

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 20.7.2012

Petition No.396(C)/2012

Ras Resorts, Silvassa and Ors.

... Petitioners

Vs.

Media Pro Enterprises India Pvt. Ltd & Ors.

... Respondents

BEFORE:

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

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

For Petitioner : Mr.Ramji Srinivasan, Sr. Advocate
Mr.Sameer Parekh, Advocate
Ms.Rukhmini Bobde, Advocate
Mr.Shashank Kumar, Advocate
Mr.Debojyoti Bhattacharya, Advocate

For Respondent Nos. 1 & 3 : Mr.Maninder Singh, Sr. Advocate
Mr.Tejevver Singh Bhatia, Advocate
Mr.Upender Thakur, Advocate for
Ms.Pratibha M. Singh, Advocate

- No.4 : Mr.Sharath Sampath, Advocate
No.5 : Ms.Kanika Sinha, Advocate
No.7 : Mr.Atul Sharma, Advocate
No.8 : Mr.Abhishek Malhotra, Advocate
Mr.Angad Singh Dugal, Advocate

ORDER

The Petitioners No.1 to 3 are owners of hotels at different places, namely, in Silvassa, Vadodara and Pune. Petitioner No.4 is an association of owners of hotel and restaurants Western India. Respondents No.1 to 3 as also Respondents No.8 and 9 are broadcasters/content aggregators.

2 The Respondents No.4 to 6 are local cable operators; whereas Respondent No.7 M/s Inter Media Communication Pvt Ltd, Pune is a Multi Service Operator (MSO).

3 The Petitioners have filed this petition inter alia for the following reliefs :-

- (i) Declare that hotels that are taking cable signal from LCO/MSOs and are duly paying cable subscription charges to such LCO/MSOs are not required to enter into separate agreements or to pay additional charges to broadcasters;
- (ii) Pass an order permanently restraining the Respondents by themselves or through

their agents/ authorized representatives from compelling the Petitioner hotels to enter into separate agreement with any broadcaster or their authorized distributors;

- (iii) Direct the broadcasters to publish on their website or otherwise the list of authorized cable operators who are authorized to provide their signals in each jurisdiction to all commercial subscribers.
- (iv) Direct the Respondents not to disconnect any cable signals without giving the statutory notice for the same.
- (v) Permanently restrain the Respondents from filing FIRs and/or initiating criminal action against the Petitioner nos. 1 to 3 and other member-hotels of Petitioner No.4 in non-CAS areas on the ground that the Petitioner-hotels are required to pay additional charges to the broadcaster/ authorized distributor for cable signal over and above the subscription charges being paid to the cable operator.

4 The interim prayers made by the Petitioners are as under :-

- (i) Direct the Respondents to refrain from disconnecting or causing disconnection of the cable signals being received by the Petitioners and all other hotels and restaurants that are members of the Petitioner Association that are (i) three star and above, (ii) heritage hotels, and (iii) having more than 50 rooms for boarding and lodging.
- (ii) Direct the Respondents to refrain from taking any coercive action against the Petitioners and all other hotels and restaurants that are members of the Petitioner Association and that are (i)

three star and above, (ii) heritage hotels, and (iii) having more than 50 rooms for boarding and lodging.

5 Inter alia on the premise that the local cable operators who had been supplying signals of the channels of the Respondents No.1 to 3, 8 and 9 in the case of Petitioner No.1 and 3 have disconnected the supply of signals to the channels of Respondent No.1 herein inter alia on the plea that they were not authorized local cable operators to retransmit signals of the commercial establishments like five star hotels etc. and were asked to do so by the Respondent No.1.

6 The Petitioner No.1 sent a notice dated 12.6.2012 to the Respondent No.4 asking it to restore the cable connections at its establishment, to which the latter by a communication dated 15.6.2012 refused to do so on the premise that the broadcasters in respect of the pay channels were insisting for commercial payments of monthly royalty for re-broadcasting of their pay channels at the commercial rates and, thus, supply of signals would be illegal.

