

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 25TH JULY 2012

Petition No.427 (C) of 2010

(With M.A. Nos.175, 220 and 232 of 2011)

Ortel Communications Ltd. ... Petitioner

Vs.

Taj Television Ltd. ... Respondent

BEFORE:

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

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

For Petitioners : Mr. Samir Sagar Vashishta, Advocate
Mr. Davender Singh Thakur, Advocate

For Respondent : Mr. Maninder Singh, Sr. Advocate
Mr. Upender Thakur, Advocate for
Mrs. Prathiba M. Singh, Advocate

J U D G E M E N T

The Petitioner is a Multi Service Operator; whereas the Respondent is a Broadcaster.

2. The dispute between the parties centers round the requests of the Petitioner to the Respondent for supply of signals to its four networks in the

State of Orissa. The first of such requests was made by reason of a letter dated 12.12.2009 addressed to Zee Turner Ltd. for some channels of Zee Group (Zee Action, Zee Premiere, Zee Classic, Warner Bros and Zee Sports).

3. Another letter dated 24.12.2009 was issued in respect of the said channels. Reply thereto was given by the Zee Turner Ltd. stating that it with its request had not annexed the certificate issued by Broadcasting Engineering Consultants India Ltd. (BECIL). It was further requested that the Petitioner should furnish the details pertaining to the existing and proposed areas of operation and complete subscriber list of both digital and analogue tier in Orissa Headend wise/city wise. A clarification was also sought for as to whether apart from the channels of which supply of signal had been sought for, the Petitioner has intended to obtain the signals of other channels.

In response thereto, the Petitioner supplied certain informations as also the certificate issued by the BECIL, stating :-

“ As regards your asking of the existing and proposed area of operation we reiterate and certify that the same is limited to the Municipal limits of areas for which service request has been noted by you, i.e. Bhubaneswar, Cuttack, Rourkela & Berhampur.*

- As regards subscriber base we bring it to your notice that we have not subscribed to the bouquet 3 comprising your above channels in our analogue tier. Further please note*

that we are ready to pay as per the subscriber base as would be reflected by SMS.

- *Further please note that the status of other subscription arrangement remains unaltered and the request is only limited to the bouquet 3 in the addressable tier.*

In view of the above as you would appreciate that as our addressable tier is recognized under the Telecommunication (Broadcasting and Cable Services) Interconnection (Fifth Amendment) Regulations, 2009 dt. 17th March, 2009 it also would be governed by the Tariff and Interconnection terms prescribed in CAS area.”

4. Yet again, it by a letter dated 03.02.2010 reminded the said Zee Turner Ltd. for issuance of decoders in respect of those channels. On or about 12.03.2010, the Petitioner restricted its request to Bouquet III of the Zee Bouquet of channels. It contended that it had upgraded its headend to a digital one. On the same date, a similar letter was issued.

It appears that the right to retransmit signals of the aforementioned channels and in particular Zee Sports was taken over by the Respondent herein.

By a letter dated 03.07.2010, it asked for signals in respect of Zee Sports and Ten Sports. A reminder was sent on 02.08.2010 contending that the

Respondent may settle commercial terms and conditions for a subscriber base as per SMS and entered into a subscription agreement.

5. The Respondent, however, contended by an undated letter, received by the Petitioner on 11.8.2010, that it had not received the said request.

Attention of the Petitioner, however, was drawn to the RIO put on the web by the Respondent. It appears that although no formal request was made in respect of the channels of Ten Sports, the Respondent in its reply proceeded on the basis that such request was made.

On the aforementioned factual backdrop, this petition has been filed.

6. The Respondent having been served with notice filed a reply on or about 18.4.2011 inter-alia questioning the legal right of the Petitioner to obtain signals of its channels on digital platform, contending :-

“19. Without prejudice to the above, it is further respectfully submitted that a number of other broadcasters in this area, i.e. in the non-notified area, are also not providing signals on digital platform. Similarly, there are a number of other MSOs/LCOs in the non-notified area who are providing transmission/re-transmission of signals of their cable TV service only on ANALOG

platform. It is further submitted that it is entirely impossible to envisage and visualize a position that whereas a number of broadcasters provide signals of their TV channels to an MSO/LCO on ANALOG mode and one of the broadcasters is compelled to provide signals of its channels to the same MSO/LCO on digital mode.

