

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated : 2.5.2012

Petition No.254 (C)/2011

Lucknow 9 Cable Network Pvt. Ltd.

... Petitioner

Vs.

MSM Discovery Pvt. Ltd.

... Respondent

BEFORE:

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

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

For Petitioner

: Mr.Vikram Singh, Advocate

Mr.Kamal Kapoor, Advocate.

For Respondent

: Mr.A.C. Mishra, Advocate.

J U D G M E N T

S.B. Sinha

Interpretation of Clauses 4.1 and 4.3 of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004 as amended from time to time (the Regulations) is in question in this petition.

2. Before, however, adverting to the said issue, we may notice the basic fact of the matter which lies within a narrow compass.

Petitioner is a Multi Service Operator (MSO).

3. It entered into an affiliation agreement with the Respondent herein, which is a content aggregator of various channels, on or about 19.9.2009.

4. The area of its operation was as under :

**“LUCKNOW 9 CABLE NETWORK PRIVATE LIMITED
3RD FLOOR, DAYAL CHAMBERS, RAM MOHAN RAI
MARG,HAZRATGANJ, LUCKNOW -226001”**

Vivek Khand, Vinay Khand, Nawabpurwa, Vineet
Khand, Viram Khand, Vijay Khand, Patrakar Puram,

Viraat Khand, Viraaj Khand, Vishesh Khand, Vikas Khand, Vibhav Khand Mantri Aawas, Vishesh Khand, Vikrant Khand, Vijyant Khand, Ujariown Murlinagar, Shakti Nagar, Ismile Gan, Malhor. Bbd Matyari.

Khadra, Chowk, Treveni Nagar, Shadat Ganj Mukti Ganj Colony, Thakur Ganj, Amber Ganj, Friend Colony, Bala Ganj, Nanak nagar, peer Bukhara, Ghas mandi, Raja Bajar, Baba balak das Puram, Asarfabad Hussaina Baad, Nakkhas, Daulat Ganj, Mansoor Nagar RadhaGram, Rasis Nagar, Chaupatia, Manohar Nagar, Mali Ka Sarai, City Station, Vajeer Ganj, River Bank Colony, Maulvi Ganj Nadan Mahal Road, Shastri Nagar, Aish Bagh, Tilak Nagar, Rakab Ganj, Tudia Ganj, Shah Ganj, Bazar Khala, Hasan Puria, Kashmiri Mohalla, Pul Gulam Hussian, Nav Basta, Napeir Road part1, 2. Thaseen Ganj, Genrall Ganj, Ali Colony, Zehra Colony, Nagria, Kalyan Puria, Vishwas Nagar, Musahib Ganj, Ahmed Ganj, Kashi Vihar Colony, Pani Wali Gali, Kachha Pul, top Darwaza, Katra Vision Begh, Baba Hazara Bagh, Devi Das Marg, Mehboob Ganj, Muzammam Nagar, Badi Peer Khan, Tessin Ganj, Hatha Mirja Ali Khan Hatha Mohd. Ali khan sharif Manjil, Tudia Manjil, Ram Ganj, Shiv Puri, Mohini Purva, Rahis Manjil, Sheesh Mahal, Lajpat Nagar, Khoti Rahim Baksh, Khun Khun ji Road, Arif Ashaiyana, Regency Awadh, Kusum Deep, Kamla Nehru Marg, Jaahuri Mahollla, Ghadiyali Mohalla, Dullai Mohalla, Abdul Aziz Road, Akbari Gate, Purani Sabji Mandi, Bagh Tola, Hatha Bhekm shah, Jhamai Tola, Dazi Bagiya, Rani Katra, Mirza Mandi, Bagh Maha Narayan, Bazar Kali Jee, Sarfaraz Ganj, Rastogi Nagar, Camp well Road, Fatima Colony, Jafariia Colony, Jhandkad Bagh, Subash Marg, Chachi Kuwan.