7 It, however, by a letter dated 18.6.2012 informed the Petitioner No.1 that monthly royalty of all the pay channels on

commercial terms would come to Rs.1,80,000/- for their 97 rooms as per the survey conducted by the Media Pro Enterprises Pvt. Ltd.

8 Sofar as Petitioner No.2 is concerned, it received a notice from the Respondent No.1 on or about 29.5.2012 whereby they informed that the cable operators from whom it had been taking supply of signals was not authorized. It was furthermore informed that the Respondent No.1 has lodged a First Information Report (FIR) in connection with the said matter with Sayajiganj P.S., Vadora Gujarat under Sections 63 and 64 of the Copyright Act, 1957.

9 As far as Petitioner No.3 is concerned, Respondent Novex asked it to enter into separate agreements with them for supply of channels. A demand for paying additional amounts over and above the charges already paid to the LCOs, was made. The Respondent Novex also lodged a FIR against the Petitioner No.3 on the plea that it had been illegally receiving channels of ESPN and Set Discovery. A charge sheet has been filed in the said criminal proceedings which is pending before the Joint Civil Judge, Judicial Magistrate (FC, Pune) under Section 379 IPC and Sections 37, 51, 63 and 69 of the Copyright Act. The Respondent No.6, a local cable operator

disconnected the cable connection of the Petitioner No.3 without giving any notice.

10 It was requested by the Petitioner to restore the supply by letter dated 15.6.2012.

An interim prayer on behalf of the Petitioner has been made on the basis that they having been receiving supply of signals of the channels of the broadcasters through local cable operators; the Broadcasters without any reason whatsoever could not have directed their LCOs not to retransmit the signals of their channels.

11 Our attention in this behalf has also been drawn to a Supreme Court decisions in Hotel & Restaurant Association and Anr. vs. Star India (P) Ltd. and Ors. (2006) 13 SCC 753, wherein the members of the appellant association therein were held to be consumers. The matter also came up for consideration in Federation of Hotel and Restaurant Association Western India. vs. Star India Pvt. Ltd. questioning the correctness of the said charges wherein the following orders were passed:-

“... The interim order dated 18.8.2005 provided that members of Petitioner Association will continue to pay at the rate at which they were paying immediately prior to passing of the interim order and they will pay to such persons whom they were making payments. We make it clear that the members of the Petitioner

Association will be free to have arrangements for supply of signals with cable operators whom they choose for which purpose they will be free to enter into fresh arrangements as they may be advised."

12 Yet again in East India Hotel Ltd vs. TRAI Appeal No.17(C)/2006, this Tribunal by a judgment dated 28.5.2010 opined:-

" .. It has furthermore been accepted that in the event the hotels offered for 62 pay channels of Star, MSM, ESS, ZEE TV, BBC, Neo TV, CNN, Star News Bouquet and ZEE, the appellants are required to pay for about Rs.2099/- per month, the cost for all pay channels per day would be Rs.68.82."

13 It was, however, held :-

"g We have noticed heretobefore, however, that the parties had negotiated for arriving at a rate which is ordinarily three to five times higher than the normal market rates offered by the domestic consumers. As indicated hereinbefore, TRAI itself has noticed that the rates vary from Rs.20 to Rs.1300/-.

h. Keeping in view the limited nature of contentions and furthermore having regard to the nature of necessity of the owners of the hotels for the purpose of obtaining the supplies of signals of the pay channels from various broadcasters, we are of the opinion that neither the principle of acquiescence nor the principle of estoppel would be applicable in this case. The submission of Mr. Ganpathy to the aforementioned effect is rejected.

i. We, therefore, are of the opinion that it is a fit case where the impugned orders are

required to be set aside. We direct accordingly. We, however, do not wish to issue any direction with regard to the refund of any amount but we would request the Authority to consider the case of commercial establishments once over again in a broad based manner.”

