

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 18TH JANUARY 2012

Petition No.307 (C) of 2011

Jak Communications Pvt. Ltd. ... Petitioner

Vs.

Star Den Media Services Pvt. Ltd. & Anr. ... Respondents

BEFORE:

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

For Petitioner : Mr. Ajay Kumar, Advocate

For Respondent No.1 : Mr. Arjun Natarajan, Advocate

For Respondent No.2 : Mr. Saurabh Srivastava, Advocate

J U D G E M E N T

S.B.SINHA

What would be the effect of an interim order passed by this Tribunal, in terms whereof the Petitioner continued to avail supply of signals in respect of the channels of the Respondent for the period 15.6.2011 to 24.8.2011, is the short question involved herein.

2. To appreciate the said question, we may notice the factual matrix involved in the matter.

3. Petitioner herein filed this petition questioning, inter-alia, a notice dated 24.5.2011 issued in terms of Clause 4.1 and a Public Notice dated 01.6.2011 issued in terms of Clause 4.3 of the Telecommunications (Broadcasting and Cable Services) Interconnection Regulations, 2004 by the Respondent on the ground of non-signing of the subscription agreement by petitioner.

By an order dated 15.6.2011, this Tribunal having regard to the various letters issued by the petitioner, to which no response had been made by the respondent herein, passed an order of injunction directing that the signals to its network may not be discontinued till the next date of hearing.

Pursuant to or in furtherance of the said interim order, supply of signals to the petitioner's network continued.

4. Petitioner admittedly returned the decoder boxes to the Respondent on 25.8.2011 inter-alia on the premise that it had not been carrying on any business.

5. It sought to withdraw the petition, which was opposed by the respondent.

By an order dated 10.10.2011, it was directed :-

“By an interim order dated 15.6.2011 the respondent, till further orders, was restrained from disconnecting the signals to the petitioner’s network. According to the petitioner it had surrendered the IRD Boxes to the respondent on 25.8.2011. The petitioner made a prayer for withdrawal of the petition on the said premise. However, the same was not permitted to be done as it had rightly been contended that the respondent was otherwise entitled to a huge amount from the petitioner.

This Tribunal, by an order dated 30.8.2011, gave liberty to the respondent to file a separate petition if it so desired for recovery of the amount. However, having regard to a letter of the petitioner dated 25.8.2011 the parties were directed to meet at the Chennai office of the respondent on 7.9.2011 for reconciliation of the accounts. We are informed that the parties have met.

Mr.Saurabh Srivastava appearing for the respondent, however, submits that the petitioner had not brought with it its book of accounts for the purpose of reconciliation of accounts or otherwise.

Indisputably, the agreement between the parties had expired on 31.12.2010. The respondent with its reply has filed a statement of accounts showing that a sum of Rs.23,10,742/- is due from the petitioner upto June, 2011.

Having regard to the fact that the petitioner has enjoyed the benefit of supply of signals to its network from the respondent from 15.6.2011 to 24.8.2011 by reason of the interim order passed by this Tribunal and furthermore having regard to the liberty granted to the respondent herein to file an appropriate petition for recovery of

its dues from the petitioner, we direct the petitioner to deposit a sum of Rs.12,46,854/- being the subscription fee for two months subject of course to deduction of any sum which the petitioner has paid to the respondent for obtaining the signals from the period 15.6.2011 to 24.8.2011.

The petitioner must make the aforementioned payment within a period of two weeks. Such payment shall be subject to the ultimate result of the petition.

The parties may, on the limited question and having regard to the subsequent event, file the affidavits of their witnesses within three weeks.”

6. It is stated that the petitioner has complied with the said direction.

7. Petitioner, in support of its case, has examined one Shi B. Hariraj, its General Manager. The said witness, in his evidence inter-alia, contended :-

“14. I say that in response to respondents disconnection notice dated 24.5.2011, the petitioner vide its letter dated 26.5.2011 informed the respondent that immediately after joint meeting, the updated list of operators was supplied to its distributor. In any case, this list was once again furnished by the petitioner to the respondent alongwith its letter dated 26.5.2011. (Copy of letter dated 26.5.2011 alongwith proof of dispatch and list of operators may be exhibit as Ex.PW1/12).