Uday Ganj, Hussain Ganj, Phool Bagh, Sadar Teli Bagh, P.G.I. Arjun Ganj, Gossian Ganj, Bandariya Bagh, Kali Das Marg Governor House, Yojna Bhawan, Cantt, Lal Kuan, Halavak Road, MohanLal Ganj, Ganj, Eidico Colony, Raj Bareli Road, OCR Nai Basti, Raj Bhawan colony, Gulistaan colony, Vikramaditya Marg, Purana Quila, Mail Avenue, KKC Colony, Lal Quan, Station Road, Bijnour GPO to Lal Kuan (Whole left hand side), Sadar, Khudai, Murli Nagar, Khatkina

Chitvapur Rdso Colony, Southcity, Virnda Van Colony, Mawaia Rai Bareliy Road, Ruchi Khand PWD Colony and Adjoining area, Irrigation colony, Sultanpur Road, Badi Lal Kurti”

5. The subscription fee payable in terms of the said agreement was Rs.3,80,780/-, the rate of the channel being Rs.139.02/- on a subscriber base of 2739.

6. Indisputably, the Respondent was to supply signals of the following channels to the network of the Petitioner:-

“Aaj Tak
Animal Planet
Animax
AXN
Channel 8
Colors
Discovery
Discovery Travel & Living
Headlines Today
MTV
NDTV 24x7
NDTV India
NDTV Profit
Nickelodeon
SAB
SET
SET MAX
SET PIX
Tez
VH1”

7. It is not in dispute that out of the said channels, the Colors, MTV, NDTV 24x7, NDTV India, NDTV Profit, Nickelodeon and VH1 Channels went out of its bouquet.

8. It is also not in dispute that two other channels, namely, Neo Sports and Neo Cricket joined the bouquet of the Respondent.

9. The agreement between the parties expired in August, 2009. It is, however, contended that by reason of clause 4 of the said agreement dated 19.9.2009, it was automatically renewed.

Indisputably, however, the parties proceeded on the basis that the agreement had expired in December, 2010.

10. Petitioner contends that a new arrangement was entered into by the parties. The area of operation was expanded to the entire municipal limits of the town of Lucknow as a result whereof the amount of subscription fee was increased from Rs.3,80,780/- to Rs.4,67,705/- exclusive of taxes.

11. Petitioner had been paying the amount of subscription fee inter alia on the premise that it has been supplying signals to a large number of customers in the area of Indira Nagar, Lucknow.

12. A notice in terms of Clause 4.1 of the Regulation was issued by the Respondent on or about 9.2.2011 contending that the Petitioner unauthorisedly extended its area of operation. The said notice was sent under certificate of posting. Petitioner denies and disputes the receipt of the said notice.

13. A public notice in terms of Clause 4.3 of the Regulations was published in two newspapers `Rashtriya Sahara' and `The Pioneer' by the Respondent herein on or about 17.2.2011.

14. Supply of signals to the Petitioner's network, was discontinued on and from 12.5.2011. Respondent, however would contend that it had never agreed for increase in the area but in fact the increase in the subscription fee was caused owing to the inclusion of Neo Group of Channels.

15. In view of the rival contentions of the parties, this Tribunal by an order dated 18.8.2011, framed the following issues :-

(i) "Whether disconnection of signals by the Respondent was legal and valid? If not, what would be the effect thereof?"

(ii) Whether the Petitioner has made out a case for a direction upon the Respondent to renew the agreement?

(vi) To what relief the Petitioner is entitled to?"

16. In support of its case, the Petitioner examined one of its Directors Mr.Jeevan Khanna; whereas the Respondent examined Mr.Kashif Raza, its authorized representative.

17. Before adverting to the oral evidence adduced by the parties herein, we may notice some of the provisions of the agreement dated 19.9.2009, which expired on 31.3.2010.