29. It is submitted that the Respondent is awaiting the Minutes of the Meeting from the Petitioner, as duly signed by it, as well as for the Petitioner's intimation that the deficiencies, as observed in the Minutes of the Meeting, in its headend have been rectified. Upon receipt of the MoM as well as intimation from the Petitioner, as mentioned hereinbefore, the Respondent will be able to conduct a final inspection of the Petitioner's headend in order to process its request for signals on digital mode."

7. On the merit of the said request, the Respondent denied and disputed the contention of the Petitioner to the effect that it has set up a digital headend and/or the same is compliant with the technical requirements.

8. The learned counsel appearing on behalf of the Respondent informed this Tribunal that an inspection of the Petitioner's headend shall be made. An inspection was carried out on 21.3.2011 by a technical team for CAS and SMS.

According to it, the following deficiencies were found :-

- “(a) Broadcaster report is not available;*
- (b) The ageing of the subscriber on the particular channel or package is not available;*
- (c) The total count of number of subscribers authorized is not available;*
- (d) CAS and SMS reconciliation process defined by Ortel was not demonstrated;*
- (e) The STB should have a provision that OSD should never be disabled however the same was being disabled on pressing exit/back buttons;*
- (f) Covert fingerprinting is not available;*
- (g) Fingerprinting location is not defined by Ortel on user defined coordinates;*
- (h) The STB’s (Dizipro & Skyworth) are not paired with smart card from CAS end;*
- (i) Finger printing location is not configured on all channels;*
- (j) In Skyworth remote gets disabled during finger-printing;*
- (k) Ortel mentioned that they are using three different CAS, i.e. Iredeto, Sumavision and Logic Eastern, however, Taj has evaluated only Iredeto;*
- (l) Water marking logo of Ortel is not available on its STBs;*
- (m) In case of masking of finger-printing with available software in the market, Ortel does not have second line of action to avoid piracy; and*
- (n) Antipiracy process with escalation matrix and turn-around time to deactivate the pirated card number should be specified which is not presently there.”*

9. The Petitioner, however, by way of an affidavit in response denied and disputed the said purported deficiencies in the said headend, contending :-

- “1. *With respect to the alleged non-availability of broadcaster report it is stated that we have Channel wise Broadcaster Report and the same has been provisioned as per Schedule IV of the Interconnect Regulation dated 17.3.2009. Our system is capable of providing report of the consolidated channels of a Broadcaster though same is not part of schedule IV of TRAI Regulation.*
2. *With regard to the issue of ageing of the subscriber on particular channel is concerned, it is submitted that this issue was not even raised. However, a report can be provisioned as and when requested through our system.*
3. *With respect to the issue of non-availability of total count of number of authorized subscribers it is stated the same is wrong and denied. It is stated that the total count of number of subscribers authorized is available in our system and the same was demonstrated to Respondent’s technical team during the inspection.*
4. *With respect to the allegation that CAS and SMS reconciliation was not demonstrated by us it is clarified that we run a periodic script developed using JAVA and ASP to reconcile the CAS and SMS. This has been demonstrated to Respondent’s technical team by taking a reconciliation statement from customer data base and CAS data base.*

5. *With respect to the issue that in our STB's, OSD was getting disabled on pressing exit/back button, it is clarified that the demonstration which was given to the Respondent's technical team was of a forced message which appears on the screen being watched at the time of sending message. After reading the same, if customer presses back/exit key it disappears. This is absolutely not an On Screen Display (OSD) which is issued from the end of Broadcaster and the same cannot be removed by customer.*
6. *The finger printing requirement as prescribed in Schedule IV of the Interconnect Regulation dated 17.3.2009 is provisioned and is approved by BECIL. This ensures the security measures.*
7. *The issue related to fingerprinting location is misconceived and in this regard it is submitted that the Finger printing demonstration which was given to Respondent's technical team is designed as per the requirements given under Schedule IV of Interconnect Regulation dated 17.3.2009 and same has been certified by BECIL.*
8. *The issue of non-pairing of the STB's with smart card are wrong and denied. The STB's (Dizipro and Skyworth) are paired with the smart card from CAS and the same STB's were duly demonstrated to Respondent's technical team.*
9. *The issue of non-configuration of fingerprinting as already explained and as demonstrated to the Respondent's technical team has been complied as per requirements of Schedule IV of Interconnect Regulation dated 17.3.2009 and duly certified by BECIL.*
10. *The issue that the Skyworth remote gets disabled during fingerprinting is false and denied. This has been designed as per the requirement of Schedule IV of Interconnect Regulation*

and the same is not removable by pressing any key in the remote and therefore it is wrong to contend that Skyworth remote gets disabled during fingerprinting.