14 M/s ESPN Software India Pvt Ltd. preferred an appeal there against which was marked as Civil Appeal No.6040-6041/2010 before the Supreme Court of India and by an order dated 16.8.2010 an interim order of stay of the impugned judgment of this Tribunal till further directions were issued.

15 The owners of those hotels, which came within the purview of the protected class, filed Petition No.111(C)/2011 and Petition No.176 (C)/2011 Hotel Airlines national vs. Telecom Authority wherein the following questions were raised :-

“14. The questions which arise for our consideration are :-

1. Whether the Respondent No.2 can levy any additional charge on the Petitioners who come within the purview of the protected category of commercial subscribers?

2. Whether the broadcasters are justified in taking action against the Petitioners for receiving signals from LCO's/MSOs to whom the prescribed carriage charges are being paid?

3. Whether the broadcasters having admittedly been supplying signals to the MSOs/LCOs with full knowledge that the same are being transmitted to Petitioners without taking any

action against them were entitled to take any independent action against Petitioners?

4. Whether keeping in view the statutory regime, the broadcasters should have informed the subscribers as to who were their authorised LCOs/MSOs in their respective areas?"

16 Question no.4 inter alia was answered in the negative. It was held that in view of the fact that the broadcasters had entered into agreements with large MSOs and keeping in view the delay on the part of the broadcasters, stating :-

"... The broadcasters in their cases must be held to have elected to condone the lapses, if any, on the part of the MSOs by not terminating their contract. They have even been renewing the contracts without any demur.

The conduct of the broadcasters in making attempt to extract some additional amounts from the Petitioners if they satisfy the conditions precedent therefor, must be deprecated.

No additional amount, in our opinion, could be charged from the protected category of commercial consumers."

17 The contention of the broadcasters were that the said MSOs were not authorized to retransmit the channels to the commercial establishments. On the aforementioned premise, it was observed :-

"...It is not a case where the Petitioners have been taking supply of signals from persons with whom

Respondents had not entered into any agreement at all.

It is, therefore, difficult to comprehend as to why, without taking any action against the MSOs concerned, Petitioners were targeted.”

18 It was furthermore observed :-

“44. Rule of law, by which we are governed, does not contemplate a strong arm tactics. If ‘Novex’ was a distributor, it could realise the amounts specified in the respective agreements with the MSOs from them. If, under law Petitioners were placed at par with the ordinary cable subscribers, there was absolutely no reason why they are asked to take a separate license and pay a fee higher than the one prescribed under the statute.”

19 It was inter alia directed:-

“6. The Petitioners are also not bound to obtain any separate licence from the broadcasters in terms of the provisions of the Regulatory laws.

7. The broadcasters are hereby directed to notify their authorised distributors of TV channels within four weeks from date. On such notification, Petitioners would take supply of signals only from the authorised distributors of TV channels of the broadcasters.”

20 All the Respondents except the Respondent No.6 appeared before us. The Respondent No.5 would contend that it did not have any direct agreement with the broadcasters but it was a LCO of In-cable.

21 It received a notice from `Mediapro' that a complaint petition may be filed with the Police Station and it was asked to enter into a contract for supply of signals with the broadcaster.

22 According to Mr.Samapath the Petitioner No.1 although had asked it to disconnect the supply of signals of the channels of Media Pro but technologically it was not possible. According to Mr.Samapath it can supply signals to the commercial houses if they are agreeably to pay a sum of Rs.1,80,000/- p.m.

23 Mr.Sharma appearing on behalf of Respondent No.7 would concede that his client does not have any contract with the Respondent No.1 for supply of signals of the channels of the Petitioner No.1 to the commercial houses.