15. *It is relevant to mention here that the original list of operators and universal base as declared by LCO's, which was also provided by the petitioner to the respondent, at the time of signing of agreement is enclosed herewith and may be exhibit as Ex.PW1/13).*

16. *I say that vide another letter dated 30.5.2011, the petitioner paid a sum of Rs.1,24,639/- towards the subscription charges for the month of April 2011 and requested the respondent to renew its subscription agreement on the basis of connectivity of the petitioner. (Copy of letter dated 30.5.2011 may be exhibit as Ex.PW1./14)."*

8. We may also notice the letter of the petitioner dated 26.5.2011, whereby and whereunder it sought for reduction of the subscriber base, which reads as under :-

"You may kindly note that while entering into the previous agreement we commanded a larger area of a declared subscribe base of around 74,007 for which we have negotiated for the subscription base as captured in the agreement. As the enclosed operator base would reveal the fact that our operational area has been shrunk to small one with 16,868 Subscriber base, we hereby kindly request you to not to waste any further time and enter into the agreement proportionally."

9. It is not denied that the respondent did not reply to the said letter. The principal question, which arises for consideration, in view of the

aforementioned order dated 10.10.2011, is as to what amount the respondent would be entitled to.

10. Petitioner, in support of its case, has contended that its subscriber base has been reduced from 74,007 to 16,868. In support of the said contention, the Petitioner has brought on record the requisite SLRs furnished by it at the time of entering into the subscription agreement as also in May, 2011.

11. Submission of Mr. Ajay Kumar, learned counsel appearing on behalf of the petitioner is that the respondent having not cross-examined the said witness on the question of reduction of its subscriber base nor having adduced any evidence, it must be held that it is liable to pay the amount by way of restitution on the aforementioned subscriber base of 16,868.

12. Contention of Mr. Saurabh Srivastava, learned counsel appearing on behalf of the respondent, on the other hand, is that the relationship between the parties having continued, the petitioner is bound to pay to the respondent the subscription charges for the entire period.

13. It is not in dispute that the agreement in writing was entered into by and between the parties hereto for the period 01.01.2010 and 31.12.2010. Indisputably, the respondent has issued the notice under Clause 4.1 and 4.3 of the Regulations, by reasons whereof the requirements of law have been complied with.

The principal contention of the petitioner in the petition revolves round the down-gradation of subscription fees. Respondent in its notice dated 24.5.2011 and Public Notice dated 01.6.2011 assigned the only reason therefor as non-signing of then subscription agreement as on the date of issuance of said notice. Respondent did not raise any contention that the petitioner had not been paying the stipulated amount of the subscription fees.

The agreement between the parties dated 05.3.2010 provided for the amount of subscription fees payable by the petitioner to the respondent at Rs.6,23,427.56.

We may notice Annexure 'C' appended to the said agreement, which reads as under :-

“Subscription Fee – Subscribed Channels : (Read with Article VI of the Subscription Agreement) (i) The Affiliate shall pay to STAR DEN the following Subscription Fee.

<i>Bouquet Options</i>	<i>Effective Period</i>	<i>Subscriber Base</i>	<i>Rate(s)* per Subscriber per month (Rs.)</i>	<i>Monthly Subscription Fee (Rs.)**</i>
<i>Bouquet 1 :</i>				
<i>STAR Movies</i> <i>STAR Plus</i>	<i>01.01.10</i> <i>To</i>	<i>8631</i>	<i>55.64</i>	<i>480228.84</i>

STAR World STAR Gold Channel (V) National Geographic Channel Fox History & Entertainment Vijay	31.12.10			
Bouquet 2 :				
STAR One Hungama Disney XD Jetix				
Bouquet 3 :				
STAR One Hungama Disney XD Jetix Times Now Zoom	01.01.10 TO 31.12.10	1616	44.51	71928.16
Bouquet 4 :				
CNBC TV 18 CNBC AWAAZ CNN IBN MGM	01.01.10 TO 31.12.10	4163	17.12	71270.56
Bouquet 5 :				
STAR Ananda STAR Jalsha				
Total Monthly Subscription Fees (Excluding Taxes)				Rs.623437.56

14. Mr. Saurabh Srivastava would contend that the petitioner having admittedly a subscriber base of 16,868, there is absolutely no reason as to why it shall not be directed to pay the said amount for a period of two months, as has been directed by this Tribunal in its order dated 10.10.2011.

We are, however, unable to agree with the said contention of Mr. Srivastava for more than one reason. It is not in dispute that the Petitioner has given the details of its subscriber base of various LCOs, who were connected to its network. It has also in its aforementioned letter dated 26.5.2011 categorically contended that the subscriber base has come down to 16,868 from 74,007 i.e. about 228%. Respondent never raised any contention that the aforementioned assertion on the part of the petitioner was untrue or otherwise incorrect.