11. *With respect to confusion of usage of three different CAS, it is clarified that as the inspection was limited to Bhubaneswar headend where we are using IREDETO CAS. We are using Sumivision CAS at Jharsuguda and Logic Eastern at Raipur headends.*
12. *With regard to issue that watermarking logo of Ortel was not available it is stated that Water Marking is not part of Schedule IV of the Interconnect Regulation dated 17.3.2009, however, the same can be provided through our system.*
13. *With respect to issue that Ortel does not have any second line of action to avoid piracy it is stated that the same is misconceived and not required under Schedule IV of the Interconnect Regulation dated of 17.3.2009.*
14. *With respect to issue related to antipiracy process and turnaround time, it is clarified that it was duly demonstrated to Respondent's technical team that all the executives of our Call Centre have been given access to SMS and they are authorized to disable signals to any customer in case, any piracy was found by them."*

10. During pendency of this proceeding, a contention was raised before us that the Petitioner being armed with the certificate issued by BECIL, the same should be treated to be final.

This Tribunal was of the opinion that the Respondent must begin. Pursuant thereto or in furtherance thereof, Respondent examined Mr. Sandeep Panwar and Mr. Ramandeep Biala.

The evidence of RW-1, Mr. Sandeep Panwar, who was a member of the inspecting team, contended that his job was confined to the preparation of minutes of meeting which he carried out in consultation of the officers representing the Petitioner. The purported deficiencies, which we have noticed heretofore, being the contents of the said minutes of meeting, we need not reproduce the same once over again.

It may, however, be noticed that none of the representatives of the Petitioner having put their signature thereupon, a copy thereof was sent by e-mail on 22.3.2011. We would revert to the deposition of the said witness at an appropriate stage.

11. The officers of BECIL, who purported to have inspected the headend of the Petitioner and issued a certificate, were summoned as witnesses.

One Lt. Col. (Retd.) Shri V.C. Khare, Technical Advisor, BECIL was examined on 12.9.2011. The said witness has produced some original documents, which on a prayer made by him, were directed to be returned upon keeping on record the xerox copies thereof. He was to be cross-examined on 23.9.2011.

12. The Petitioner, however, filed an application on or about 14.9.2011 inter-alia praying for inspection of the headend again by the officers of BECIL in the context of objections raised by the Respondent herein. While the said application was pending consideration, a copy thereof with a forwarding letter was sent to Shri Khare.

The Respondent also filed a Miscellaneous Application contending that keeping in view the fact that correspondences had been exchanged between the Petitioner and the said witness, his evidence should not be accepted.

13. The said two Miscellaneous Applications were disposed of by this Tribunal by an order dated 19.01.2012 whereby and whereunder, while dismissing the Miscellaneous Application filed by the Petitioner being M.A. No. 242 of 2011, it was directed :-

“So far as the respondent’s application marked as MA No.250/2011 is concerned, we do not agree with Mr. Maninder Singh’s submission that on this ground this petition should be dismissed but keeping in view the peculiar facts and circumstances of this case, particularly, in view of the fact that the certificate of BECIL having not been granted in terms of the second proviso appended to Clause 13.2B.4 of the Regulations, the same, it is held, cannot be treated to be final

and, thus, even if the same is proved, the statutory presumption cannot be drawn.

Mr. Khare has been forewarned by the petitioner by pointing out the deficiencies existing in its equipments as had been opined by the respondent's technical team. Evidently, Mr.Khare had no occasion to make inspections having regard to the said deficiencies in mind. No fruitful purpose, therefore, would be served by bringing the said certificate on record.

However, with a view to do complete justice to the parties, we are of the opinion an opportunity should be granted to the petitioner to examine its own witnesses, other than Mr.Khare. The affidavits of such witnesses, if any, may be filed within two weeks from date.