"4. Term – Subject to the Standard Terms, the term of this Agreement shall begin on the Start Date set forth on Page 1 hereto and end on the immediately following March 31 (the "Initial Term"). This Agreement shall be automatically renewed on the same terms and conditions provided herein for successive years starting on April 1 and ending on March 31 of the following year unless written notice of termination is provided by Distributor to Affiliate no later than march 1. As used herein, "Term" shall mean the Initial Term together with any renewal thereof.

4. Anti Piracy – Affiliate shall not (a) authorize or cause or suffer any portion of the Services to be recorded, duplicated, cablecast, exhibited or otherwise used for any purpose other than for distribution by Affiliate at the time the same is made available. If Affiliate becomes aware that any unauthorized third party is recording, duplicating,

cablecasting, exhibiting or otherwise using the Services for any other purpose, Affiliate shall immediately so notify Distributor and Affiliate shall take all reasonable steps necessary to prevent such unauthorized use; (b) authorize or permit the exhibition of the Services or any portion thereof at any place where admission for exhibition of such Services is charged; or (c) use the rights granted to it hereunder for any unlawful purposes. Distributor reserves the right to initiate a criminal action against Affiliate in the event there is a breach of this Section.

17. Termination

xxx

Clause **17.1 (g)** – By giving two (2) days' notice to Affiliate without assigning any reason; or"

18. The validation form annexed to the said agreement provides for the rate of supply of signals per subscriber per month at Rs.139.02/-. It also contains the subscriber base of the Petitioner being 2739.

19. The said agreement also contains the details of the area of operation of the Petitioner. It is neither denied nor disputed that the Indira Nagar area did not form part of the original agreement.

20. Mr.Vikram Singh, learned counsel appearing on behalf of the Petitioner would contend :-

- (i) The subscription fee having substantially been increased despite the fact that a large number of

channels had gone out of the bouquet of the Respondent would clearly go to show that a new agreement was arrived at by and between the parties hereto in terms whereof the area of operation of the Petitioner increased to the entire town of Lucknow including Indira Nagar.

(ii) In any event the Petitioner having been supplying signals to the customers of Indira Nagar, this Tribunal should balance the equities between the parties by directing the Respondent to continue to supply signals of its channels in respect of the area of Indira Nagar upon payment of the agreed amount of subscription fee on the basis whereof the Petitioner had been making payments and/or on such reasonable term (s) as it may think fit and proper.

(iii) The purported notice under Clause 4.1 of the Regulations having not been received, in terms whereof an MSO is entitled to know the reason of termination of the agreement, the purported notices

under Clauses 4.1 and 4.3 should be held to be bad in law.

(iv) In any event the Respondent's purported notice of termination dated 9.2.2011, being not one of 21 days, as is required under Clause 4.1 of the Regulations, the same should not be permitted to be acted upon.

(v) Even no notice having been issued in terms of Clause 17.1 (q) of the agreement, this Tribunal should hold that the agreement between the parties was not validly terminated.

21. Mr.A.C. Mishra, learned counsel appearing on behalf of the Respondent, on the other hand, urged :-

(i) Respondent in this case is not concerned with the outstanding amount but only with the act of unauthorized transgression of its area of operation on the part of the Petitioner.

- (ii) Having regard to the fact that the Petitioner had admittedly been operating in the area of Indira Nagar in the town of Lucknow, there cannot be any doubt or dispute that it had violated the conditions of the agreement by taking recourse to unauthorized cable casting.

- (iii) A notice sent under certificate of posting also raises a presumption of valid service and the same having not been rebutted, it must be held that the same has duly been served upon the Petitioner.

- (iv) By way of abundant caution, the Respondent however, has served another notice on the Petitioner under Clause 4.1 of the Regulation on or about 1.7.2011, which was sent under speed post and in that view of the matter, the Respondent must be held to be entitled to discontinue supply of signals to the network of the Petitioner.

