

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

**DATED : 3<sup>RD</sup> JANUARY, 2012**

**Petition No. 171 (C) of 2011**

Star Den Media Pvt. Ltd. .... Petitioner

Vs.

Mr. Ajit Meher, Proprietor M.M. Communication ..... Respondent

**BEFORE :**

**HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON  
HON'BLE MR. P.K. RASTOGI, MEMBER**

For Petitioner : Mr. Amit Chaddha, Senior Advocate  
Mr. Arjun Natarajan, Advocate

For Respondent : Mr. Sanjeeb Panigrahi, Advocate

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

Interpretation of some provisions of the Telecommunication (Broadcasting & Cable Services) Interconnection Regulations, 2004 and in particular, Clause 8.1 thereof falls for consideration in this petition.

2. Petitioner is a 'Broadcaster' within the meaning of the Telecommunication (Broadcasting & Cable Services) Interconnection Regulations, 2004 as amended from time to time (The Regulations).

3. The Respondent herein is a Multi Service Operator. It had entered into a subscription agreement with the Petitioner on or about 28.5.2009 for the period 01.01.2009 and 31.12.2009 on a subscriber base of 743.

There exists a controversy as to whether the parties hereto had entered into negotiations for renewal thereof or not.

Whereas, according to the Petitioner, it had requested the Respondent to come forward for holding negotiations with a view to execute an agreement for the year 2010, it had failed and/or neglected to do so.

According to the Respondent, however, it for the purpose of entering into a fresh agreement, has been visiting the office of the Respondent but on one pretend or the other it did not do so.

4. The Petitioner contends that the Respondent, despite having been called upon to furnish a true and correct subscriber base, failed and/or neglected to do so and,, thus, a ground survey was conducted by an independent body known as National Council of Applied Economic Research (NCAER). A report

was submitted wherein it was stated that during the period of survey namely 16.6.2010 and 12.7.2010, there were 2,464 DTH connections, 7,865 cable connections and 7,623 analog antenna based connections in the town of Balangir. An Executive summary of the said report was prepared, wherefrom it appears that out of the total viewers of the Petitioner, 44% of them obtained signals through cable network i.e. 7,865, who were subscribers of the Respondent.

5. Relying on and/or on the basis of the said survey, the Petitioner herein has filed this petition claiming inter-alia for the following reliefs :-

- “(a) direct the Respondent to render accounts of the Profits made by them effective January 2009 till the date of disconnection and a decree be passed in favour of the petitioner on a proper rendition of accounts by the Respondent;*
- (b) direct the Respondent to pay the cost of survey to the Petitioner;*
- (c) pass an injunction order restraining the Respondent, its employees, agent, any person claiming from or through or under or on behalf of Respondent from re-transmitting Petitioner’s Bouquet-I channels or any other pay channels of the Petitioner without written agreement as contemplated under the Interconnect Regulations framed by TRAI;*
- (d) Cost of the proceedings be awarded to the Petitioner.”*

6. Indisputably, the network of the Respondent had been disconnected by the Petitioner upon service of a notice under Clause 4.1 of the Regulations and a Public Notice under Clause 4.3 on and from 05.01.2011.

7. The Respondent, in its reply, inter-alia contended :-

- (i) no case has been made out for rendition of accounts;
- (ii) upon expiry of the subscription agreement on 31.12.2009, it visited the office of the Petitioner on several occasion for execution of the agreement for the year 2010, but its authorized agent did not come forward to do so and went on providing signals throughout the year with a view to confer such rights on another cable operator;
- (iii) the Petitioner has been forcing other small operators to sell their rights to another operator, who was an agent of the Respondent, with a view to monopolise the cable market in small towns;
- (iv) it had not given any assurance or made any representation to enter into the subscription agreement with a higher subscriber base, but in fact, Petitioner while continuing to supply signals to the Respondent's network, had been preparing grounds to take legal action against it;

- (v) The purported report prepared by the agency is a one-sided one and thus, the same cannot be taken into account. Kalahandi, Balangir and Koraput in the State of Orissa are backward and undeveloped districts and the town of Balangir, being a small one, it is not correct to contend that it had been catering to as many as 7,865 customers; and
- (vi) it furnished all its connectivities to the Petitioner by its letter dated 12.01.2011.