15. Moreover, when the Petitioner examined its witness raising the aforementioned contention, it was obligatory on the part of the respondent to cross-examine the said witness; particularly when not only all the relevant details have been disclosed by him in his affidavit but also a copy of the SLR was annexed.

16. Mr. Hariraj has not been cross-examined on the said question at all. He, in his cross-examination also stated that the petitioner has been making payments through cheques including the month of June 2011.

17. The effect of non-cross examination of a witness on material points is significant. It is now well settled, of-course, subject to just exceptions, that if a witness is not cross-examined on the material point, the same would be deemed to have been admitted.

(See **Indian Cablenet Company Ltd. Vs. Dum Dum Cable TV Network Pvt. Ltd.** [Petition No.151(C) of 2008] disposed of on 18th December 2009; **Sarwan Singh v. State of Punjab**, (2003) 1 SCC 240; **Malanbee (Died per L. Rs.) vs. Syed Amjed Hussain (Died per L.Rs.)** 2011 (2) ALT 34; **AEG Carapiet v AY Derderian** AIR 1961 Cal 359)

18. Moreover the respondent, for reasons best known to it, did not examine any witness. If the respondent intended to contest the issue so far as the same related to quantum of the amount of restitution, to which it was entitled to, it could have adduced some evidence in that behalf; particularly having regard to the fact that it opposed the prayer of the petitioner to withdraw the petition.

Non-examination of a party to a lis leads to drawl of an adverse inference. It has been so held in **Sardar Gurbakhsh Singh vs. Gurdial Singh & Anr.** Reported in AIR 1927 PC 230 which has been considered recently by this Tribunal in Petition No. Petition No. 155(C) of 2011 of Sri **Sivakami Amman Cable TV Vs ESPN Software India Pvt. Ltd** disposed of on 30.11.2011 in the following terms :-

“A party to a lis, it is well settled, must examine himself before a court of law particularly in a case where the burden of proof lay on it. Even otherwise the petitioner was required to examine himself to show that the contention of the respondent that it was a defaulter was not correct.”

19. Mr. Srivastava, however, would urge that keeping in view the provisions of Clause 8.1 as also 10.2 of the Regulations, the old commercial terms continued.

Clauses 8.1 and 10.2 of the Regulations read thus :-

“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 then the terms and conditions 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, whichever is earlier. However, once the parties reach an 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.

10.2 In non-addressable systems, the subscriber base agreed upon by the parties at the time of execution of the interconnection agreement between a multi system operator and a broadcaster shall remain fixed during the course of the agreement except in exceptional circumstances that warrant an increase or decrease in the subscriber base. In such an eventuality, it is for the service provider seeking a change in the subscriber base to provide reasons and accompanying evidence including local survey for the proposed change.

Provided that this sub-clause shall not apply to changes in the subscriber base of a multi system operator on account of any cable operator joining or leaving the multi system operator.

Provided further that any change in the subscriber base of a multi system operator, which is the basis of payment to a broadcaster, on account of any cable operator joining or leaving the network of the multi system operator shall be equal to the subscriber base of the cable operator, joining or leaving the network.”

20. We have noticed heretobefore that the agreement came to an end on 31.12.2010.

It was expected having regard to Clause 8.1 read with its provisos appended thereto as also paragraph 13 of the Explanatory Memorandum issued by the TRAI that within a period of three months from the said date, the parties, (subject to initiation of the process of negotiations two months prior to expiry of the agreement) would have arrived at some settlement.

21. Commercial terms between the parties continued in terms of the 2nd proviso appended to Clause 8.1 of the Regulations. Having regard to the fact that the petitioner itself terminated the agreement upon issuance of a Public Notice in terms of Clause 4.3 of the Regulations, the requirements of the 2nd proviso stand satisfied. Even the respondent had terminated the said agreement. Moreover, in a case of restitution of the benefit derived by the parties by reason of an interim order passed by a court of law, the provisions of the Regulations will have no effect; as the agreement itself has come to an end.

22. Similarly, the provisions of Clause 10.2 of the Regulations would also have no application keeping in view the fact that the same operates during the currency of the agreement. The agreement having expired, the provisions of Clause 10.2 or the principles analogous thereto will also have no application. Moreover, even in terms of Clause 10.2 of the Regulations, in the event, the broadcaster is made known that several of the franchisees of the MSO had

gone out of its network for one reason or the other, as an exceptional measure down-gradation can be granted.

