

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**

**NEW DELHI**

**Dated 29.3.2012**

**Petition No.313 (C)/2011**

**MA No.314/2011**

M/s Vijay Communications

... Petitioner

Vs.

Sun 18 Media Services South Pvt Ltd

... Respondent

**BEFORE:**

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

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

For Petitioner

: Mr.B.S. Sai, Advocate

For Respondent

: Mr. Nittin Bhatia, Advocate

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

### **S.B. Sinha**

The Petitioner, a Multi Service Operator (MSO) within the meaning of the provisions of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004 as amended from time to time (the Regulations), has filed this petition against the Respondent herein, which is a Content Aggregator inter alia of the Sun Group of Channels, claiming for the following reliefs :-

“(i) Declare the impugned notices dated 21.6.2011 and 23.6.2011 issued by the Respondent under Regulations 4.1 and 4.3 respectively of the interconnect Regulations, 2004 as invalid, null, void and non est;

(ii) Direct the Respondent to negotiate and execute with the Petitioner a subscription agreement for the period of 2011-2012 in a fair and non-discriminatory manner;

(iii) Direct the Respondent to sign the distributorship agreement with the Petitioner in a fair and non-discriminatory manner;

(iv) Direct the Respondent to render accounts of the distributorship commission payable to the Petitioner for the distribution area of the Petitioner namely Theni

District @ 5% of the total subscription amounts collected by the Respondent and thereafter pass such appropriate orders and decree for payment/credit of such amount as may be found due towards distributorship commission payable by the Respondent to the petitioner alongwith interest @ 18% pa. from the date of the amount becoming payable till the date of payment/credit to the Petitioner;"

A proprietary concern of Mr.M. Bhaskar Rao, the Petitioner had earlier filed a petition before this Tribunal which was marked as Petition No.288 (C)/2007 contending inter alia that it, in terms of Clause 3.2 of the Regulations was entitled to IRD boxes/decoders of the Respondent's channels.

During pendency of the said petition a survey was conducted. A joint verification report dated 5.2.2008 was filed before this Tribunal showing its direct connectivity to be 148 and 600 dual connections.

An Agreement was thereafter entered into.

Petitioner was asked to deposit a sum of Rs.2 lakhs by way of advance and a sum of Rs.19,000 towards the costs of the IRD boxes.

The Petitioner contends that the said agreement dated 23.4.2008 contained blanks and he had never been supplied with a copy thereof.

A notice was issued on 23.3.2009 stating that a sum of Rs.1,33,987.90 paise due and owing from the Petitioner. According to it, it had only 1450 subscribers and not 3000 subscribers, which was communicated to the Respondent by a letter dated 25.3.2009.

On or about 31.3.2009, the Petitioner sent a DD of Rs.25000/- towards the subscription fee. A SLR was also sent showing that the Petitioner had 1015 subscribers.

A sum of Rs.25000/- by way of demand draft was again sent on 30.4.2009.

It's position with regard to its subscriber base was reiterated in various letters issued by the Petitioner including the one dated 17.6.2009.

Petitioner wanted to have IRD boxes with MPEG-4 technology for which it was asked to and deposited a sum of Rs.20000/-.

It has also been making payments from time to time on the basis of 1015 subscribers. An agreement was entered into for the year 2010-11 on or about 15.10.2009.

The impugned notices dated 31.5.2011 under Clause 4.1 and a public notice dated 14.6.2011 under Clause 4.3 of the Regulations were issued on the premise that the Petitioner owes to the Respondent a sum of Rs.11,59,538/-.

This petition was filed on or about 5.7.2011.

Respondent in its reply would, however, contend that in terms of the agreement dated 15.10.2009, the subscriber base was fixed at 3000 and the Petitioner was to pay a sum of Rs.44,671.50 paise per month towards subscription fee, exclusive of taxes, the Petitioner being always irregular in payment and as on 5.9.2011 a sum of Rs.12,73,223.19 paise had fallen due.

The Respondent furthermore denied and disputed the contention of the Petitioner that a copy of the agreement dated 15.3.2009 had not been served on it.

The core issues between the parties in view of the rival contentions are :-

- (i) What is the true and correct subscriber base of the Petitioner?
- (ii) Whether the blank agreement was supplied to the Petitioner and the same had been filled up at a later stage?