8. By reason of an order dated 19.08.2011, this Tribunal framed the following issues :-

- i) Whether the respondent has under-declared its subscriber base?*
- ii) Whether the respondent was catering to as many as 7865 subscribers?*
- iii) Whether the respondent is liable to render accounts of profits made by it w.e.f. January, 2010 till the date of disconnection?*
- iv) Whether the Survey conducted by NCAER is admissible?*
- v) Whether the respondent is re-transmitting the petitioner's channel without any written agreement?*

9. The Petitioner in support of its case examined one Mr. Rahul Sinha who, at the material time, was working as Senior Regional Manager and currently working as Deputy General Manager at Kolkata. It furthermore has examined one Dr. Saurabh Bandyopadhyay, working as an Associate Fellow in National Council of Applied Economic Research.

Respondent did not examine any witness.

10. Mr. Amit Chaddha, learned senior counsel appearing on behalf of the Petitioner, urged :-

- (i) The Respondent, although was under a contractual obligation to furnish SLR to the Petitioner but having failed and/or neglected to do so, it had no other option but to get a survey conducted through a reputed independent agency and in view of the report that the town of Balangir has 7,865 cable connections, Respondent should be called upon to furnish accounts;
- (ii) Having regard to the fact that the process of negotiation did not begin, Clause 8.1 of the Regulations will have no application in the instant case;
- (iii) Para 13 of the Explanatory Memorandum issued by the Telecom Regulatory Authority of India clearly shows that it was conscious of

the fact that it would be unfair to keep the commercial terms confined to the old agreement despite expiry of three months of the agreement;

- (iv) Assuming that clause 8.1 including the 2<sup>nd</sup> proviso appended thereto apply to the facts and circumstances of the present case, keeping in view the provisions of the contract providing for increase in the subscriber base and the obligation on the part of the franchisee to furnish true and correct particulars including giving an opportunity to the broadcaster to inspect the books of accounts and other documents, the said commercial terms contained therein would also be applicable in terms whereof the Respondent must be held to be bound to render true and correct accounts;
- (v) As the Respondent deliberately and intentionally did not examine himself before this Tribunal, an adverse presumption should be drawn;
- (vi) On a true and correct rendition of accounts by the Respondent, it may be possible to be ascertained as to how many subscribers had been viewing the bouquet I of the channel of the Petitioner;
- (vii) Respondent cannot refuse to furnish its books of accounts, bills and the list of subscribers etc. to Petitioner as it made itself bound

itself to do so in terms of the agreement itself and as it has special knowledge with regard thereto.

11. Mr. Sanjeeb Panigrahi, learned counsel appearing on behalf of the Respondent, on the other hand, would contend :-

- (i) The survey conducted by National Council of Applied Economic Research cannot be relied upon as Dr. Saurabh Bandyopadhyay, PW-2 has made contradictory and inconsistent statements before this Tribunal;
- (ii) Having regard to the fact that the Petitioner continued to supply signals of its channels for the entire period of one year and having been accepted payment from the Respondent without any demur whatsoever, cannot now be heard to say that it is entitled to rendition of accounts, as prayed for or otherwise;
- (iii) With a view to do justice to the parties, this Tribunal must take into consideration the ground realities that in small towns, negotiations are held orally with the local authorized representatives of the Broadcasters and, thus, it cannot be said

that the Respondent was not ready and willing to enter into the agreement for the year 2010;

- (iv) If the Petitioner did not intend to supply signals to the network of the Respondent, it could have in law disconnected the supply of signals in accordance with the regulatory provisions.

12. We may, at the outset, notice certain provisions of the agreement dated 28.5.2009, to which our attention has been drawn by Mr. Chaddha :-

*“1.(d) The Parties agree that (i) Schedule 1 of the agreement (Definitions) (ii) Schedule II of this Agreement (General Terms and Conditions) and (iii) Applicable Annexure(s) to this Agreement form integral part of this Agreement and shall be deemed to be incorporated herein and failure to comply with any of the terms and conditions mentioned in any of the said Schedules and Applicable Annexure(s), shall constitute a breach of this Agreement.*

*1.(a) Affiliate agrees and acknowledges that STAR DEN may, at any point of time during the Term, review and based on such review, determines that the actual number of Subscribers of the Affiliate is greater than the Subscriber Base. STAR DEN may at its sole discretion call for an increase in the Subscriber Base which Affiliate has declared for its Distribution System, on the Applicable Annexure C and with reference to which Affiliate is paying for the Subscription*

*Fees. If such review shows that the Subscription Fees for prior months were not paid in full, the affiliate shall pay STAR DEN the difference within 7 days after such determination. If Affiliate fails to pay such additional fees, STAR DEN may immediately suspend any of the Subscribed Channels or terminate this agreement without prejudice to the rights to claim such additional fees with applicable interest.*