22. Respondent herein has filed two replies.

23. A short reply was filed by the Respondent for hearing of the interim prayer of the Petitioner, wherein it was contended :-

“13. ...It is submitted that the agreed increase in the subscription fee was on account of the inclusion of the “neo group of channels” in the bouquet of channels of the Respondent. It is further submitted that the area of operation was agreed to have been restricted to the area of operation agreed vide the written Agreement between the parties.

18. That the contents of Paragraph 4 are admitted and it is reiterated that the agreement between the Petitioner and the Respondent had expired on 31.3.2010.”

24. Respondent with the said short reply annexed a copy of the agreement.

25. It had also annexed a copy of notice under Clause 4.1 of the Regulations being dated 9.2.2011, the relevant portions whereof read as under :-

“ We are disheartened to note that basis the investigation done on the ground and information available to us, we are seriously alarmed by the manner of your functioning which is not at all in consonance to and altogether unbecoming of the stature of a MSO, leave alone your sheer disregard for the basic business ethics. That the signals of the “TheOneAlliance” channels have been unauthorisedly re-transmitted by you in the area of INDRANAGAR in LUCKNOW city. In this regard, please be informed for authorized distribution/ re-transmission of the signals

of the TOA channels, you are required to execute an appropriate licensing contract/ agreement with MSM Discovery Pvt. Ltd.

Whereas, we have noticed that without taking any prior authorization from MSMD by signing the agreement in this regard, you have been re-transmitting the signals of TOA channels by pirating/ stealing the signals of our channels.

You are aware that your act as such constitutes a criminal offence under Section 379 of the Indian Penal Code, besides being a blatant violation of the Copyrights of the principal channels comprised in the TOA Bouquets. As such you had also committed a criminal offence of infringement of the copyright of the TOA Channels of MSMD which falls under Sections 51, 52A, 63, 69 and 37 of the Indian Copyright Act, 1957 against which we are entitled to initiate appropriate criminal proceedings against you besides making you liable to pay compensation for the unlawful profit earned by you.

We are to state that acts of unauthorized cable casting and material suppression of facts had now become endemic to you. Please note that your such illegal acts without any prior agreement/ arrangement/ intimation to us is severely affecting our commercial interests. You are hereby put to notice to immediately refrain from cable casting and TOA channels on receipt of this notice failing which we shall initiate appropriate civil/criminal proceedings against you making you liable for the costs and consequences arising thereof. Hence, you are called upon to immediately refrain, cease and desist from unauthorized supply/ pirating of the signals of the TOA channels, failing which necessary action to vindicate our rights, interests and entitlements shall be initiated against you."

26. In the Public Notice, the reasons for termination was stated to be both non-payment of dues as also unauthorized cable casting.

27. Rendition of `Broadcasting and Cable Services', being governed by a regulatory regime, there cannot be any doubt or dispute that in the event of conflict between the contractual provisions and those of the Regulations, the later shall prevail.

28. In terms of the said Regulations as amended in 2009 which came into force on and from 17.3.2009, it was obligatory on the parties to a franchise agreement to enter into an agreement in writing.

29. Although, Mr.Vikram Singh has drawn our attention to Clause 4 of the Agreement dated 19.9.2009, evidently the parties had proceeded on the basis that the same had expired on 31.3.2010.

30. Keeping in view the provisions of the Regulations, there cannot furthermore be any doubt or dispute that inter alia on the ground of breach of the provisions of the agreement and/or the Regulations, the supply of signals can be discontinued subject, of course, to compliance of the provisions contained in Clauses 4.1 and 4.3 of the Regulation.

31. It must be placed on record that the supply of signals to the Petitioner's network was discontinued on and from 12.5.2011.

32. This petition was filed on 18.5.2011.

33. The parties were heard in the matter of grant of interim relief on 25.5.2011.

34. By an order of the said date, the Respondent was directed to restore supply of signals to the Petitioner's network on its depositing a sum of Rs.7.77 lakhs till April, 2011 as also on the Petitioner's undertaking to pay the monthly charges in terms of the Agreement dated 19.9.2011.