M.A. No.247/2011 is dismissed and M.A. No.250/2011 is disposed of on the above terms.”

14. It may be placed on record that during the hearing of the said applications, justification was sought to be made as regards issuance of the said letter to the witness by the Petitioner herein on the premise that in terms of clause 13.2.B(4) of the Telecommunication (Broadcasting & Cable Services) Interconnection Regulations 2004 as amended from time to time, in the event of a dispute arising between the Broadcaster and the Multi Service Operator so far as compliance of minimum requirements to supply signals of its channels on digital platform is concerned, the opinion of BECIL shall be final.

The said contention was rejected by reason of the aforementioned letter dated 19.01.2012.

The Petitioner examined Lt. Col. Manmohan Pattnaik, a whole time Director on the Board of the Petitioner Company as well as its Chief Technical Officer.

15. Before, however, we begin our task to appraise the depositions of the expert witnesses, it may be placed on record that the Petitioner's witness Lt. Col. Pattnaik in para 5 of his affidavit raised a contention that the Petitioner had been obtaining supply of signals of ETV (Telugu) channel of Ushodaya Enterprises Ltd. purported to be pursuant to or in furtherance of the order passed by this Tribunal on 01.3.2007. The Petitioner not only failed to plead the said fact even when specific objection was raised with regard thereto by the Respondent in its reply, even did not raise a contention in its rejoinder. It merely relied upon the order of this Tribunal in Petition No. 288 (C) of 2006.

16. On the aforementioned premise, the question which arise for consideration in this petition are :-

- (i) Whether this petition is maintainable in law?
- (ii) Whether the Petitioner has proved that the headend established by it at least in Bhubaneswar, is compliant to

the minimum statutory requirements laid down in Schedule IV appended to the Regulations as amended in the year 2009?

17. In support of the first question, Mr. Maninder Singh, learned senior counsel appearing on behalf of the Respondent urged that having regard to the provisions of Section 4A of the Cable T.V. Networks Act, 1995 as also the Rules framed thereunder, no distributor of TV services in absence of a notification issued by the Central Government thereunder classifying a town to be Conditional Access Service area, has an existing legal right to obtain signals on digital platform.

Strong reliance in this behalf has been placed by Mr. Maninder Singh on a judgment of this Tribunal in Intermedia Cable Communication Pvt. Ltd. Vs. Zee Turner Ltd. being Petition No.244 (C) of 2010.

We have, however, not inclined to accept the said contention in the facts and circumstances of the case. We have noticed heretobefore that the Petitioner rightly or wrongly had all along been asking for supply of signals on digital platform on the Respondent and/or it is in its interest.

18. In none of its correspondence, the question of absence of any legal right on the part of the Petitioner was raised. In fact, it had been asking for supply of certificate issued by the BECIL as also other informations pertaining thereto.

It is not a case where in a law there is any bar in supplying the signals on digital platform. In fact, learned counsel accepted that such an arrangement can be entered into by the parties on a voluntary basis which has also been recognized by the TRAI.

We, therefore, are of the opinion that the Respondent is estopped and precluded from raising the aforementioned plea in support whereof no legal foundation has been placed on record.

19. Coming now to the principal issue between the parties, we at the outset, may notice that :-

- (i) The certificate issued by the BECIL has not been proved;
- (ii) It has not been nor could it be in law contended that the said certificate is a public document;
- (iii) The Petitioner sought to bring on record a DVD purported to be containing the nature of equipments installed at its headend, so as to show that the objections raised by the Respondent herein are incorrect. The said purported DVD, however, concedingly does not satisfy the requirements of Section 65-B of the Indian Evidence Act.

In that view of the matter, this Tribunal is called upon to determine the aforementioned issue between the parties on the basis of the deposition of two experts, one examined by the Petitioner and the other by the Respondent.

20. It may also be noted that although RW-1 has been cross-examined to a large extent with regard to his participation in the inspection of the Petitioner's headend.