*(b) In the event STAR DEN believes in its sole discretion that Affiliate has suppressed or failed to disclose to STAR DEN the correct number of Subscribers and/or LCO's, STAR DEN may call for increased Subscription Fees from Affiliate to the extent of the number of Subscribers and/or LCO's that were not properly declared by the Affiliate.*

*6.(r) The Affiliate shall keep accurate and complete records and accounts of billings of the Subscribers and all other matters, which pertain to the business and its LCO's. These records shall be made applicable to STAR DEN and or its representatives on reasonable notice to the Affiliate, during the term of the Agreement and for two years after the termination or expiry of the agreement. The Affiliate undertakes to provide all assistance to STAR DEN for any such inspection, audit or survey, including but not limited to accompanying STAR DEN's representative to visit the Subscribers' residence, providing all records and documents pertaining to billing of Subscribers and the like. Neither STAR DEN's acceptance of any information or payment nor STAR DEN's inspection or audit of the Affiliate's records or accounts will prevent STAR DEN from later disputing the accuracy or completeness of any payment made or any information supplied. The Affiliate further undertakes to furnish*

*and submit to STAR DEN any and all documents as may be required by STAR DEN from the Affiliate from time to time.”*

### **Regulations**

13. The Regulations were made by the TRAI intending to cover arrangement amongst service providers or interconnection and revenue shares for all Telecommunications (Broadcasting & Cable Services) throughout the territory of India.

14. The Petitioner is a broadcaster within the meaning of the provisions of Clause 2 (e) of the Regulations; whereas the Respondent is a Multi Service Operator within the meaning of Clause 2 (m) thereof.

15. Clause 8.1 provides for the time period for renewal of existing agreements.

It reads as under :-

*“8.1 Parties to an interconnection agreement for supply of TV channel signals shall begin the process of negotiations for renewal of existing agreement at least two months before the due date of expiry of the existing agreement.*

*Provided that if the negotiations for renewal of the interconnection agreement continue beyond the due date of expiry of the existing agreement shall continue to apply till a new agreement is reached or for the next three months from the date of expiry of the original agreement, the new commercial terms shall become applicable from the date of expiry of the original agreement.*

*Provided further that if the parties are not able to arrive at a mutually acceptable new agreement, then any party may disconnect the retransmission of TV channel signals at any time after the expiry of the original agreement after giving a three weeks notice in the manner specified in clause 4.3. The commercial terms of the original agreement shall apply till the date of disconnection of signals.”*

16. Para 13 of the Explanatory Memorandum issued by the TRAI may also be noticed, which is as under :-

*“13. Renewal of agreements is smooth in most of the cases, but the problems arise when the negotiations for renewal extend beyond the date of expiry of the original agreement. To govern the terms and conditions for continuation of signals beyond the expiry date of the original agreement, the original agreement can be extended till an agreement is reached regarding the terms and conditions for renewal. However, it must be recognized that the new commercial terms will apply retrospectively from the date of expiry of the original agreement. If however, no agreement is reached, then either party can disconnect the signals after giving the statutory notice as provided in Regulation 4 of these regulations. The terms and*

*conditions of original agreement would govern the relationship between the two parties till the date of disconnection of signals. It is believed that the parties should be able to reach a new agreement within three months of expiry of the old agreement (after five months of negotiations). However, in case negotiations carry on beyond this period, then some new interim arrangement regarding terms and conditions should be worked out between the parties and terms and conditions of the old agreement would not get automatically extended beyond this period.”*

17. Keeping in view the aforementioned provisions of the Regulations as also the terms & conditions of the agreement, we may notice the pleadings of the parties as regards the question of negotiation between them.

Paragraph 7 of the petition states that the Petitioner had called upon the Respondent to come forward for negotiations with a view to execute the agreement for the year 2010 and, thus, the process for negotiation evidently started.

According to the Respondent, despite issuance of its letter dated 02.02.2010 to the aforementioned effect, Petitioner did not come forward to sign the fresh agreement.

Paragraph 9 of the petition reads as under :-

*“It is submitted that despite repeated assurances, the Respondent avoided the furnishing of essential details.”*

18. In paragraph 11 of the petition, it has been averred that on account of the Respondent’s lackadaisical approach, a ground survey was conducted. The survey report was prepared sometimes in December 2010.

The Respondent was said to have again been called upon to negotiate on the basis of its own ground connectivity.