35. It was directed that the Petitioner shall continue to pay the subscription amount of Rs.4,67,705/- per month.

36. So far as sending of notice under 'Certificate of Posting' is concerned, a decision of this Tribunal in India Cablenet Company P.No.146/2009 decided on 25.1.2010, a decision of the Delhi High Court in Tarlok Chand Khanna and Anr. vs. Raj Kumar Kapoor & Ors. reported in ILR 1982 1 156 as also the decision of the

Supreme Court of India in State of Maharashtra vs. Rashid B. Mulani reported in (2006) 1 SCC 407, were noticed in the said order to opine that the same prima facie had not been served, in the following terms:-

“The Petitioner has, thus, been able to make out a strong prima facie case. The factors of ‘balance of convenience’ and ‘irreparable injury’ are also in its favour. According to Petitioner the LCOs have been migrating to the distributor of the Respondent namely Jolly Sky Brothers which is a part of the Den Group of Company.

In the event, an order of injunction in mandatory form is not issued, all other LCOs may shift to the rival MSO of Petitioner.

In that event, Petitioner would lose its entire business. In a situation of this nature, where Respondent can be compensated on monetary terms and its interest can be secured, Petitioner cannot be monetarily compensated as it will go out of the business in no time.

The question of ‘balance of convenience’ between the parties is required to be considered in the light of the question of ‘balance of inconvenience’ to the other. The term ‘irreparable loss’ does not mean that in all cases monetary compensation would be sufficient. It means substantive loss. It would include such cases where actual amount of compensation cannot be determined. A person once go out of business may not be able to restart it.

We have noticed heretobefore the conduct of the parties. The Respondent had issued notices and taken actions in various phases. In fact, issuance of

the crucial letter being dated 3.2.2011 prima facie has not been proved to be served.”

37. We may, however, notice that this Tribunal in *India Cable Net Company Ltd. vs. Economic Entertainment and Anr.* being Petition No. 146(C) of 2009 decided on 21.5.2010 in the fact situation obtaining therein did not place much reliance on the ‘Certificate of Posting’.

38. In *Tarlok Chand Khanna (supra)* the Delhi High Court opined :-

“It has often been pointed out that though the requirement of the Companies Act is satisfied by posting a communication under certificate of posting. Service by this mode is the easiest stand for any one to take at any time and it is not a sheer coincidence that in practically all controversial meetings, the party claiming to have held the meetings and to have notified the others almost always relies on a certificate of posting clearly pointing to the possibility that such meetings are invariably managed rather than held. This is because of the unfortunate circumstance that certificates of posting are readily available....”

39. In *State of Maharashtra (supra)* the law was laid down in the following terms:-

“17. A certificate of posting obtained by a sender is not comparable to a receipt for sending a communication by registered post. When a letter is sent by registered post, a receipt with serial number is

issued and a record is maintained by the post office. But when a mere certificate of posting is sought, no record is maintained by the post office either about the receipt of the letter or the certificate issued. The ease with which such certificates can be procured by affixing antedated seal with the connivance of any employee of the post office is a matter of concern. The Department of Posts may have to evolve some procedure whereby a record in regard to the issuance of certificates is regularly maintained showing a serial number, date, sender's name and addressee's name to avoid misuse. In the absence of such a record, a certificate of posting may be of very little assistance, where the dispatch of such communications is disputed or denied as in this case. Be that as it may."