24 Mr.Maninder Singh, learned senior counsel, however, would submit that the 2006 circular issued by the TRAI being inforce and the rates notified thereby being subsisting, the Petitioners were bound to pay the Respondent No.1 in terms thereof. It was furthermore submitted that having regard to the provisions contained in Clauses 3.2 and 3.4 of the Telecommunication

(Broadcasting and Cable Services) Interconnect Regulations 2004, the Respondent No.1 has no obligation to supply signals of its channels to any MSO or LCO and it has a right with regard thereto to choose the medium of supply.

25 It has been pointed out that the order of this Tribunal passed in Petition No.18 (C)/2005 related to the 3 star hotels and below which came within the purview of the protected category of customers and thus the said judgment is not relevant for the purpose of this case.

26 Mr.Ganpathy, learned counsel appearing on behalf of the Respondent ESPN submitted that keeping in view the main prayers made by the Petitioner, no interim prayer can be granted by this Tribunal.

27 It was furthermore urged that illegality cannot be allowed to be continued. It has furthermore been submitted that the rates in respect of the concerned channels of the said Respondent have been notified, the same would be applicable in the case of the Petitioners.

28 Mr.Malhotra, appearing on behalf of that Respondent MSM would point out that the Petitioners have not made any specific prayer against his client.

29 From the facts noticed heretobefore, it is evident that as the Petitioners do not come within the purview of the protected class, for all intent and purport the parties concerned are required to negotiate the rates for supply of signals to the network of the LCOs and/or consumers directly.

30 Keeping in view the specific stands taken by the parties hereto, prima facie, it appears that the Petitioners cannot obtain supply of signals from the LCOs who are not authorized therefor and at the same rate are payable by the protected categories of the consumers. The Regulator as far back as in 2003 had frozen the rate. It had permitted the broadcasters to enhance the rate of supply of signals only by 7% and 4%, by two different notifications.

31 Submission of Mr.Srinivasan that the Petitioner had been receiving supply of signals legally from the LCO for a long time but, the supply of signals to their network may not be legal.

32 The concerned LCO, namely, Respondent no.4 obtains supply of signals from In-cable.

33 In-cable concedes that it has not entered into any agreement with the broadcasters to supply signals to the unprotected category of consumers. In that view of the matter it could not have supplied signals of the channels of the broadcasters to Respondent No.4. Consequently, the Respondent no.4 also could not have supplied signals to the commercial establishment of the Petitioner No.1.

34 Mr.Srinivasan would urge that the Petitioners No.1 to 3 have a right not to take supply of signals of an expensive channel and stand taken by Respondent No.4 that it cannot disconnect the supply of signals of the Respondent No.1, if true, some via media has to be found out.

35 It is, however, conceded that the 2004 Regulations would not stand in the way of a broadcaster to transmit supply signals directly to a consumer. It is true that for that purpose a headend has to be established by the concerned hotelier.

36 Some hotelier have done so but others like Petitioners No.1 to 3, contrary to the rate fixed by the TRAI had been taking supply of signals from LCOs who are not authorized therefor at the rate fixed for the protected category of consumers.

37 It appears that the Petitioner No.4 itself by a circular letter dated 30.12.2006 stated :-

1) ... As advised earlier, TRAI has issued Notifications for CAS and Non-CAS areas on the above subject on 21st November ,2006. TRAI has excluded the following categories of Hotels from its tariff regulations and has stipulated that these Hotels will negotiate the tariff with the Broadcasters or their authorized agents. The categories are:

- I) Hotels of 3-Star and above ranking,
- II) Heritage Hotels,
- III) Motels with 50 or more rooms.

2) All other Hotels and Restaurants will be subject to tariff as under:

a) In the Island city of Mumbai (CAS area), the rate would be Rs.5/- per channel per month per pay channel.

b) In all other means in Western India, the tariff will be as was prevailing on 26th December, 2003, plus the 7% increase, as advised by TRAI in October 2001.