In paragraphs 13 of the petition, it is averred that the Respondent’s staff present at his office refused to accept the said letter.

In paragraphs 18 & 19 of the petition, it is stated that based on the said report, the representative of the Petitioner made a proposal to the Respondent to negotiate with it on a subscriber base of 7,500 and enter into an agreement on the basis of the actual subscriber base, but he started dilly dallying the process of entering into the agreement with the Petitioner. The Respondent, however, in its reply states that its representatives visited several times the office of the Petitioner for the purpose of execution of the agreement.

Admittedly, the relationship between the parties hereto is governed by regulatory regime. It is not in dispute that Clause 8.1 of the Regulations postulates renewal of an existing agreement.

It does not envisage that it would be obligatory only on the part of the seeker of the signals to initiate the process of negotiation.

19. In this case, as indicated heretofore, on their own showing the parties wanted to enter into a fresh agreement wherefor negotiations were to be held. It is true that the Petitioner had issued a letter dated 02.02.2010 asking the Respondent to enter into an agreement, but it is difficult to ignore the realities existing at the ground level, particularly in a small town like Balangir. The Respondent has categorically stated that for the purpose of entering into the agreement it's representative had been visiting the office of the Petitioner, but no fresh agreement had been entered into.

20. It is one thing to say that for the aforementioned purpose, no negotiation at all had been held, but the same would not mean that the parties had agreed as regards the terms of the contract.

21. Three situations, as envisaged under the Regulations, in our opinion, may ensue; namely:-

(i) negotiations should start between the parties;

- (ii) despite negotiations, no agreement has been arrived at; and
- (iii) the process of negotiations had not started at all.

22. Whereas the first and the second situations are taken care of by Clause 8.1 read with the proviso appended thereto, the third situation is not contemplated in terms of the Regulations.

23. Mr. Chaddha has drawn our attention to the definition of the term 'Negotiate' in Black's Law Dictionary (Eighth Edition) and P. Ramanatha Aiyar's Advanced Law Lexicon, which are as under :-

*"Negotiate. To communicate with another party for the purpose of reaching an understanding, To bring about by discussion or bargaining."*

*"Negotiation. A consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter."*

24. Our attention has also been drawn to a decision of this Tribunal dated 28.7.2011 in Petition No. 17 (C) of 2011 – Media Worldwide Pvt. Ltd. Vs. Prasar Bharti, wherein it was opined :-

*“32. There are three aspects for fulfilling the condition as prescribed under the clause 8.1 :*

*A. The process of negotiations should start two months in advance before the expiry of the agreement.*

*B. If the negotiations continue before the expiry of the agreement, the conditions of the previous agreement continue for another three months or the date of agreement whichever is earlier.*

*C. If the parties are not able to arrive at mutually acceptable new agreement, any party can disconnect retransmission of the TV channels at any time after the expiry of the original agreement after giving three weeks notice in the manner prescribed under clause 4.3.*

*33. In this particular case no party has initiated the process of negotiations. The process of negotiations will include willingness to continue with their relationship. The renewal is not binding or automatic and none of the party has started this process of negotiations.*

*36. In this particular case, when the process on negotiations itself has not started, the proviso to the clause 8.1 is not applicable. Even if we consider that disconnection has taken place without giving three weeks notice in the manner specified under clause 4.3. Further, we are of the view that Clause 4.3 is for the purpose of informing the consumers and not the petitioner.*

*Clause 4.2 relating to disconnection of TV signals by the distributors is not applicable in this case. This notice is necessary during the currency of the agreement and not after the completion of the period of the agreement. At the most consumers may approach this Tribunal and agitate about their rights and obligations but the petitioner cannot claim right of renewal when he has not shown any*

*interest or willingness to continue their relationship by executing a fresh agreement with the respondent.”*

25. The pleadings of the parties, as noticed heretofore, in the opinion of this Tribunal does not ipso facto lead to any conclusion that no process of negotiation had started at all, particularly as there is nothing on record to show that Rahul Sinha had been working in Balangir town.

It may be noticed that the said witness stated :-

*“Q.6 I put it to you that the respondent has furnished the details of subscriber list to the petitioner as per your dictation?”*

*A. Yes.*

*Again said No.”*

He is, therefore, not sure as to whether in fact any negotiation had started between the parties or not.

26. We would, however, assume that no negotiation had taken place between the parties within the meaning of the provisions of Clause 8.1 of the Regulations.

If that be so, the Petitioner on its showing, could disconnect supply of signals to the Respondent's network on the expiry thereof as the agreement in question became inoperative by efflux of time.