However, PW-1 in para 12 of his affidavit clearly stated as under :-

"12. I say that no reply came from the Respondent, despite various reminders which forced the Petitioner to move this Hon'ble Tribunal, I say that to resolve the dispute amicably and at the earliest both parties agreed for an inspection and accordingly this Tribunal fixed 21.3.2011 as the date for inspection. I say that on 21.3.2011 the Respondent's technical team comprising of Mr. Sanjeev Bhargava, VP (Technical) Taj India Pvt. Ltd., Mr. Sandeep Panwar, Senior Manager (Legal), Taj India Pvt. Ltd. and one Mr. Ramandeep Biala, AVP (Technical), Zee Turner Ltd. arrived at the Petitioner's headend for technical inspection. I say that I was present during the entire duration of the inspection and our technical team demonstrated and showed our head-end's full compliance with all the specifications as provided under Schedule IV of the TRAI Regulation. I say that the said inspection ended around 5 pm and the Respondent's team informed us that they have to rush to the airport to catch their flight and assured us that they would revert on our request for digital supply of signals. I say that the Respondent's technical team had to leave for airport therefore no minutes of meeting could be drawn at the inspection place."

21. We, therefore, fail to understand as to why the participation of RW-1 was denied and disputed by the Petitioner.

22. Mr. Vashishta, learned counsel appearing on behalf of the Petitioner would submit that the court, being an expert of all experts, should determine the question keeping in view the deposition of PW-1 and RW-2.

It may be correct that when called upon to do so, the court has no other option but to determine a technical question.

But, while doing so, it cannot and should not fail to take into consideration the provisions of part III, Chapter 7 of the Indian Evidence Act and in particular, Sections 101 and 102 thereof, in terms whereof the burden of proof would be on a party who has put forward a positive case.

23. Mr. Vashishta, on a query made by us, very fairly accepted that the Petitioner has not produced any document to show that in terms of an order of this Tribunal dated 01.4.2007, it had been obtaining supply of signals on digital platform.

24. There cannot be any doubt or dispute that failure on the part of a party, who is in possession and power of any document to establish its case,

intentionally and/or deliberately fails to do so, an adverse inference should be drawn against it.

In *Gopal Krishnaji Ketkar v. Mohamed Haji Latif* reported in AIR 1968 SC 1413 reported in AIR 1968 SC 1413, the law in this regard has been laid down in the following terms :-

"5..... Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof. In Murugesam Pillai v. Manickavasaka Pandara [44 IA 98, at p 103] Lord Shaw observed as follows:

“A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough — they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in Their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition.”

This passage was cited with approval by this Court in a recent decision—Biltu Ram v. Jainandan Prasad [Civil Appeal No. 941 of 1965 decided on April 15, 1968] . In that case, reliance was placed on behalf of the defendants upon the following passage from the decision of the Judicial Committee in Bilas Kunwar v. Desraj Ranjit Singh [42 IA 202, at p. 206] :

“But it is open to a litigant to refrain from producing any documents that he considers irrelevant; if the other litigant is dissatisfied it is for him to apply for an affidavit of documents and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents.”

But Shah, J., speaking for the Court, stated:

“The observations of the Judicial Committee do not support the proposition that unless a party is called upon expressly to make an affidavit of documents and inspection and production of documents is demanded, the Court cannot raise an adverse inference against a party withholding evidence in his possession. Such a rule is inconsistent with Illustration (g) of Section 114 of the Evidence Act, and also an impressive body of authority.”

Gopal Krishanji Ketkar (supra) has been followed by this Tribunal in P.R.T. Satellite Network System v. Sun Distribution Services, Petition No.323

(C) of 2010, dated 8th June, 2011, Hathway Cable & Datacom Ltd. v Sahara Sanchar Ltd. & Anr, Petition No.245 (C) of 2009, 23rd November, 2010 and Mona Cable Network v. ESPN Software India Private Ltd., Petition No.145(C) of 2009, decided on 20th November, 2009.

25. Section 45 of the Indian Evidence Act makes the opinion of an expert inter-alia relevant for 'Science'; the witness inter-alia being especially skilled in that sense. Thus, PW-1, who not only had the benefit of the statement made in the cross-examination of RW-2 has also seen the opinion of Shri V.C. Khare. As a Director of the Petitioner Company, he is said to have established the headend of the Petitioner in compliance with the technical requirements necessary for re-transmission of signals on digital mode.

In his affidavit, however, the said witness principally reproduced the contentions raised in the counter affidavit filed by the Petitioner in response to an affidavit filed by the Respondent with regard to the inspection of the headend made on 21.3.2011. It, however, does not mean that for the aforementioned purpose, we need not consider the evidence of PW-2 at all.