The Petitioner in support of its case has examined its proprietor Mr.Musunuru Bhaskar Rao.

In view of the Respondent's contention that the agreement was signed at Vijayawada, but as according to it the same had been filled up by the Respondent in its Chennai Office, the Petitioner summoned Mr.D. Udayakiran, a former employee of the Respondent, Mr.P.V. Shiva Prasad, its former distributor as also Mr.Chandra Shekhar Naidu its Manager (Operations), who have also been examined.

The Respondent examined Mr.K. Srinivas, its Area Sales Manager as its witness.

Mr.B.S. Sai, learned counsel appearing on behalf of the Petitioner took us through the correspondences exchanged between the parties as also the deposition of the witnesses examined by them.

It was urged that from a bare comparison of the copy of the agreement which has been filed by the Petitioner with the one which has been filed by the Respondent, it would be evident, that the blanks have been filled up at the Chennai office of the Respondent.

It was furthermore submitted that 3000 having never been the subscriber base of the Petitioner, the impugned notices cannot be sustained.

Mr. Nitin Bhatia, learned counsel appearing on behalf of the Respondent, on the other hand, submitted :-

- (i) The fact that the Petitioner himself in its letter dated 25.3.2009 referred to 3000 connections, it does not lie in its mouth now to

contend that it had not received a copy of the agreement.

(ii) The contention of the Petitioner with regard to the subscriber base being premised on its agreement entered into with M/s Ushodaya Enterprises, the impugned notices should not be interfered with.

(iii) The statement of accounts filed by the Respondent having not been disputed, from a perusal whereof it would appear that the Petitioner had been making payments on an ad-hoc basis, it must be held that the Petitioner was a defaulter.

(iv) Having regard to the fact that the summoned witnesses Mr.D. Udayakiran, had been dismissed from his services and Mr.P.V. Siva Prasad, whose distributorship agreement had been terminated, no reliance has been placed on their depositions.

This Tribunal by an interim order dated 28.7.2011, directed that the signals supplied to the Petitioner's network shall not be discontinued.

The Respondent was also directed to supply a copy of the agreement within one week from the said date.

The Petitioner, however, was directed to pay the subscription amount on a subscriber basis of 1115.

The basic fact of the matter is not in dispute.

The Respondent herein had served a notice dated 31.5.2011 in terms of Clause 4.1 of the Regulations claiming inter alia a sum of Rs.11 lakhs towards the arrears subscription fees.

The Statement of Account filed by the Respondent herein goes to show that arrears had been shown from 26.8.2008, the opening balance being Rs.43,718.40paise.

A part of the claim of the arrears subscription amount admittedly pertains to the claim of the predecessor-in-interest of the Respondent.

The Petitioner apparently had been making lump sum payments. According to it, it had not been receiving invoices from the Respondent.

We are herein concerned with the agreement dated 15.10.2009. It was valid upto 14.10.2010.

Only when the public notice was issued on 14.6.2011, the Petitioner approached this Tribunal in July, 2011. An interim order has been passed by this Tribunal for continuance of the supply of signals to the Petitioner.

By reason of the said interim order, as noticed heretobefore, the Petitioner was directed to pay the subscription amount only on the basis of 1115 subscribers. As indicated heretobefore, however, in terms of the interim order, the Respondent could be compensated on monetary terms.

Be that as it may, as an interim order has been passed in favour of the Petitioner; the effect thereof keeping in view the materials brought on record by the parties hereto has to be considered.

The backdrop of events shows that a joint survey had been conducted, wherein the subscriber base of the Petitioner was determined.

The agreement entered into by the parties for the year 2009 shows that it was entered into on a subscriber base of 3000. The Petitioner however, by reason of various letters had been contending that it has a lesser subscriber base.

We may notice the letter dated 25.3.2009, which is in the following terms :-

“

25.3.2009

Sub : Subscription amount – reg  
Ref. : Your Letter dt. 23.3.2009

.....

I am in receipt of your letter dt.23.3.2009 and surprised to note the contents of it. As I am bringing to your kind notice a few lines for your ready reference.

1. You have given me D Coder as per the instructions of T.D.S.A.T. At the time of giving D Coder your authorized people visited our office and verified the connections and they have given me a letter stating connections. I also agree with their verification.