3) TRAI vide its aforesaid Notifications has directed the Broadcasters to advise their a-la-carte rates. The Association has received the rates [per month per channel per T.V]

38 It was further more stated :-

"Note: The above rates are valid upto 31/3/2007 and the Broadcasters are at liberty to change them as and when they deem fit.

Star India has also advised the names of their agents in Western India as under. Members in the respective area may contract them for further necessary action."

39 Yet again it was conveyed :-

"4] In order to get the a-la-carte rates, the excluded category of Hotels as stated above, will have to set up their own system, which is made available by various suppliers including local area Cable operators and agents of the Broadcasters.

5] In case, the Hotels do not have their own system and desire to obtain connection through their local area cable operator, such hotels will be subject to the bouquet rates notified by the Broadcasters.

6] Kindly note that Hotels will have to obtain the signals only from authorized Cable Operators of the Broadcasters and it will be, therefore, in your own interest to secure a letter to this effect from your Cable Operator that he is authorized to give the signals to you. In this case, the Hotel will not have a choice to choose any particular channels, but it can negotiate the tariff with the Broadcaster based upon its occupancy level. The Broadcasters have advised that the tariff notified is not negotiable, and the same has been submitted to TRAI by them, but they are open to negotiations with the Hotels, for the entire bouquet cost, based upon the occupancy levels."

40 By a circular letter dated 20.3.2007 the Petitioner No.4 addressed to the Managing Director of Star India Pvt. Ltd. contended that the rate card had been given to some of the members of the Petitioner No.4, despite the fact that the notification dated 21.11.2006, issued by the TRAI was under challenge before this Tribunal.

41 Yet again by a circular letter dated 19.6.2012, the Petitioner No.4 stated as under:-

“4. As for Hotels above 3 star category, above 50 rooms and Heritage Hotels, the charges payable would be mutually decided by the Hotel and the Local Cable Operator/ Service provider. No additional charges payable directly to the Broadcasters /channels is contemplated in TRAI notification dated 26.11.2006.

5. Any monetary demand by the agents of MediaPro/ Novex/STAR/ESPN/NEO Channels under threat of disconnection of cable feed or Police case must be reported to the Association and the Local Police.”

It is not and cannot be disputed that a direction by an Executive order would be prospective in nature.

42 A direction issued by a Regulator must be clear and explicit, when it seeks to curtail the contractual freedom of the parties.

43 If an illegality has been committed in the matter of supply of signals to the Petitioners by an agent of the Respondents-broadcasters who were not authorized therefor, a Court of law ordinarily cannot interfere therewith.

44 It is trite that the Court cannot perpetuate the illegality. It is also well-settled that the Court would not allow the parties to continue with an unauthorized act resorted to by one of them with a third party, the agent of the broadcaster being not authorized when it comes to the knowledge of the principal, appropriate legal actions can be taken.

45 In the matter of supply of signals of the channels of the respective broadcaster to an unprotected customer, the terms would be based on mutual terms, there is no reason whatsoever to interpret the same otherwise as it has been conceded before us that there exists no bar on the part of the broadcasters to supply signals directly to a consumer.

46 Indisputably, the parties can enter into a consensual agreement.

47 As far as submissions of Mr.Maninder Singh that the broadcasters have a right to supply signals of its choice either directly or through its authorized agents as envisaged under Clause 3.4 of the Regulations may not be correct. The said Regulations, in our opinion, prima facie do not cover the supply of signals by the broadcasters directly to the consumer. It, however, appears that there is no statutory bar in this behalf subject, of course, to the compliance of Regulations relating to quality of service.

48 Mr.Srinivasan urged that the Petitioner may be permitted to take supply of signals from the DTH operators.

49 On a query made by us, however, the learned counsel appearing on behalf of the Broadcasters-Respondents would contend that no DTH operator has been authorized for that purpose.