26. Before, however, we do so, we may notice the provisions of clause 13.2B.4 of the 2009 Regulations :-

13.2B.4 Any distributor of TV channels using an addressable system for distribution of TV channels seeking interconnection with a broadcaster in terms of the Reference Interconnect Offer referred to in regulation 13.2B.1 or 13.2B.2, as the case may be, shall ensure that the addressable system being used for distribution of TV channels satisfies the minimum specifications for addressable systems as specified in Schedule IV to these regulations:

Provided that in cases where a broadcaster is of the opinion that the addressable system being used for distribution of TV channels does not satisfy the minimum specifications for addressable systems as specified in Schedule IV to these regulations, upon being informed of such opinion by the broadcaster, the distributor of TV channels shall get the addressable system audited by M/s. Broadcast Engineering Consultants India Ltd., or any other agency as may be notified by the Authority from time to time for the purpose of such audit and obtain a certificate to the effect that the addressable system being used for distribution of TV channels satisfies the minimum specifications for addressable systems as specified in Schedule IV to these regulations:

Provided further that the finding of M/s. Broadcast Engineering Consultants India Ltd., or any other agency notified by the Authority in this regard, as the case may be, based on such audit as referred to in the first proviso, about the addressable system being used for distribution of TV channels satisfying or not satisfying the minimum specifications for addressable systems as specified in Schedule IV to these regulations, shall be final."

27. Schedule IV appended to the said Regulations provide for a minimum standard with regard to the following :-

- “3. The STB should be capable of doing Finger printing. The STB should support both Entitlement Control Message (ECM) & Entitlement Management Message (EMM) based fingerprinting.
 - 1. The Finger printing should not be removable by pressing any key on the remote.
 - 4. The Finger printing should appear on all the screens of the STB, such as Menu, EPG etc.
 - 8. The Overt finger printing and On screen display (OSD) messages of the respective broadcasters should be displayed by the MSO/ LCO without any alteration with regard to the time, location, duration and frequency.
 - 10. The STB should have a provision that OSD is never disabled.

28. So far as CAS and SMS requirements are concerned, it was stated :-

- “3. The STB & VC should be paired from head-end to ensure security.
 - 8.a. Viewing and printing historical data in terms of the activations, deactivations etc.
 - c. The SMS should be capable of giving the reporting at any desired time about :-
 - iii. The total no. of subscribers subscribing to a particular service at any particular date.
 - iv. The details of channels opted by subscriber on a-la carte basis.
 - vii. The ageing of the subscriber on the particular channel or package.”

29. Item No.1, as indicated heretobefore, strongly relied upon in the order of this Tribunal dated 01.4.2007 whereby and whereunder it directed the Respondent therein to supply signals on digital platform, stating :-

“Now it is to be considered whether petitioner can insist on supply of signals in digital mode alone. We find that the efforts throughout the country is to encourage the CAS system and the petitioner is promoting the same. As an measure of encouragement of the CAS system and keeping in view that another agent by the name Variety Entertainment Pvt. Ltd. has come up in the state who will provide signals in the analogue mode, we direct the respondent to supply signals to the petitioner in the digital mode as per prayer of the petitioner and the petitioner will pay as per the number of subscribers registered with it under the Subscribers Management System (SMS). The supply of signals should commence within one week.”

30. However, the said order was explained on a Review Application filed by the Respondent therein on 09.4.2007, the relevant portions whereof read as under :-

“The learned Senior Counsel for the respondents has tried to stretch our order so as to bring it within the provisions of Section 4A of the Cable Television Networks (Regulation) Act, 1995 in a bid to show that it violates that Section. In our considered view, the argument is untenable as we find that there is no violation of Section 4A by our said order. It is respondent’s own case that it is making signals available both in digital as well as analogue modes which means that a consumer has a freedom of choice whether to have the signals in digital mode or in the analogue mode. The petitioner wants