2. During the discussions with your officials Mr.UDAY KIRAN, Executive, Mr.M.Ch. CHOWDARY, Manager and your distributor Mr.P.V. Siva Prasad forced me to say that a minimum of 3000 connections.

3. Actually even today I am having 1450 connections and I earnestly request you to depute your official to verify the connections from our end.

I am ready to pay the connections of 1450 without any default. From the day of opening I am paying the amount regularly even though I am having only 748 connections in the beginning. I hope you will definitely consider my request and I am also very much interested to maintain good relationship with you.

As soon as if I cross the figure of 3000 connections, I will pay the amount for 3000 connections."

Even as on that date, therefore, the Petitioner was aware that according to the Respondent it's subscriber base was 3000.

Yet again on receipt of the notice under Clause 4.1 dated 23.3.2009, the Petitioner by its letter dated 17.6.2009, stated :-

"... Here with us thankful to you for received Gemini, Teja, Gemini Music and Gemini News IRD Boxes and Viewing cards as per orders of Honorable TDSAT.

On the time of case was running on TDSAT your company executive Mr.D. Uday Kiran and Distribution office executive Mr.Lakshmana Rao were verified our ground individual connections as 148 connections only. Not having any other pay channels we had only 748 connections are joint connections through (Siti cable and Vijay communications). On that time coming three months having enhancement to 3000 connections I agree to received IRD Boxes with that connectivity. But in my area I had no any enhancement due to not having any pay channels, I had only 1115 connections. In my area I had total joint connections are only 1450. So, I will co-operate with you for joint survey. So, please do billing as my ground connectivity.

I had received 4.1 notice. For giving 3000 connectivity of Gemini IRD Boxes ETV also had raised my billing with 3000 connections. ETV had given 4.3 notice in today news paper for not having any subscription dues. Thats why we are giving a contempt notice to Mr.Ramoji Rao, chairman to protect my business. So please verify our ground connections with joint survey please raise billing.

Hence I request you for not giving any 4.3 notice from your company, because of not damaging my business. Please do the needful."

Thereafter almost every month, letters were being issued by the Petitioner contending that it had only 1115 connections.

Despite the same, the second agreement had been entered into. We must however, place on record that the allegations of the Petitioner had all along been that PW-2 and PW-3 and in particular

the later being the distributor of the Respondent being biased, he was being harassed and thus, no agreement could be entered into.

The Petitioner has filed an agreement which contained the blanks.

For one reason or the other the first page of said agreement has not been filed. Except, the numbers of the decoders and the viewing cards, the other blanks were not filled up.

It bears the signature of the Petitioner alone and not that of the Respondent. Surprisingly, however, it also bears the signatures of Mr.P.V. Siva Prasad as a witness, although, even at that point of time the Respondent's authorized representative being the Manager, Distribution did not sign the same.

Mr.P.V. Siva Prasad in his deposition, however, stated that after issuance of the decoder boxes (evidently new IRD boxes having MPEG-4 technology) were taken by the Petitioner's son and the blank agreement was taken to the Petitioner who was then admitted in a hospital.

It now stands admitted that Mr.Chandra Shekhar Naidu who signed the said agreement on behalf of the Respondent as its authorized representative, at the relevant time was at Chennai.

In his deposition he stated as under :-

"District distributors have to collect subscription collections, connectivity enhancement and other operations relating to the distributor's area.

District distributor is not authorized to sign the agreements. However, he prepares the same.

I am the authorized signatory for the respondent company.

Q: What is the procedure for signing of an agreement?

A: Distributor with the help of the company's sales staff will negotiate with the operators and fill the agreement and send it to Chennai for signatures on the agreement."

He furthermore stated :-

"The second agreement was executed between the parties at the time of conversion to MPEG-4 boxes.

Q: Whether there were any differences between the parties on subscriber base and outstanding at the time of execution of second agreement?

A: There was dispute relating to outstanding.

Q: If there was a dispute, why the respondent again entered into an agreement with the petitioner?

A: There may be some assurances for settlement of outstanding from the petitioner to the sales staff of the respondent during negotiations.

Q: Who prepared the agreement at pages 155 to 167 of the Paper Book and where the same was prepared?

A: Distributor and our Sales people prepared the agreement at Distributor's end.

I identify my signatures on the agreement dated 15.10.2009.