40. We may place on record that the Postal Authorities have issued Post Office Guide Part I, para 32 whereof read as under:-

"32. Object in issuing Certificates. – The object in granting certificates of posting is to afford the public an assurance that letters and other articles entrusted to servants or messengers for posting have actually been posted. The grant of a certificate will not, however, mean that the letters and articles in respect of which the certificate is issued were fully prepaid with postage stamps, nor will it guarantee in any way the dispatch of the articles entered in the certificate on the same day, unless they are handed over well in time to catch the last dispatch of mails for the day for the particular destination concerned. It must be clearly understood that the articles in respect of which such certificates are issued are not registered and that they are treated in exactly the same manner as if they had been posted in a letter box. In the event of loss, damage or delay, the certificates will confer no claim for compensation, nor do they furnish any proof of the nature of the contents."

41. There cannot be any doubt or dispute that even a letter sent by ordinary post carries a presumption.

42. However, it furthermore appears that the procedure of sending letters under certificate of posting having been misused, the Courts and particularly the Supreme Court in State of Maharashtra (supra) took cognizance thereof.

43. Each case therefore, has to be considered on its merits.

44. Sofar as service of notice under Clause 4.1 of the Regulations is concerned.

45. RW-1 Mr.K. Razza in his deposition stated as under :-

"Attention of the witness is drawn to page no. 75 to 80 of the paper book

Q: Whether this letter sent by you personally?

A: Yes. I have sent this letter.

Q: Whether you have mentioned any outstanding amount in the said letter?

A: No.

Q: Whether you have any proof/acknowledgement that this letter has been received by the Petitioner?

A: No."

46. However, recently in *Samitri Devi v. Sampuran Singh*, (2011) 3 SCC 556, the Supreme Court of India held as under :-

"24. The High Court has held that there is nothing on record to suggest that Respondent 1 herein had, in fact, been served with the notice dated 8-4-1987 and thereby reversed the finding rendered by the first appellate court. It is material to note in this behalf that it was canvassed by Respondent 1 before the first appellate court that a certificate of posting is very easy to procure and it does not inspire confidence. The Additional District Judge observed that there was no dispute with this proposition of law, but there was no such averment or even allegation against Appellant 1 herein, that she had procured the certificate of posting nor was there any such pleading to that effect. It is on this background that the first appellate court has drawn the inference that the notice must be deemed to have been served within the period of five days thereafter i.e. before 13-4-1987, the date on which Respondent 1 herein entered into an agreement to purchase the suit property. It is also material to note that the appellant's premises are situated on College Road, Pathankot and so also the residence of the first Respondent where the notice was sent. Therefore, there was nothing wrong in drawing the inference which was permissible under Section 114 of the Evidence Act that such notice must have been duly served in the normal course of business before 13-4-1987.

25. We may fruitfully refer to a few judgments laying down the propositions relating to service of notice. To begin with, we may note two judgments in the context of the notice to quit, sent to the tenants under Section 106 of the Transfer of Property Act, 1882, though both the judgments are concerning the notices sent by registered post. Firstly, the judgment in *Harihar Banerji v. Ramsashi Roy* wherein the Privy Council quoted with approval the following observations in *Gresham House Estate Co. v. Rossa Grande Gold*

Mining Co. to the following effect: (Harihar case, IA pp. 231-32

“... if a letter properly directed, containing a notice to quit, is proved to have been put into the post office, it is presumed that the letter reached its destination at the proper time according to the regular course of business of the post office, and was received by the person to whom it was addressed. That presumption would appear to Their Lordships to apply with still greater force to letters which the sender has taken the precaution to register, and is not rebutted, but strengthened, by the fact that a receipt for the letter is produced signed on behalf of the addressee by some person other than the addressee himself.””

47. In this case, as noticed heretobefore, the Petitioner itself has obtained a positive statement from Mr.K. Razza that he had sent the letter personally. If that be so, there is some material on record to prove that the notice under Clause 4.1 was tendered to the Postal Authorities.

48. Moreover, in this case, it appears that the Respondent had sent other communications to the Petitioner also under certificate of posting.

49. We, therefore, are of the opinion that in this case some presumption may be drawn in terms of Section 114 of the Indian Evidence Act as well as Section 27 of the General Clauses Act.