signals only in the digital mode which means that a customer who is interested in having signals in the digital mode alone will come to the petitioner. As per the respondent's own case, there is another dealer who is supplying signals in that area in the analogue mode. So, a consumer who wants signals in analogue mode can go to him. There is no compulsion so far as the customer is concerned. Our order creates no compulsion. We may note what Section 4A provides: "...make it obligatory for every cable operator to transmit or retransmit programme of any pay channel through an addressable system...". Our order does not make it obligatory for the cable operators to transmit or retransmit programmes in a particular form nor does it apply to all the cable operators. Therefore, in our view, our order cannot be said to be violative of Section 4A of Cable Television Networks (Regulation) Act, 1995. By our order we are not introducing CAS nor we are compelling anybody to go for digital system. Accordingly, this Review Application is dismissed. The interim order dated 14.3.07 staying order order dated 1.3.07 is hereby vacated. Compliance of order dated 1.3.07 be made within one week. R.A.No.2 of 2007 and M.A.No.38 of 2007 are dismissed."

31. The contention of the Petitioner would have some force if it had established that at least some broadcasters have been supplying their signals of their channels on digital platform; in which event this Tribunal could have proceeded on the basis that at least a few broadcasters had satisfied themselves about the sufficiency of the legal requirements so far as the capability of the Petitioner to re-transmit channels on digital mode is concerned.

32. In his cross-examination, the said witness, however, categorically stated that the Petitioner had not entered into any agreement with the said broadcaster, stating :-

“However, we do not have any channels given by broadcasters in our digital platform.

Q32: If you say that you do not have any channels of broadcaster in digital platform then can you explain how the report generated by SMS is showing channels of various broadcasters including ESPN, MSM, Mediapro etc. in the alleged report?

A: These channels are given in voluntarily by broadcasters to show in the digital platform and hence these channels are the part of package and no total strength shows.”

33. It is, therefore, difficult to conceive that in the absence of any agreement, a large number of broadcasters had been supplying signals to the Petitioner’s network on digital mode.

34. We would assume that the said witness is an expert, although as an officer of Indian Army, he merely provided telecommunication in some backward areas, where the broadcaster had been providing digital services being Doordarshan, stating :-

“A: For the welfare of the troops Doordarshan used to donate entire headend and necessary CAS for viewing the digital channels. But these channels were limited to 20-30 channels. I was involved in the setting up and operations of the said headend as it was set up under my supervision.”

35. Re-transmission of channels by Doordarshan which is captured on antenna does not require a digital platform.

It is in the aforementioned context we may notice certain questions and answers :-

“Q29: Please tell me whether this file can show the aging of the subscriber on a particular channel or a package?”

A: No. This is the aging report of the subscriber as per receivable. This format is as given by BECIL during their audit. However, we have subscriber aging report separately as per package.

Q30: Is it correct that you have not filed any subscriber aging report as per the packages or channels in the present proceedings?”

A: No.

Volunteers: The subscriber aging report was demonstrated at the time of audit.

(The witness was shown file the Point 1 Broadcaster Report1.pdf file.)

Q32: If you say that you do not have any channels of broadcaster in digital platform then can you explain how the report generated by

SMS is showing channels of various broadcasters including ESPN, MSM, Mediapro etc. in the alleged report?

A: These channels are given in voluntarily by broadcasters to show in the digital platform and hence these channels are the part of package and no total strength shows.

Q33: Do you have any agreement with any broadcasters for transmission of above mentioned channels in digital mode?

A: No.

Q34: Then on what basis do you make the above statement “These channels are given in voluntarily by broadcasters to show in the digital platform and hence these channels are the part of package and no total strength shows?”

A: The report format is ready in SMS. Moment we get these above broadcaster channel in our digital platform will be able to take report from SMS.

(The witness was shown file the Point 3 Total Customer Count.pdf file.)

It is incorrect to suggest that this report has not been generated by SMS.

Q35: Does the report show Channel wise count of number of subscribers?

A: No.

Volunteers: As per TRAI regulations 17.03.2009 report should be either channel wise or package. So we have package wise total report.

It is incorrect to suggest that channel wise count of number of subscriber is required as general specification of any SMS.

(The witness was shown a video clip titled Point 5)

Q37: Can you please tell us what this video clip relates to?

A: This is demonstrating the pairing of Box and card.

It is incorrect to suggest that the aforesaid clip had been made by the petitioner in its headend at Raipur or Jharsugada and the same does not relate to Bhubaneswar headend.

Q38: I put it to you that from the video clip one cannot make out which STB is being used?

A: It is correct.