I can not identify the author of handwritten portion on the agreement dated 15.10.2009.

(Attention of the witness is drawn to pages 157 and 167 of the paper book.)

The subscriber number mentioned in the above pages were filled by the distributor."

It was not stated that the agreement was signed at Vijayawada. The agreement produced by the Respondent, however, contains the 'term' of the agreement being from 15.10.2009 to 14.10.2010 as also the connectivity at 3000 and the subscription fee payable therefor being Rs.44,671.50paise. However, the blanks at paragraph 6 remained.

There is some justification in the contention of Mr.Sai that the handwritings in other parts of the agreements and those in the blanks so far as clause 3 and 4 are concerned, which have been filled up, appear to be different.

But, as indicated heretobefore Mr.Siva Prasad in his evidence stated :-

“At the time of signing the second agreement, Mr. Hari Krishna, son of the petitioner was in my office. After taking the boxes, he went to the hospital to get the agreement signed from the petitioner. This agreement was filled by my Executive, Mr. Ravi in my office.

Witness identifies the handwriting of Mr. Ravi at pages 58, 59, 69, 70 & 71 of the Paper Book.

The subscriber base was not finalized in the second agreement.

(Attention of the witness is drawn to pages 155 to 167 of the Paper Book.)

Witness identifies the copy of the agreement entered into between the parties, however, he clarifies that that the subscriber base of 3,000 mentioned at pages 157 & 167 was entered by the respondent subsequent to signing of the agreement.”

He furthermore stated :-

“Mr. Chander Shekhar Naidu signed the second agreement at Chennai, on behalf of the respondent, after filling up of the details at my office.”

He, however, in his cross-examination furthermore stated :-

Q.9: Who all were present at the time when the agreement dated 15.10.2009 was executed?

(Witness took some time in understanding the question and the question is explained to him again and again.)

A: Myself, Mr. Ravi, Mr. Uday Kiran and Mr. Hari Krishna were present in my office.

Q.10: Who had sent the agreement to Chennai for signatures of Mr. Chander Shekhar Naidu, as stated by you at Page 19-L of the Evidence Folder?

A: Myself.

(Attention of the witness is drawn to pages 155 to 167 of the Paper Book.)

The handwriting at pages 155 to 167 is of Mr. Ravi Kiran, Accountant of my company.

Vol.: The witness states that the handwriting at Page 157 is not of Mr. Ravi Kiran.

Q.11: Are you aware as to what was the monthly subscription amount raised by the respondent upon the petitioner?

A: I am not aware."

We may also notice the following suggestions given by learned counsel for the Respondent to the said witness.

"Q.17: I put it to you that all the details including the connectivity were filled at the time of signing the agreement and not later?

A: It is incorrect.

Q.18: I put it to you that the agreement dated 15.10.2009 was not signed at your office?

A: It is correct.

Vol.: Mr. Bhaskar Rao was in hospital and Mr. Chander Shekhar Naidu was in Chennai."

Almost to the said effect is the evidence of Mr.D. Udayakiran, who is said to be present at the distributor's office at the relevant time.

The said witness stated:-

"Q: Were you present at time of execution of the subscription agreement in Oct.2009?

A: Yes.

(Attention of the witness is drawn to Pg.155 to 167 of the Paper book)

Q: Does this agreement bear your signatures at any place?

A: No.

Q: What is your basis to say that the subscriber's base was not filled at the time of execution of this agreement?

A: This is a special case as a supervisor has to determine the connectivity and for this reason connectivity was not mentioned.

Mr.Ravi has filled the subscription agreement form."

It will be of some significance to notice that the distributorship agreement of Mr.Siva Prasad has been terminated, although, he is agreeable to work with the Respondent even now. Services of Mr.D. Udayakiran has also been terminated and, thus, their depositions should not be accepted blindly but the Petitioner also summoned

Mr.Chandra Shekhar Naidu, who at all material times was and still is the Manager (Operations) of the Respondent.

He has still been working with the Respondent. For all intent and purport, he has been cross-examined by the Petitioner's counsel in relation where to no protest was raised by the Respondent.

He at least in his evidence could have stated as to under what circumstances the agreement was executed and where.

He does not say that even other blanks at the relevant paragraphs had been filled up by the distributor. He should have explained as to why two agreements filed before us by the parties are different.