50 Mr.Malhotra, however, would contend that Hathway is authorized distributor for the town of Bhopal. According to the learned counsel in a case where some MSOs have been authorized to supply signals to the commercial establishments, having regard to the number of rooms and other factors, a tripartite agreement

has to be entered into and in the event the Petitioners No.1 to 3 are permitted to take supply of signals to their hotels from a DTH operator, similar arrangements are required to be entered into.

51 The practical problem raised in this case is of a complex issue. On the one hand, the broadcasters have a right to supply signals to the consumers by itself or through their authorized distributors; on the other hand as consumers the Petitioners No.1 to 3 are entitled not to take supply of signals of any of the broadcasters. It is stated at the bar that there are more than 500 pay channels out of which arrangements may have to be entered into for 200 pay channels. We are not concerned therewith for the present.

52 Having said so, we must also observe that this Tribunal having wide jurisdiction with regard to the settlement between the parties keeping in view the regulatory regime, we are of the opinion that some acceptable solutions must be found out.

53 In some cases as we have noticed heretofore that if the broadcasters have authorized certain persons, the hoteliers and others must have to enter into a contract through them. It would be in the fitness of things that the other broadcasters should follow,

particularly, in the cases where the hoteliers may not be in a position to install headends etc. but the choice must be left to the parties concerned with regard thereto.

54 The channel which a consumer does not like to have supply, can be supplied only by the digital service providers and not by the analog service provider.

55 In such an event, the DTH operators will also have to enter into a separate agreement with the concerned broadcasters.

56 We have noticed heretobefore that the Petitioner No.1 is taking supply of signals from the DTH operators.

57 Mr.Srinivasan does not deny or dispute the same but contends that it had been taking supply of signals for the fee to the air channels from a DTH operator. The rates of each of the channels of the broadcasters are available on the website. The said rates are also known to the DTH operators.

58 The DTH operators, therefore, may enter into suitable arrangements with the concerned broadcasters in whose channels

the Petitioners are interested. There is no bar for any DTH operator to supply signals so far as free to air channels is concerned. The requirements to enter into a separate agreement with the broadcasters only arise in respect of the pay channels. If that be so, save and except the places where broadcasters like MSM have notified their distributing agents and/or MSOs, they may enter into with an agreement with the broadcasters wherefor necessary informations are to be supplied by the DTH operators to the concerned broadcasters.

59 So far as the prayer (d) of the Petitioner is concerned, there is a clear bar in granting such a declaration as no party can be restrained from initiating any criminal proceedings in terms of the Specific Relief Act, 1963.

60 For the present we think, that the interest of justice would be sub-served if DTH operators are permitted to supply signals to those commercial establishments subject to the terms of a contract. In the event the charges therefor are fixed without prejudice to the rights and contentions of the parties herein, the Petitioner can be directed to pay @ 50% of the notified rates till further orders. The concerned Respondent may for a few months enter into such

contract with the DTH operators of the concerned petitioners at an early date or notify the list of MSOs/ cable operators who may be authorized therefor.

61 This order is provisional in nature and the same shall be subject to a final order and/or any other or further order that may be passed by this Tribunal.

62 This order furthermore would be without prejudice to the rights and contentions of the parties. It would be open to the broadcasters and the DTH operators/ authorized MSOs/ cable operators to work out the modalities for implementation of these directions as early as possible.

63 We have passed this interim order keeping in view the prevailing situation and so as to enable the parties to act on a provisional basis subject to any other or further order that may be passed by this Tribunal.

64 Before parting with this case, it must be placed on record that keeping in view the different nature of causes of action of each broadcasters, the Petitioners No.2 and 3 should file independent petitions. However, as they have also been heard in the interim matter, this order shall enure to their benefit.

65 The Respondent No.4, in our opinion, is neither a necessary party nor a proper party as this petition involved not only a pure question of law but also involved determination of disputed question of law. It must, however, be made clear that other hoteliers who may be aggrieved by any action of the broadcasters may move separate petitions before this Tribunal.

(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

July 20, 2012
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