

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

Dated 15.2.2012

Petition No. 371 (C)/2011

Wire & Wireless India Pvt. Ltd.

... Petitioner

Vs.

ESPN Software India Pvt. Ltd.

... Respondent

BEFORE:

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

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

For Petitioner

: Mr.Tejveer Singh Bhatia and

Mr.Surendra Kumar, Advocates

For Respondent

: Mr.N.Ganpathy, Advocate

J U D G M E N T

S.B. Sinha

Whether in the facts and circumstances of the case the Petitioner is entitled to down gradation of the subscription fee, is the core question which arises for consideration in this petition, wherein the following reliefs have been prayed for :-

(a) Order in favour of the Petitioner and against the Respondent directing the Respondent to enter into a subscription agreement with the Petitioner for the reduced subscriber base after accounting for the loss in subscriber base on account of migration of cable operators w.e.f. April, 2011

(b) Order directing the Respondent to raise the revised invoices on the basis of the reduced subscriber base w.e.f April, 2011.

The parties hereto indisputably have entered into a subscription agreement on or about 1.2.2011, which was valid upto January, 2012.

We may notice the relevant clauses thereof, which are as under :-

"IV FEES

Immediately upon execution of this Agreement, based on a subscriber base as represented by the Affiliate, the Affiliate shall pay to the Licensor, for the term of this Agreement, total subscription fees of Rs.5,617,092.36.

For purposes of this Agreement, the 'Total Subscription Fee' referred to above shall be equal to the number of Subscribers, declared by the Affiliate, multiplied by the price per Subscriber home multiplied by the number of months (term of the contract) Based on the representations and subject to fulfillment obligations under this Agreement, by the Affiliate, the Licensor has offered as discount of Rs.816,780.36 on the total subscription fees and therefore, the subscription fees payable by the Affiliate shall be Rs.4,800,312, for the term of the Agreement.

The subscription fees payable under the Agreement shall be excluding applicable taxes as may be notified from time to time. It is clarified that applicable taxes payable at the prevalent rate shall be over and above the Subscription Fee."

The total annual fee, thus, determined on the basis of the subscriber base was to be paid in 12 equal monthly instalments of Rs.4,26,000/- excluding taxes.

As regards increase in the Petitioner's subscriber base is concerned, it was stated :-

"... For avoidance of doubt, an increase of Affiliate's Subscribers shall include, without limitation, increase of Subscribers to which Affiliate directly distributes the Service or an increase of such Subscribers to which the service is distributed by the sub operators and sub affiliates/ cable operators listed in Annexure 1 and other sub operators and sub affiliates/ cable operators added by the Affiliate to its/ his cable network and/or Distribution System (s) during the term of this Agreement..."

Annexure 1 appended thereto discloses the names of the sub-affiliators/ cable operators of the Petitioner. They were 84 in number, having a subscriber base of 10436. On or about 8.4.2011, the Petitioner informed the Respondent with regard to alleged migration of a large number of cable operators as also reduction in their number. Respondent was informed that about 23 cable operators had migrated. It, however, on the premise that its representative had been asked to conduct a ground survey did not accede to the Petitioner's request for down gradation as would appear from its letter dated 20th April 2011.

Petitioner by its letter dated 2.5.2011 stated as under :-

“Thereafter our company had intimated, vide letter dated 8/4/2011, to your company with regard cable operators migrated from our network to the competing MSO in Bilaspur and also requested to reduce 4007 connectivity from the negotiated subscriber base of 10617 from the month of April 2011, but till date your company had not considered out request of process for reduction in monthly subscription fee, hence our company hereby requesting to provide monthly reduction fee of Rs.1,50,984 (4007xRs.37.46 = Rs.1,50,984 per month) in terms of earlier intimation given to your company with relevant details due to existing/ prevalent ground situation of our network operators.”

According to the Petitioner, it was entitled to down gradation of subscription fee to the extent of Rs.1,50,984 p.m.

By a letter dated 27.5.2011, the Respondent herein reiterated its stand as was done on 20.4.2011. Petitioner, on the other hand, stuck to its stand as would appear from its letter dated 30.6.2011.

Respondent by its letter dated 26.7.2011 contended that the Petitioner had five more cable operators in its network.

On the premise that it had not been paying the lawful subscription fee, a notice under Regulation 4.1 was issued on 13.7.2011 which is said to have been received by the Petitioner on 25.7.2011.

In the said notice dated 13.7.2011 the Respondent indicated that the Petitioner owes to it a sum of (Rs.10,57,657/-). The network of the Petitioner was disconnected on 18.8.2011.

This petition was filed before this Tribunal on 8.9.2011.

By reason of an interim order dated 9.9.2011, the Respondent was directed to restore the supply of signals as the Petitioner made offers of payment of a sum of Rs.8,02,000/- and Rs.4,33,000/- upon deduction of the TDS.

Respondent in its reply contends :-

- i) The SLR submitted by the Petitioner are incorrect insofar as the names of those operators who were not connected to the Petitioner's network also find place in its SLR

- ii) Petitioner had been paying a sum of Rs.6.5 lakhs to Star and a sum of Rs.4.89 lakhs to MSM and, thus, its subscriber base is much higher.

- iii) The claim of the Petitioner for down gradation was malafide in so far as the same has been claimed only after the world cup was over.

- iv) The number of cable operators furnished by the distributor of the Respondent was 110 as would appear from a reply to the RTI query made by the one Galaxy Communication.

- v) Having regard to an order of the Collector of the Bilaspur District, whereby all cable operators had been restrained from migration, it is wholly unlikely that a large number of local cable operators would migrate from its network.