27. If that be so, it was not necessary for the Petitioner to continue supply of signals to the network of the Respondent.

28. It is not denied or disputed that the Petitioner was not serving any invoice on the Respondent. The Respondent, in consideration of the supply of signals of its channels by the Petitioner, had been paying the feed charges as was stipulated in the agreement for the year 2009. The Petitioner had been accepting the said payment without any demur, whatsoever.

29. Mr. Chaddha would contend that even assuming that the 2<sup>nd</sup> proviso appended to Clause 8.1 would apply, for the purpose of invoking the doctrine of restitution, the commercial term would not mean that the subscriber base would continue to be the same.

30. Subscriber base, even according to Mr. Chaddha, is one of the fundamental commercial terms.

It may not be the only one. We have noticed heretofore the relevant terms of the agreement, whereupon Mr. Chaddha has placed reliance upon to contend that the commercial terms would include increase in the subscription charges at the discretion of the broadcasters.

31. Keeping in view the fact that the relationship between the parties is governed by the regulatory regime, it is difficult to accept the contention of Mr. Chaddha that the amount of feed charges could be enhanced at the sweet will of the Petitioner.

In this connection, we may notice Clause 10.1 of the Regulations which in no uncertain terms provides that the subscriber base agreed upon by the Respondent at the time of execution of interconnection agreement between a Multi Service Operator and a Local Cable Operator shall remain fixed during the course of the said agreement only in exceptional circumstances an increase or decrease in the subscriber base is permissible.

If the contention of Mr. Chaddha is correct that the agreement had expired due to efflux of time, the purported commercial terms, to which our attention has been drawn by Mr. Chaddha, also came to an end.

The obligation on the part of the franchisee was not only to pay increased feed charges at the dictate of the broadcaster also could have been enforced the same without taking recourse to Clause 10.1 of the Regulations. No case has been made out by the Petitioner that an exceptional situation had arisen, as a result whereof the subscriber base could be increased.

Even if that was so, the Petitioner should have invoked the provision of Clause 10.1 of the Regulations during the currency of the agreement.

32. Mr. Chaddha would contend that the universe of the Respondent would, in view of the aforementioned terms of the agreement, constitute the subscriber base.

We are afraid that such a contention in view of the definition of the subscriber base as contained in Clause 2 (p) of the agreement cannot be accepted.

It reads as under :-

*“Subscriber Base” shall mean the number of Subscribers declared by the Affiliate to STAR DEN for the Subscribed Channels and as stated in annexure C of the Agreement against the Subscribed Channels, on the date of execution of the Applicable Annexure C.”*

33. When the first agreement was entered into by and between the parties hereto, presumably the requirements of the provisions of Clause 9.1 of the Regulations had been satisfied.

If at that point of time no SLR existed, the subscriber base could be negotiated on the basis of the evidence provided by the parties. It is not the case of the Petitioner that during pendency of the aforementioned agreement, the subscriber base of the Respondent increased to a great extent. If the 2009 agreement was not to be renewed by the Petitioner and/or it intended to impose fresh commercial terms on the Respondent, it had two options.

It could either terminate the agreement when the Respondent was not agreeable for an increased subscriber base; or (ii) to continue to supply of signals in terms of the old subscriber base.

There is nothing on record to show that supply of signals to the Petitioner's network for the year 2010 was with a prior notice that the Respondent had to pay the subscription charges on an enhanced subscriber base. If that is not so, in our considered opinion, the Petitioner cannot take advantage of the situation, which is its own creation namely, continuing to supply of signals to the Respondent's network without any pre-condition and then turn round and contend that it is liable to pay the enhanced subscriber base.

34. It was urged before us by Mr. Chaddha that the Respondent was obligated to maintain books of accounts. It may be so. It is also true that in terms of the agreement, it was liable to maintain the books of accounts and other documents for a period of two years from the date of termination thereof. However, in our considered view, having regard to the fact that the Petitioner, as it appears from the record, used to collect only Rs.120/- or Rs.130/- from its subscribers and a much less sum from its franchisees for retransmission of signals of the channels of a large number of broadcasters and, thus, from the books of accounts maintained by the Respondent, it may not be possible to ascertain as to what was the viewership of the Bouquet I of the Petitioner.

35. Such a contingency could have been possibly met, had the signals been supplied on Conditional Access System.

36. We, therefore, are of the opinion that no case has been made out for granting any relief to the Petitioner.

37. This petition is dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

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

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

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