In this case, the petitioner had contended that a large number of LCOs have gone out of its network. It has furthermore been contended that even in some cases the number of subscribers of its franchisees had come down.

23. In the aforementioned fact situation, the doctrine of unjust enrichment and/or restitution would be only to the extent that the petitioner would not be permitted to retain the benefit.

What is the quantum of benefit derived by the petitioner in terms of the interim order passed by this Tribunal is the core question?

In *Essel Shyam Communication Ltd. Vs. Department of Telecommunication* (Petition No. 151 of 20111 disposed of on 04.7.2011), it was stated :-

“29. In Mahabir Kishore and Ors. v. State of M.P. (1989) 4 SSC 1, the Supreme Court of India noticed as under:-

“The principle of unjust enrichment requires: first, that the Defendants has been 'enriched' by the receipt of a "benefit"; secondly, that this enrichment is " at the expense of the Plaintiffs"; and thirdly, that the retention of the enrichment be unjust. This justifies restitution. Enrichment may take the form of direct advantage to the recipient wealth such as by the receipt of money or indirect one for instance where inevitable expense has been saved.”

24. Yet, again in Petition No. 30(C) of 2010 (Assam Cable Communications Vs. Zee Turner Ltd. disposed of on 28.4.2011), the law has been stated in the following terms :-

“42. In a given case, restitution can be ordered even in terms of inherent power of the Court/Tribunal.

(i) The Expression “restitution” has not been defined in the Code of Civil Procedure, but it is “an act of restoring a thing to its proper owner”. {See Concise Oxford English Dictionary (2002) at p. 1220} In other words, restitution means restoring to a party the benefit which the other party has received under a decree subsequently held to be wrong. {Per Subba Rao, J. In Mahijibhai Mohanbhai v. Patel Manibhai, AIR 1965 SC 1477 at p. 1482}

(ii) In law the term “restitution” is used in three senses; (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done in another; (iii) compensation or reparation for the loss caused to another. {Black’s Law Dictionary, Seventh Ed, p 1315. See also Southern Eastern Coalfields Ltd. V. State of Madhya Pradesh AIR 2003 SC 4482.

(iii) In Halsbury’s Laws of England, 4th Edn. At page 434 it is stated, “Any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep.”

The doctrine of restitution contemplates the case where property has been received by a decree-holder in execution of

a decree, and the decree, or part thereof, is subsequently varied or reversed on appeal by the judgment-debtor, or even in a separate suit {Jogendra Nath Singh v. Hira Shahu AIR 1948 AII 252 (FB); Maqbool Alam v. Khodaija Begum AIR 1949} or otherwise, as for instance, on an application under the Bengal Money Lenders Act or Agriculturist Relief Act. {Alpati Ankamma v. Pvulari Basava AIR 1945 Mad. 360}

(iv) The principle of restitution has been statutorily recognised in Section 144 of the Code of Civil Procedure. It does not confer any new substantive right to the party not available under the general law, but merely regulates the power of the court in that behalf. It is the paramount duty of all courts to ensure that they do not injure to any litigant.

(v) Section 144 of the Code of Civil Procedure is not the foundation source of restitution, it is rather a statutory recognition of a pre-existing rule of justice, equity and fair play. The jurisdiction to make restitution is inherent in every court and can be exercised whenever justice of the case demands. {Kavita Trehan v. Balsara Hygiene Products Ltd., (1994) 5 SCC 380 : AIR 1995 SC 441.}

43. *In Kavita Trehan (Mrs.) and Another Vs. Balsara Hygiene Products Ltd., 1994 (5) SCC 380, the law is stated thus,*

“21. *Section 144 CPC incorporates only a part of the general law of restitution. It is not exhaustive. (See Gangadhar v. Raghubar Dayal and State Govt. of A.P. v. Manickchand Jeevraj & Co*

22. *The jurisdiction to make restitution is inherent in every court and will be exercised whenever the justice*

of the case demands. It will be exercised under inherent powers where the case did not strictly fall within the ambit of Section 144. Section 144 opens with the words : “Where and insofar as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose,” The instant case may not strictly fall within the terms of Section 144; but the aggrieved party in such a case can appeal to the larger and general powers of restitution inherent in every court.”