Keeping in view the aforementioned rival contentions of the parties, the following issues were framed by an order dated 13.10.2011 :-

- "i) Whether the LCOs attached to the Petitioner's network have migrated?
- ii) Whether the LCOs have joined/merged with the network of the Petitioner?
- iii) Whether the Petitioner is entitled to reduction in subscription fee as claimed, if yes, to what extent?
- iv) To what relief, if any, the Petitioner is entitled to?"

In support of their respective cases, the Petitioner examined Mr.Amit Sharma, PW-1 and Mr.Naresh Dubey PW-2; whereas the Respondent examined Mr.Rajesh Naidu, its Senior Manager based at Nagpur.

Mr.Tejveer Singh Bhatia, learned counsel appearing on behalf of the Petitioner, would contend :-

- (i) Respondent having not raised any contention with regard to the incorrectness of the SLR or otherwise in the correspondences despite

having been informed thereof including the one issued on 8.4.2011, the Petitioner must be held to have proved its case.

- (ii) PW-1 Amit Sharma in his evidence having categorically stated that SLR has been supplied on 28.1.2011 enclosing therewith a list of 84 cable operators, it is incorrect to contend that the names of those persons had also been mentioned therein who had never been attached to the network of the Petitioner.

Our attention has also been drawn to the evidence of Mr.Naresh Dubey, PW-2 who in his deposition proved a letter of the Petitioner.

From a perusal of paragraph 15 of the said affidavit, it would appear that the Petitioner had issued several reminders and communications to the cable operators who had stopped taking feed from its network.

Mr.N. Ganpathy, learned counsel appearing on behalf of the Respondent, on the other hand urged :-

(i) Although, the Petitioner had claimed migration of its cable operators to a rival channel, namely, Hathway CCN Ltd., it was expected that the Respondent would receive a letter to that effect from them viz increase of subscriber base of the network of Hathway.

(ii) Having regard to the fact that in terms of the Regulations, in the event of migration of LCOs from the network of a MSO, notice under Regulation 4.2 would be issued and no such notice was issued, the Petitioner's case cannot be believed.

(iii) Although, the Petitioner has proved some letters written to some of the LCOs, it having been brought on record that a huge amount was due to it from the LCOs; and at least from one of them a sum of Rs.92,01,00.10 paise, there is no reason as to why no action had been taken to recover the same.

(iv) Had the Petitioner's contention of migration of a large number of cable operators been correct, there does not seem to be any reason as to why it did not seek down gradation from other broadcasters.

(v) In any event the Petitioner's claim does not come within the purview of Clause 10.2 of the Regulations.

The question as to whether a large number of MSOs have left the network of the Petitioner resulting in loss of its revenue is essentially a question of fact. Before us, PW-2 has proved a letter dated 30.7.2011 whereby and whereunder a request was made to down grade the monthly subscription fee to Rs.3.5 lakhs p.m.

From the evidence of PW-2, however, it appears that only negotiations had been going on for down gradation with Star and MSM discovery. PW-2 has furthermore accepted that it had not initiated any proceedings against Star or MSM. He has furthermore admitted that no LCO had issued any notice in terms of Clause 4.2 of the Regulations nor any action had been taken for recovery of the

amount. The said witness, however, has denied the suggestion that five more LCOs joined the network of the Petitioner.

It is, however, evident that the Respondent also did not reject the contention of the Petitioner that no such migration had taken place contending that a ground survey would be conducted. No ground survey, however, has been conducted.

Mr.Bhatia may be correct in his contention that if some cable operators have violated the provisions of the Regulations, the same would not ipso facto confer any benefit on the Respondent.

A question pertaining to appreciation of evidence must be considered having regard to the conduct of the parties.

A large number of migration is said to have taken place in April, 2011. Keeping in view the nature of the business carried out by the Petitioner, such migration must have affected it in its entire business. There is absolutely no reason why the Petitioner had not insisted on down gradation from the very beginning sofar as the Star and MSM Discovery is concerned, apart from other broadcasters, if any.

There is also no reason as to why only one letter had been issued to Star Den. Nothing has been brought on record to show that it had ever approached the MSM.

If it was compelled to take action against the Respondent as has been contended, there is absolutely no reason as to why similar actions were not taken against Star Den and MSM Discovery Ltd.

Petitioner, moreover, in support of its contention that it has substantially lost its revenue could have filed its books of accounts. If failed and/or neglected to do so. It being a public limited company, is obligated to maintain books of accounts.

It is difficult to conceive that despite the fact it as an MSO has a PAN India presence, it would not initiate any proceedings for recovery of amount due to it from the LCOs; even if it be assumed that it for one reason or the other, did not insist on the legal requirement of issuance of notice by the LCOs in terms of Clause 4.2 of the Regulations and a public notice under Clause 4.3 thereof.

It may be true that the Respondent has not conducted a ground survey but the same by itself would not mean that having regard to the provisions contained in Sections 101 and 102 of the Indian Evidence Act, the Petitioner need not prove its case.

Mr. Bhatia would contend that in terms of the agreement, the subscription fee was a fixed amount and the same was not determinative of its subscriber base. We are not in a position to accept the said contention. In any event the same will have no bearing on the matter.

Keeping in view the provisions of Clauses 10.1 and 10.2 of the Regulations, for the purpose of reduction of the amount of subscription fee, an exceptional case has to be made out. Petitioner was required to bring its case within the purview of the Second Proviso appended to the said Clause.

We would, however, assume that the Petitioner had furnished its SLR but we are not concerned with that question in the present petition.

We, therefore, are of the opinion that the Petitioner cannot be said to have proved its case.

This petition is dismissed accordingly with no order as to costs.

(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

February 15, 2012
`ns'