

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 1st November, 2012

Petition No.16(C) of 2012

M/s Nandgaon Cable Network	...Petitioner
Vs.	
Media Pro Enterprise India Pvt. Ltd.	...Respondent

BEFORE:

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

For Petitioner : Mr.Sharath Sampath,Advocate

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

J U D G M E N T

1. Background facts

The parties hereto respectively are 'Multi Service Operator' and 'Broadcaster' within the meaning of the provisions of the Telecommunications (Broadcasting and Cable Services) Inter Connect Regulations, 2004 as amended from time to time (The Regulations).

2. The Respondent is a joint venture company constituted inter alia for supply of signals of both Zee Bouquet of channels and Star Bouquet of channels.

3. The Petitioner entered into five agreements with Zee Turner Limited and Star Den India Limited.

So far as the Zee Group of channels is concerned, the agreement expired on 31.03.2011 in respect of the towns of Rajnandgaon and Ambagarhchowki.

It entered into an agreement for retransmitting the signals of the Star Bouquet channels also for the area Dongergaon.

4. In this petition this Tribunal primarily is concerned with the agreement pertaining to the town of Rajnandgaon in the State of Chhattisgarh.

5. The Petitioner is aggrieved by and dissatisfied with a notice issued by the Respondent being dated 19.11.2011, in terms of clause 4.1 of the Regulations as also a public notice dated 22.02.2011 issued in terms of clause 4.3 thereof.

6. Mr. Sharath Sampath, learned counsel appearing on behalf of the petitioner raised a contention that there is said discrepancy in the grounds stated in the notices issued under Clauses 4.1 and 4.2 of the Regulations and in that view of the matter this petition should be allowed, having regard to the fact that the respondent as broadcaster was statutorily obligated to assign some reason in both notices.

7. Although a large number of issues have been raised by the parties herein we are principally concerned with the following issues:

- i) Whether the notice under clauses 4.1 and 4.3 having been issued for different reasons, the same can be sustained?
- ii) Whether the Petitioner was bound to clear off all the outstandings

of different agreements and to reconcile its accounts with those of the Respondent?

iii) Whether in the facts and circumstances of this case the Petitioner is entitled to a direction upon the Respondents to renew the subscription agreement?

8. Mr. Thakur appearing for the Respondents urged:

- i. Although different notices under clause 4.1 had been issued in respect of all the aforementioned five agreements, but a common public notice was issued in terms of clause 5.3 of the agreement.
- ii. It is not in dispute that for each of the aforementioned five agreements, different area code numbers were allocated.
- iii. The notice dated 19.12.2011 referred to code number 55522 by reason whereof the Petitioner was asked to pay a sum of Rs. 5,57,737/- as on the said date.
- iv. Moreover, the code number 59363 pertains to the Star Channels but the said notice dated 19.12.2011 was issued in respect of Zee Channels.

- v. The Respondent has brought on record only one notice purported to have been issued under clause 4.1 of the Regulations but on perusal of the different notices issued for different agreements, it would appear that so far as the notice pertaining to the Rajnandgaon network of the Petitioner dated 5.10.2011 is concerned, a sum of Rs. 7,20,197/- was claimed towards the outstanding subscription charge.
- vi. The said notice despite having been served upon the Petitioner, it has raised a contention that except the one pertaining to Zee Group of Channels it has not received any other notice.

9. Reliance in this behalf has been placed on *Petition No. 360 (C) of 2010 M/s Nataraj Communication Vs. Digicable and Neo Sports Broadcast Pvt. Limited Vs. Sun Digital*, wherein this Tribunal opined as under:

“Regulations being ‘law’ within the meaning of Article 13 of the Constitution of India, it is trite, shall prevail over the contract. The field of ‘Broadcasting and Cable Services’ being regulated, it is difficult to conceive that a multiservice operator will have a privilege or sole discretion to disconnect the supply

of signal of any of its franchisees without any rhyme or reason.

We have noticed hereto before the public notices. In one of the public notices, viz one published in 'The Financial Express', the respondent has not assigned any reason; only in the other, viz, 'Andhra Bhoomi' 'termination of agreement' has been stated to be the reason for issuance thereof. Apart from the fact that in a situation of this nature, termination of the agreement cannot be a ground for issuance of notice under Regulation 4.1 of the Regulations, no such action could be taken simultaneously.

We, therefore, are of the opinion that the action on the part of the respondent in disconnecting the supply of the signal of the petitioner relying on or on the basis of the impugned notices as also the public notice issued by the respondent must be held to be bad in law. "

10. It is not correct to contend as has been submitted by Mr. Upender Thakur, that five different notices had been issued in respect of the five areas upon assigning the reasons of nonpayment and non entering into an agreement, both the aforementioned grounds where thus required to be mentioned in the notice under clause 4.3 of the Regulations.