Volunteers: This is the Skyworth STB used for demonstration.

It is incorrect to suggest that my above statement is false.

(The witness was shown a video clip titled Point 10)

Q41: Can you please tell us what this video clip relates to?

A: This is water marking logo demonstrated from Skyworth STB.

It is incorrect to suggest that the aforesaid clip had been made by the petitioner in its headend at Raipur or Jharsugada and the same does not relate to Bhubaneswar headend.

It is incorrect to suggest that water mark logo of the petitioner was not visible when the inspection was carried out by the respondent on 21.03.2011.

It is incorrect to suggest that the contents of para 17 of my affidavit are wrong.”

36. Answer to Question No.38 would clearly show that the same is contrary to the Schedule IV appended to 2009 Regulations. What is the difference between ‘pay channel’ and a ‘package’ may be noticed from the definition and interpretation given by the TRAI itself :-

“Package” means the type of the Channels either individual or in the form of bouquets subscribed by the subscriber which may include the Pay Channels as availed by the subscriber from time to time.”

“Pay Channel” means the Channels transmitted by the multi system operator (MSO) in encrypted form which can be accessed by the subscribers only by means of the Hardware.”

37. It is, therefore, difficult to hold that a proper SMS system would not be able to determine the number of channels subscribed by each subscriber. It is in fact the heart and soul of an addressable system.

Question Nos. 38 and 39 clearly show that the system did not provide for pairing of STB Box and the Viewing Cards. It is needed to identify the STB to which signals are supplied.

38. Schedule IV appended to 2009 Regulations lay down the minimum standard. It, therefore, can be supplemented by newer technologies which became available.

The finger printing requirement again is a relevant factor in relation to receipt of signals and re-transmission thereof by a digital mode.

Answer to question No.35 would indicate that the Petitioner’s headend does not satisfy the tests.

One of the contentions, which had been raised in the cross-examination of RW-2 was as regards the difference between an On-Screen Display and forced message, and as RW-2 answered that there is no such difference; whereas PW-1 contended that the difference lies in the fact that in the case of OSD, the subscriber will have no control but in the case of a forced message, the subscriber can remove the same upon reading the message itself and thus, the said witness is not an expert.

39. Schedule IV, however, states that what RW-2 stated as correct and should never be disabled as in terms thereof no message displayed can be interfered with by any subscriber. Moreover, the SMS, there cannot be any doubt whatsoever, should be able to undertake the viewing and printing historical data in terms of the activation, de-activation etc. Thus, the particulars of a subscriber must be available both to the MSO and the broadcaster.

40. Mr. Ramandeep Biala, RW-2 and Mr. Sandeep Panwar were employees of Zee Turner Ltd. They are not employees of the Respondent. Their services, however, were requisitioned by it.

He, in his deposition, stated :-

“I also asked the petitioner for any previous broadcaster report which may have been printed by them. However, I was told that no such report has been fetched from the system as the system is not capable of the same.”

He, furthermore, stated :-

“I requested the petitioner to demonstrate the reconciliation process of CAS and SMS which was not shown.”

It was of vital significance.

41. We may also notice the following question and answer :-

“Q.: What is the difference between “Overt” and “Covert” Fingerprinting?”

A: Overt finger printing is finger printing displayed on TV screen viewable by human eye and covert finger printing is also displayed on TV screen but cannot be viewed/noted by naked eye.”

42. Finger printing, however, cannot be removed.

Only because he has not been able to give the full form of BECIL or failed to satisfactorily answer with regard to the definition of ‘OSD’ and ‘forced message’ (assuming it to be so as contended by the Petitioner), we are of the opinion that his deposition cannot be thrown out totally.

43. For the reasons aforementioned, we are of the opinion that the Petitioner has not been able to establish its case on merit that it has set up a headend which is capable of re-transmission of signals of the Respondent's channels on a digital platform.

44. This petition is, therefore, dismissed with costs which is quantified at Rs.50,000/-.

However, the Petitioner will be at liberty to approach the Respondent as and when it establishes the headend capable of receiving and retransmitting signals in digital platform in terms of the relevant provisions of The Telecom (Broadcasting & Cable) Interconnection Regulations, 2004 as amended from time to time.

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(S.B. Sinha)
Chairperson

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(P.K. Rastogi)
Member

rkc