

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 14TH MARCH, 2012

M.A. No. 249 of 2011

IN

Petition No.95 (C) of 2011

ESPN Software India Pvt. Ltd. ... Respondent/Applicant
Vs.

Shivam Cable Network ... Petitioner/Opposite Party

BEFORE:

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

For Petitioner : Mr. Sharat Sampath, Advocate

For Respondent : Mr. N. Ganpathy, Advocate
Mr. Kartik Yadav, Advocate

ORDER

The Applicant before us is the Respondent in the main petition.

The Petitioner filed Petition No. 95 (C) of 2011 inter-alia for a declaration that the notices dated 20.01.2011 purported to be under Clause 4.1 of the Telecommunication (Broadcasting and Cable Services) Interconnect

Regulations, 2004 ('Regulations') and public notice dated 21.01.2011 are illegal, arbitrary and void ab-initio.

The said petition was disposed of by an order dated 18.7.2011.

2. Inter-alia on the premise that the original Petitioner did not comply with the said order of this Tribunal, this Application has been filed purported to be under Sections 19 and 20 of the Telecom Regulatory Authority of India Act, 1997 praying inter-alia for the following reliefs :-

“This Hon’ble Tribunal ought hold and declare :

- (a) That the Petitioner has willfully failed to comply with the order dated 18.7.2011 passed by this Hon’ble Tribunal and to punish the Petitioner with fine of Rs One Lakh and in case of subsequent default impose a fine of Rs. Two Lakhs for every day during which such default continues;*
- (b) Permit the Applicant/Respondent to forthwith deactivate its signals to the Petitioner without recourse to requirement under TRAI’s regulations bearing No. 4.2 and 4.3;*
- (c) Direct Petitioner to pay outstanding subscription fee from the due date(s) till date of enjoyment of Applicant/Respondent services alongwith interest rate of @ 18% per annum;”*

3. Applicant-Respondent contended that the original Petitioner having availed services of all three channels, of which it is the producer, was bounded to pay to it a sum of Rs.2.09 lakhs; however in the event it had re-transmitted the signals of only two channels namely ESPN and Star Sports channel, a sum of Rs.70,000/- would become payable.

Applicant contended that the World Cup was being telecast on its channel 'Star Cricket' from February 19 to April 2004. On a prayer made by the Petitioner; an interim order was passed in its favour by an order dated 16.3.2011, whereby it was directed :-

“Taking a prima facie view of the matter and furthermore in view of the fact that the agreement between the parties hereto has expired in June 2010, we are of the opinion that interest of justice would be subserved if without prejudice to the rights and contentions of the parties and subject to any other or further orders which may be passed by this Tribunal the petitioner is directed to pay the subscription fee on the basis of 50% of the number of subscribers as per the informations delivered to the respondent by the District Entertainment Officer, Sitapur being on the pages 56-61. The petitioner, therefore, during the pendency of this petition shall pay subscription fee to the respondent on the basis of a subscriber base of 930.”

4. Petitioner, thereafter, filed a Miscellaneous Application, which was marked as M.A. No. 124 of 2011 for return of the decoders.

The said M.A. was disposed of by an order dated 08.4.2011, directing :-

“Upon hearing the learned counsel for the parties, we direct that the petitioner before discontinuing to take supply of signals of the channels of the respondent, may issue a notice as provided for under Regulation 4.2 of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation, 2004 as amended from time to time as also Public Notice under Regulation 4.3. of the Regulations. This order is also subject to the condition that the petitioner must pay the arrears in terms of our orders dated 16.3.2011 and 28.3.2011, within two weeks. We may place on record that the statement made by the learned counsel for the petitioner that the payment shall be made with retrospective effect on the subscriber base as may be determined by this Tribunal upon hearing the parties in the main matter.

The M.A. is disposed of.”

5. The said petition, as indicated heretobefore, was disposed of on 18.7.2011, holding :-

“We have passed an interim order purely on an adhoc and/or provisional basis. The figure specified in the said order need not be the basis for passing a final order.

Keeping in view the changed situation particularly the area of operation of the petitioner, the limited number of viewers of a sports channel like the respondent, the fact that another MSO has started operating, we are of the opinion that the number of subscribers as on 1st July, 2011 should be determined as 650 and on the said basis the amount of outstanding as on 30th June, 2011 should be determined as Rs. 1,98,449/-.

This order, however, shall not be treated to be a precedent because of the peculiar facts and circumstances of this case.

The petitioner must pay the balance amount within a period of 6 weeks from date whereupon the respondent shall continue to supply the signals of its channels.

This petition is disposed of with the aforementioned observations and directions but without any order as to costs.”

6. After this M.A. was filed, the parties were asked to reconcile their accounts subject to determination of the issue as to whether the decoder of Star Cricket had been returned or not.

On a direction made by this Tribunal, the Petitioner has paid the arrears to the extent of Rs.3,10,073/-.

After the said M.A. was filed, a cheque for a further sum of Rs.1 lakh was handed over to learned counsel for the Respondent.

Meetings have been held between the parties from time to time.

7. The core controversy between the parties has been noticed by us in our order dated 06.01.2012.

By an order dated 18.02.2011, an order of injunction was passed and at that point of time, the Petitioner did not state that it had not been availing the services of Star Cricket. It is also not in dispute that two IRD boxes were replaced.

8. In M.A. No. 124 of 2011, the following prayer was made :-

“It is respectfully submitted that in these circumstances in order to avoid liability on the petitioner under orders of this Hon’ble Tribunal which the petitioner will not be able to make good the petitioner is filing the present application seeking this Hon’ble Tribunal’s permission to surrender decoder boxes of ESPN & Star Sports Channels to the respondent in order to avoid the payment of subscription fee which will make it unviable for the petitioner to run its business. It is respectfully submitted that in so far as decoder box of Star Cricket is concerned, the same has already with the distributor of the respondent since 19.2.2011 as the said Set Top Box was not working properly.”

