12. The Respondent, with a view to show the subscriber base of the Petitioner, has brought on record in response to a query made in terms of the

provisions of the RTI Act to show that a large number of operators had joined the network of the Petitioner. The said letters are dated 27.02.2012, 05.03.2012 and 12.03.2012. From the response to the RTI query issued by the Office of the Agricultural Income Tax Officer – In-charge Howrah Range dated 05.3.2012, it appears that the Petitioner has 56 cable operators.

13. Mr. Vineet Bhagat, learned counsel appearing on behalf of the Petitioner, would contend that the Petitioner is earnest to make payments of the amounts said to be due from it. The Petitioner appears to have made certain adhoc payments.

The relevant statement of Shri Pradip Pandya, the authorized representative of the Petitioner relating to its statement of accounts and its claim for down gradation, reads as under :-

“Q.17: Has this statement of account being prepared by you?”

A: No. By my accountant.

Q.18: This statement of accounts shows a credit balance in your favour of an amount of Rs. 17,037.25P. Can you please explain the same including the basis thereof?

A: The credit balance in our favour is because we have been making on account payments to the respondent, since we have never received the invoices on time. Since we were unsure as to whether the invoices would reflect the requested down gradation, hence we have made the payments as per our own calculation which

approximately reflects the down gradation claimed by us. While we did receive invoices from the respondent on dates that were much later than the invoice dates and which invoices were for the full amount as per the subscription agreement, we raised our objection orally to the amounts mentioned therein. However, we were told that as per practice, we would get the benefit of the down gradation at the end of the term.

Q.19: I put it to you that you have, despite receipt of the invoices in terms of the subscription agreement, unilaterally and deliberately made payments as per your own calculation, which has no basis and was not agreed to by the respondent?

A: It is correct.

(Witness clarifies that there was no agreement in writing for down gradation but the respondent neither refused the request nor agreed to it, even orally.)

(Attention of the witness is drawn to para 15 of his affidavit.)

I am in receipt of E Mails dated 27.2.2012, 5.3.2012, 9.3.2012 and 12.3.2012.

I have responded to all these E Mails together vide an E Mail but I can not recollect the date of such an E Mail. I confirm, after having perused the entire record of this case that the said E Mail is not on record. I have denied the contents of these E Mails received from the respondent in my said E Mail reply.

It is correct that petitioner company is registered with the office of the Agricultural Income Tax Officer, Howrah Range, Howrah, govt. of West Bengal. I am not aware of the renewal, if any, of the petitioner company's registration with the said authority. The said registration is required for the purposes of Entertainment cum Amusement Tax.

The petitioner company is required to file Tax returns and pays such tax regularly and on an annual basis. I am not aware whether the

petitioner company has, in fact filed and paid these taxes regularly. I will have to check with my team and confirm the same.

The petitioner's network has 24 or 25 LCOs, as per the last SLR provided to the respondent.

(Attention of the witness is drawn to page 112 of the paper book.)

Q.20: As per this document, which is the reply received from the office of the Agricultural Income Tax Officer, Howrah Range, Howrah, Govt. of West Bengal, to respondent's application under the RTI Act, 2005, the number of your sub cable operators is mentioned as 56. What do you have to say to this?

A: I would like to see further details about this document and without seeing the same, I can not confirm whether the said number is correct.

(Ld. Counsel for the respondent calls upon the witness to produce the documents stated by the witness to be produced at a later stage and further calls upon the witness to respond to Q. 20 after perusing the further details of the document in question.)"

14. The Petitioner, therefore, admitted that it is a defaulter.

So far as the response of the Agricultural Income Tax Officer is concerned, we have noticed his statement. He was called upon to produce the relevant documents with regard to the number of cable operators attending to its network. Despite the same, no document has been produced.

15. Having regard to the provisions of Clause 10.2 of the Regulations, it was for the Petitioner to show that it is entitled to a down-gradation. Down-gradation in the peculiar facts and circumstances of this case, could not have been claimed only having regard to the purported admission made by Shri Alok Choudhary. His statement has to be read as a whole.

The Petitioner having regard to the provisions of Clauses 11 & 12 of the Regulations was under a statutory obligation to disclose its SLR every month. Disclosure of such SLR was necessary being relevant for the purpose of renewal of the agreement. The Petitioner had not shown its willingness to enter into a fresh agreement in terms of the provisions of the said regulations.

16. Mr. Bhagat, in our considered opinion, contends that it is not a case where the Respondent has filed a suit for recovery.

In a given situation, parties are required to reconcile their respective accounts so as to enable a court of law to ascertain as to whether it was in fact a defaulter or not.

In this case, the Petitioner does not deny that a large number of cheques have bounced. It has not paid the entire amount of subscription fee. It unilaterally started paying his subscription amount as per its own claim. If it made out a case for down gradation, it should have furnished the details of the LCOs leaving its network so that the Respondent could find out at the relevant time as to whether such a contention of the Petitioner is correct.

RW1 verified the connectivity of the Petitioner in February 2012.

If his findings are correct, it would show that the Petitioner had not been disclosing true and correct SLR to the Respondent. The burden of proof with regard to down gradation of its subscriber base, as envisaged under the second proviso appended to Clause 10.2 of the Regulations, was on the Petitioner. It failed to discharge the said burden.

The Petitioner despite assurances gives at the time of the cross-examination of its witness did not produce the relevant documents.

It did not make a correct statement as regards filing of the Return in respect of payments of Entertainment and Amusement Tax.

The Petitioner has a large area of operation. The towns of Howrah and Kolkata falling within KMDA are thickly populated areas.

Even otherwise, it will bear repetition to state that the Petitioner was obligated in law to furnish true and correct SLR.

It not only failed to do so; it made wrong claims with regard to its subscriber base. It could not even prove the letter purported to have been issued to the Respondent to show that a large number of operators have left its network.

17. Keeping in view the fact that the Petitioner has not been able to establish that a large number of operators have left its network, in our opinion, it was obligated to pay the balance amount.

It, thus, being a defaulter the contents of the Public Notice must be held to be correct.

18. We, however, by way of indulgence to the Petitioner direct that the said notice under Clause 4.3 of the Regulations shall not be given effect to for a period of three weeks, subject to the following conditions :-

- i) It shall within three days from date supply its true and correct SLR including its returns to the Office of the Agricultural Income Tax Officer for the purpose of establishing its subscriber base;
- ii) It shall send its authorized representative to the office of the Respondent with all requisite and relevant documents for the purpose of reconciliation of accounts;
- iii) The amount found to be due and payable by the Petitioner must be paid within one week from date when the accounts are reconciled;
- iv) The Petitioner shall continue to hold negotiations on a day to day basis for the purpose of entering into a fresh agreement or a renewed agreement, as the case may be;

v) It must also disclose its area of operation as also the areas of operation of its LCOs;

vi) The Petitioner shall pay all lawful dues during pendency of this petition as well as the period of three weeks from date;

vii) If no settlement is arrived at, it would be open to the Respondent to disconnect the network of the Petitioner and take recourse to such an action as is available to it in law for recovery of its dues;

viii) The Petitioner shall pay interest at the rate of nine percent per annum on due amount which became payable from the relevant date till realization.

19. This petition is disposed of with the aforementioned directions without any order as to costs.

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

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(P.K. Rastogi)
Member