50. There cannot be any doubt or dispute that service of notice under Clause 4.1 and publication of public notices in terms of Clause 4.3 of the Regulations is imperative in character.

51. It was so held in Silverline Entertainment vs. ESPN Software India Pvt. Ltd. Petition No.114 (C)/2010 disposed of on 2.2.2011, in the following terms :-

“ A bare perusal of the Clause 4.1 of the Regulations would clearly show that service of notice thereunder is imperative in character. A contract by and between the parties in regard to the supply of signal of channels would indisputably be governed by the Regulations. If the Regulations, for one reason or the other provide for service of notice of three weeks, there cannot be any doubt, whatsoever, that the same is mandatory. More significantly, it is couched in negative language.”

52. Keeping in view the aforementioned legal provisions, we may notice Clauses 4.1 and 4.3 of the Regulations, which read as under:

“4. Disconnection of TV channel signals

4.1 No broadcaster or multi system operator shall disconnect the TV channel signals to a distributor of

TV channels without giving three weeks' notice to the distributor clearly giving the reasons for the proposed action.

Provided that a notice would also be required before disconnection of signals to a distributor of TV channels if there was an agreement [a written agreement], permitting the distribution of the broadcasting service, which has expired due to efflux of time.

Provided further that no notice would be required if there is no [written agreement], permitting the distribution of the signals.

4.3 A broadcaster/ multi system operator/ distributor of TV channels shall inform the consumers about such dispute to enable them to protect their interests. Accordingly, the notice to disconnect signals shall also be given in two local newspapers out of which at least one notice shall be given in local language in a newspaper which is published in the local language, in case the distributor of TV channels is operating in one district and in two national newspapers in case the distributor of TV channels is providing services in more than one district. The period of three weeks mentioned in sub-clauses 4.1 and 4.2 of this regulation shall start from the date of publication of the notice in the newspapers or the date of service of the notice on the service provider, whichever is later."

53. Bare perusal of Clause 4.1 of the Regulations and the proviso appended thereto would clearly go to show that no notice would be required to be issued if a written agreement permitting distribution of signals has not been entered into.

54. Apart from the facts in the case a written agreement has not been proved, admittedly, the Petitioner was not, according to the Respondent, permitted to transmit signals in the area of Indira

Nagar. A public notice is required to be issued provided there is a dispute between the parties. Such a notice is necessary only for the purpose of protecting the interest of the consumers. How, such public notice could be published is provided for in the said provision.

55. By reason of the aforementioned notice dated 9.2.2011, the agreement was terminated. It is not necessary, in our opinion, to take into consideration the fact such termination was to take effect after two days in view of the fact that the same admittedly has not been given effect to for a long time.

56. Contention of the Petitioner that there are circumstantial evidence to show that a new agreement had been entered into by the parties in December, 2010 so as to include transmission of signals by the Respondent in the area of Indira Nagar is concerned, may now be considered.

57. It is accepted that apart from the circumstantial evidence, namely, the fact that 7 out of 16 channels had gone out of the bouquet of the Respondent and two new channels had come in, no other material has been brought on record in this behalf.

58. Respondent in its reply filed on 8.2.2011 has specifically contended that the subscription fee was increased due to introduction of the two channels of Neo Group, in the following terms:

"... It is submitted that the agreed increase in the subscription fee was on account of the inclusion of the "neo group of channels" in the bouquet of channels of the Respondent. It is further submitted that the area of operation was agreed to have been restricted to the area of operation agreed vide the written Agreement between the parties."

59. Respondent's witness in his deposition also stated:-

"Q: What was the reason for the said increase of the subscription amount?

A: The one and only reason was the inclusion of Neo Sports and Neo Cricket.

Q: Whether any negotiation took place between the Petitioner and Respondent before this increase in the subscription fee?

A: Yes. As per the TRAI guidelines we had informed the Petitioner about the inclusion of Neo Group of channels and thereafter the Petitioner had given his consent to run Neo channels.