44. *In South Eastern Coalfields Ltd. Vs. State of M.P. and Others, 2003 (8) S.C.C. Page 648, it is stated :*

“26. In our opinion, the principle of restitution takes care of this submission. The word “restitution” in its etymological sense means restoring to a party on the modification, variation or reversal of a decree or order, what has been lost to him in execution of decree or order of the court or in direct consequence of a decree or order (see Zafar Khan v. Board of Revenue, U.P.) In law, the term “restitution” is used in three senses: (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done to another; and (iii) compensation or reparation for the loss caused to another. (See Black’s Law Dictionary, 7th Edn., p. 1315). The Law of Contracts by John D. Calamari & Joseph M. Perillo has been quoted by Black to say that “restitution” is an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for injury done:

“Often, the result under either meaning of the term would be the same. ... Unjust impoverishment as well as unjust enrichment is a ground for restitution. If the defendant is guilty of a non-tortious misrepresentation, the measure of recovery is not rigid but, as in other cases of restitution, such factors as relative fault, the agreed-upon risks, and the fairness of alternative risk allocations not agreed upon and not attributable to the fault of either party need to be weighed.”

The principle of restitution has been statutorily recognized in Section 144 of the Code of Civil Procedure, 1908. Section 144 CPC speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on a par with a decree. The scope of the provision is wide enough so as to include therein almost all the kinds of variation, reversal, setting aside or modification of a decree or order. The interim order passed by the court merges into a final decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of a final decision going against the party successful at the interim stage. Unless otherwise ordered by the court, the successful party at the end would be justified with all expediency in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand (a) the delivery of benefit earned by the opposite party under the interim order of the court, or (b) to make restitution for what it has lost; and it is the duty of the court to do so unless it feels that in the facts and on the circumstances of the case, the restitution far from meeting the ends of justice, would rather defeat the same. Undoing the effect of an interim order by resorting to principles of restitution is an obligation

of the party, who has gained by the interim order of the court, so as to wipe out the effect of the interim order passed which, in view of the reasoning adopted by the court at the stage of final decision, the court earlier would not or ought not to have passed. There is nothing wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed.”

{See also Atma Ram Properties (P) Ltd. Vs. Federal Mother (P) Ltd. 2005 (1) S.C.C. 705 (9).}

45. Recently in *M/s. Makhija Development Pvt. Ltd. Vs. City and Industries Development Corporation of Maharashtra and Others (2010-(BO2)-GJX-0242, (Disposed of on 20.01.2010), the Bombay High Court held :-*

*“Coming to the principle of restitution, the Supreme Court, in the case of South Eastern Coalfields Ltd. (Supra), held that in law, the term restitution is used in three senses, namely, (a) return or restoration of some specific thing to its rightful owner or status; (b) compensation for benefits derived from a wrong done to another; and (c) compensation or preparation for the loss caused to another. By referring to the scheme of Section 144 of C.P.C., the Supreme Court held that the scope of the provision is wide enough so as to include therein almost all the kinds of variation, reversal, setting aside or modification of a decree or order and Section 144 of C.P.C. is not the fountain source of restitution, it is rather a statutory recognition of pre-existing rule of justice, equity and fair play. In *Jai Berham v. Kedar Nath Marwari* {AIR 1922 PC 269}, it is held that it is the*

duty of the court under Section 144 of the Civil Procedure Code to place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed. It is inherent in the general jurisdiction of the court rightly and fairly according to the circumstances towards all parties involved and that no one shall suffer by an act of the court is not a rule confined to an erroneous act of the court; the “act of the court” embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law.”

46. *Moreover, as the interim order passed by this Court affected the rights of the parties, the Tribunal must be held to have ample jurisdiction to compensate the party suffering loss, keeping in view the principles ‘**Actus curiae neminem gravabit**’ i.e. the act of the Court shall not prejudice any one.”*

25. In view of the aforementioned principles, there cannot be any doubt or dispute that whereas a party to a lis cannot unjustly enrich itself, while granting restitution the court shall also not shower undue benefit to the other side.

26. Keeping in view the materials on records, we are of the opinion that interest of justice will be sub-served, if the Petitioner is directed to pay Rs.1,55,857/- per month i.e. Rs.3,63,147/- towards the subscription fees for the period 15.6.2011 to 24.8.2011 at the rate of 25% of the amount payable to the Respondent stipulated in Annexure 'C' to the agreement i.e. Rs.6,23,427.56. The Petitioner, pursuant to this Tribunal's order dated 10.10.2011 has paid a sum of Rs.12,46,854/-. The Respondent shall return the balance amount to the Petitioner within two weeks from date, failing which interest at the rate of twelve percent per annum shall become payable.

27. This petition is disposed of with the aforementioned directions with 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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