We are appalled to see that the copy of the agreement was not supplied to the Petitioner, despite a statutory obligation on the part of the Respondent in terms of Clause 4.A (4) of the Regulations.

In that view of the matter the question which would arise for consideration is as to whether the subscriber base of 3000 could

have been the basis for issuance of notices under Clauses 4.1 and 4.3 of the Regulations.

Before, however, we enter into the said controversy, we may notice the evidence of Mr.K. Srinivas. He stated :-

"Attention of the witness is drawn to page no. 49 of the paper book

Q: Are the signatures at points "x", "y" and "z" belong to your company's officials?

A: Yes.

Q: What is the date of first agreement between petitioner and respondent?

A: 2007 or 2008.

Q: Who sign the first agreement on behalf of respondent company?

A: Mr. Chandrasekhar Naidu, Operations Manager."

He furthermore stated :-

"Q: When and where the second agreement was signed between the parties?

A: It was signed at Chennai head office on 15<sup>th</sup> October, 2009.

Q: Who were the signatories on behalf of petitioner and respondent?

A: Mr. M. Bhaskar Rao for the petitioner and Mr. Chandrasekhar Naidu, operations manager for the respondent. Mr. P.V. Siva Prasad signed as witness."

Evidently therefore, the Respondent has failed to prove that the agreement had been executed at Vijayawada.

The Respondent's officers did not disclose the basis for arriving at a subscriber base of 3000.

Except one invoice which Mr.Sai himself produced at the time of hearing of the interim matter i.e. for the month of January, 2011 showing the subscription amount of Rs.44,671.50 paise and outstanding at Rs.2,07,357.50 paise, on the Petitioner, service of invoices has not been proved.

The statement of account filed by the Respondent is not supported by basic documents.

As on 1.6.2011, the amount shown to be due was Rs.1,012,851.90 paise. It does not tally with the invoiced amount.

It is, therefore, difficult to accept that there was any other basis for arriving at a subscriber base of 3000.

The Petitioner has brought on record materials to establish the fact that so far as ETV is concerned, a joint survey was conducted

wherein also the subscriber base was found to be 1115 and an agreement had been entered into on a subscriber base of 1200. A similar agreement is said to have been entered into by and between the Petitioner and MAA TV.

Our attention has been drawn to the statements of the Petitioner in his cross-examination, wherein it was stated :-

"Q: You have said in para 14 of your affidavit that you have a subscriber base of 1115 connections and have also stated in the same paragraph your subscriber base was never more than 1450 connections. Can you please explain?

A: I did not have more than 1450 connections at any time. E TV conducted joint survey and found 1175 but they obtained agreement for 1200 connections.

Vol. We are very poor people and never had more than 1450 connections and Gemini TV people are asking for Lacs of Rupees.

Q: Does it then mean that E TV's joint survey is your basis for alleging subscriber base of 1115?

A: Yes.

Vol. Gemini TV also conducted survey.

Q: When was the Gemini survey conducted?

A: In 2008.

Q: Have you filed the same on record?

A: Yes.

Q: Can you please show the joint survey report?

A: I can not show as I am not conversant with the English language.

(Attention of the witness is drawn to para 18 of his affidavit)

Q: You say that that the respondent made you sign a blank agreement on 15.10.2009. Did you made any complaint in this regard to the respondent?

A: Yes.

Q: When did you made these complaints?

A: I do not remember. The same is on the record."

He furthermore stated :-

"Q: I put it to you that you have changed your stand after executing the agreement on 15.10.2009 only on the basis of the judgment in E TV matter?

A: It is correct.

Q: I put it to you that you have not cleared the outstanding dues payable to the respondent?

A: No. If I am not able to clear in the current month, I clear up the dues in the next month."

To what relief in the aforementioned situation the Petitioner is entitled to is the question?

The Respondent is entitled to be restituted to the benefits received by the Petitioner in terms of the interim order passed by us.

As the Petitioner at one point of time himself has agreed that he had a subscriber base of 1450, we are of the opinion that for the present purpose, restitution to the Respondent should be directed to be on the basis of 1500 subscribers.

We furthermore direct that the parties will enter into a fresh agreement on the subscriber base of 1500 subscribers.

This petition is disposed of with the aforementioned observations and directions.

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

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

**March 29, 2012**  
**`ns'**