9. The Petitioner, thus, stated that it had already deposited the IRD boxes and viewing cards in respect of Star Cricket with the distributor of the Respondent, in support whereof a receipt granted by the distributor of Respondent has been relied upon.

It reads as under :-

“Received with thanks from M/s. Shivam Cable Net, Sitapur through M/s. Satellite Distributor against agreement number Rs.1103/- (Rupees One Thousand One Hundred & Three Only) vide DD/Cheque No. 788378 dated 19.02.2011 drawn on S.B.I. payable at Lucknow for the period to towards Box replacement charges.”

10. By reason of an order dated 06.01.2012, the Petitioner was asked to bring to this Tribunal the decoders on 16.01.2012. Two IRD boxes were brought on 01.02.2012, which according to the Petitioner, were in respect of ESPN and Star Sports. The IRD boxes were directed to be scrutinized by the learned Advisor of this Tribunal.

He has submitted his report on or about 15.02.2012, which reads as under :-

*“1. Box No.1 details :
Box No. SC (CD) – 721-722193*

VC no. 18235020

VC Card No. 9073883

(presently inserted in the Box)

Comments : - box is not getting switched on due to power supply issue.

2. *Box No.2 details :*

Box No. 55 (Z) 721714841

IRD No. 25098000121379199

VC no. 0019104076

VC Card No. 9110867

(presently inserted in the Box)

Comments : Box is getting switched on but the box is defective and not receiving signal.”

11. Mr. Kartik Yadav, learned counsel appearing on behalf of the Applicant/Respondent, however, submitted that the services of a Technician would be availed for the purpose of opening the said IRD Boxes, which was recorded in our order dated 21.02.2012, in the following terms :-

“It is stated by Mr. Kartik Yadav, learned counsel appearing on behalf of the respondent, in view of the report of the learned Advisor, a Technician may be permitted to visit the Tribunal and test the IDR boxes without interfering with the software installed therein. The same is permitted subject to the condition that advance notice thereof may be given to Mr. Sharath Sampath, learned counsel appearing on behalf of the

petitioner. The Technician may examine the boxes in the presence of Mr. Sharath Sampath.

Mr. Yadav states that Technician shall examine the IRD boxes on 27.02.2012. The Registry is directed to give all the facilities to the Technician.”

12. However, a report has been submitted by the Assistant Registrar after the Technician came to this Tribunal and inspected the said IRD boxes.

It reads as under :-

(i) Box No.1 (details as per report of the Advisor dated:15.02.2012)

Comments: The box was opened in the presence of the counsels for both parties by the technician of the Respondent, Mr. Prashant Dhar. As the box seal was already broken, the technician changed the fuse of the box and checked the same for power defects. As there was no power reaching the box even after the new fuse was put in, the technician stated that the box needs to be sent to their authorized service center to identify the defect(s).

(ii) Box No.2 (details as per report of the Advisor dated:15.02.2012)

Comments: The box was opened in the presence of the counsels for both parties by the technician of the Respondent, Mr. Prashant Dhar. As the box seal was already broken, the technician checked for any

hardware problem with the tuner however no defect could be identified. As the power was reaching the box, the technician stated that the box needs to be taken to their authorized service center/headend to identify the defect(s)/to check if box is receiving signals from the satellite.”

13. Mr. N. Ganpathny, learned counsel would contend that on comparison of the number of viewing cards as also the internal e. mail dated 19.02.2011, it would appear that the IRD box in respect of Star Cricket was replaced by the distributor and the same having not been produced, the Petitioner should be directed to pay the balance amount to his client.

14. Mr. Sharath Sampath, learned counsel appearing on behalf of the Petitioner would contend that the viewing cards in respect of Star Sports and ESPN channels tally with the numbers which have been clearly been mentioned in the agreement; but no reliance can be placed on the said e. mail which is an internal document of the Respondent.

We have compared the number of IRD boxes and the viewing cards, as noticed by the learned Advisor vis-à-vis the agreement entered into by and between the parties hereto.

15. The core question herein is whether the Petitioner has held back the third IRD box, said to be pertaining to the Star Cricket channel.

The contents of the receipt in question have been noticed by us. It was stated that a sum of Rs.1103/- had been received towards box replacement charges. The receipt, therefore, does not show that the Petitioner had deposited the IRD boxes pertaining to Star Cricket channel.

It was, in the facts and circumstances of the case, for the Petitioner to demonstrate that it had not availed the supply of signals of Star Cricket channel during the relevant period. He failed to do so. As indicated heretobefore, this petition was filed when the World Cup Cricket was to be held. It is also not in dispute that the telecasting of said event took place between the period 19.02.2011 to 02.04.2011.

Petitioner, having regard to the aforementioned circumstantial evidence, must be held to have availed the services of the said channel as otherwise there was no reason as to why immediately thereafter it filed an application for deactivating all the channels on one ground or the other.

16. We, therefore, are of the opinion that the Petitioner, having enjoyed the benefit of supply of signals of the Star Cricket channel, is bound to retribute the Applicant-Respondent to the said effect.

Petitioner, therefore, is directed to pay balance sum of Rs.1.39 lakhs to the Respondent within two weeks from date, failing which the same shall bear interest at the rate of twelve percent per annum.

17. We have taken a lenient view in the matter as the Petitioner is a small cable operator, which factor also weighed with us at the time of passing the final order.

18. This Application and other connected M.A.s are disposed of with the aforementioned direction.

There shall be no order as to costs.

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(S.B. Sinha)
Chairperson

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(P.K. Rastogi)
Member

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