Q: Who participated in the negotiations?

A: Mr. Jeevan Khanna, Mr. Anil Singh and Myself.

I do not remember the date of meeting however; it was around September -October, 2010.

No minutes of meeting were recorded.

Q: At the time of the meeting did the Petitioner provide you with the latest SLR?

A: No.

Q: How has the Respondent calculated the increase regarding the subscription amount for Neo Group of channels charged from the Petitioner?

A: There has been increase in the bouquet rate after the inclusion of Neo Channels so the entire calculation is done by finance deptt. and the calculation can be provided on the next date of hearing.

(The witness is requested to provide the calculation on the next date of hearing)"

60. In view of the fact that the witness was called upon to provide for detailed calculations causing increase in the subscription fee, the Respondent has filed a large number of documents including a chart showing as under :-

"N12492- LUCKNOW 9 CABLE NETWORK PRIVATE LIMITED

As Per system

| | B1 | B2 | B3 | Total | Old MF |
|-----------------------------|-----------|-----------|-----------|--------------|----------------------------------|
| With Viacom | 58.82 | 58.80 | 21.40 | 139.02 | |
| Post Viacom | 58.82 | 46.93 | - | 105.75 | |
| Discount due to rate change | | | | -23.93% | 380,745 -91119.16 289,626 |

As per agreement (Pending for regularisation)

| | B1 | B2 | B3 | Total | New MF |
|------------|-----------|-----------|-----------|--------------|---|
| Before NEO | 58.82 | 46.93 | - | 105.75 | |
| Post NEO | 58.82 | 46.93 | 65.00 | 170.75 | 467,689 1.61 467,646 61.47%" |

61. Mr.Vikram Singh would urge that the said documents have been filed after cross examination of the Petitioner's witness. It is

so, but the Respondent furnished the said documents only on having been called upon by the Petitioner's counsel to do so. Inspection of the said document has also been given to the Petitioner.

62. In the event the Petitioner wanted to further cross-examine the said witness or recall PW-1 in regard thereto, it was at liberty to do so. It, however, did not make any prayer in that regard. Petitioner was granted inspection of the said document. In that view of the matter the provision of Section 163 of the Indian Evidence Act shall be attracted.

63. Moreover, in this case this Tribunal is inter alia concerned with the question as to whether the area of Indira Nagar was the subject matter of agreement.

64. The only circumstantial evidence on which Mr. Vikram Singh relies upon, in our opinion, would not justify drawing of an inference that the said area was included; the parties having arrived at agreement with regard thereto. Moreover, as contended by Mr. Mishra, the Respondent in this petition is not concerned with the recovery of the amount of outstanding.

65. There cannot be any doubt or dispute that the Petitioner must reconstitute the benefit, it received by way of supply of signals of the channels from the Respondent of which it is the Content Aggregator in terms of the interim order. If the area Indira Nagar did not form part of the agreement, the Petitioner must restore the benefit in relation thereto to the Respondent. We, however, in view of the submissions of Mr.Mishra need not go into the question of quantum thereof.

66. So far as question of balancing the equities between the parties is concerned, in the facts and circumstances of the case, the same does not arise.

67. Petitioner is not entitled to any equity. It having not entered into any agreement in respect of the area of Indira Nagar, it cannot be permitted by reason of a judicial fiat to continue to operate in the said area without any agreement in that behalf. It having resorted to unauthorized cable casting has made itself liable for discontinuance of supply of signals at the hands of the Respondent. Respondent cannot be deprived of such a right to which it is otherwise entitled to under the Regulations.

68. Liberty is granted to the Respondent to file an appropriate petition with regard to realization of its dues.

69. For the reasons aforementioned, there is no merit in this petition. It is, accordingly, dismissed with costs and with the aforementioned observations.

70. Advocate's fee is assessed at Rs.25,000/-.

(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

May 2, 2012
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