11. Mr. Thakur, in my opinion, is also not correct in his contention that the public notice had been issued in respect of all the five agreements.

A bare perusal of the said public notice dated 22.12.2011 would clearly go to show that the same had been issued only pertaining the Dongargaon network of the Petitioner and the Rajnandgaon network.

In this latter, arrears as also non signing of the subscription agreement were said to be the reason for issuance thereof; whereas in respect of the Dongargaon network the only issue was non signing of the agreement.

It is from that point of view, the only question which survives for consideration is as to whether the Petitioner was a defaulter.

12. It is, however, accepted at the Bar that the Respondent either having regard to the interim order passed by this Tribunal or on its own did not disconnect the other network of the Petitioner.

13. Mr. Thakur is furthermore not correct to contend that the Petitioner has suppressed the notice under clause 4.1 in respect of Star Group of channels.

14. The notice in question is dated 19.12.2011.

In the said notice it has been stated that the outstandings payable by the Petitioner both with regard to M/s Starden and M/s Zee Turner was Rs. 5,57,737/-.

Although a contention was raised by the Respondent in its Reply that a separate notice for Star channels was issued, the same had not been annexed therewith.

RW-1 only for the first time annexed the same with his affidavit.

15. In the said notice dues in respect of the Star Den channels was stated to be Rs. 7,20,197/- (Rupees Seven lakhs twenty thousand one hundred and ninety seven).

16. The Petitioner denied and disputed the receipt of the said notice.

The Respondent, however, has brought on record that the Courier Services agency allegedly meant to be served on the petitioner wherein a report has been made that an article had been delivered on 10.12.2011.

It was necessary for the Respondent to clarify the same. RW-1 in his

evidence has not offered any such explanation.

17. If there was a mistake in the calculation, the same should have been explained. We may, however, place on record that whereas in the notice date 05.12.2011 the ID no. has been mentioned as 59363 in the notice dated 19.12.2011 the ID no. has been mentioned as 55522. Moreover, the Petitioner knew thereabout.

18. It may be noticed that in stead and in place of a clarification to the said effect, RW-1 in his evidence stated as under:

“Q 8. For which account has this 4.1 notice been issued by the respondent?

A. For Rajnandgaon.

Q 9. Is this a combined notice for the Star and Zee accounts maintained by the Petitioner with the respondent?

A. Yes.

(Attention of the witness is drawn to page no. 28,30,32 and 34 of the evidence affidavit)

Q 10. Can you show me from the record the speed post acknowledgement/receipt of sending of the above

documents?

A. it is not on the record.

Vol. the track report shows that the party has received the consignment."

19. It must therefore be held that there was no suppression of fact on the part of the Petitioner as contended by Mr. Thakur or otherwise.

20. This petition which was filed on or about 10.06.2012. It was listed before this Tribunal on 11.01.2012.

While directing the Petitioner to deposit a sum of Rs. 5,57,737/- both for Star Den and Zee Turner channels in two instalments, it was observed:

"We may, however, place on record that according to the learned counsel for the Respondent the parties hereto are maintaining four different accounts and in respect of all the accounts a sum of Rs. 12 lakhs is payable."

21. Pursuant to or in furtherance of a direction of this Tribunal in his said interim order the parties met on or about 18.01.2012; the minutes of meeting whereof read as under:

“ 1. Pursuant to Order dated 11th January’12 passed by Hon’ble TDSAT in Petition No. 16(C) of 2011 titled ‘Nandgaon Cable Network Vs. Media Pro Enterprise India Pvt. Ltd’, representatives of both parties have met today for reconciliation of statement of accounts of all accounts of Nandgaon Cable Network with Media Pro.

2. However, due to shortage of time parties could not conclude the reconciliation of all accounts today, hence the parties will meet again on 19th January’12 at Raipur office for reconciliation of statement of accounts in terms of the directions passed by Hon’ble TDSAT.”

22. However, it appears from an E-mail dated 20.01.2012 issued by Shri Manish Kumar Sinha (RW- 1) that the Petitioner refused to reconcile its other accounts i.e., in respect of, all the agreement other than the network of Rajnandgaon and furthermore refused to sign minutes of meeting on the plea that one more day would be required for him to rethink whether to reconcile other accounts or not.

23. By an E-mail dated 23.01.2012 the Petitioner responded to the aforementioned E-mail of Shri Manish Sinha stating that public notice

having been issued only in respect of Rajnadangaon headened the Reconciliation process should be undertaken only for Rajnadgaon network

Stated as under:

“At the outset I deny all the contents of your email under reply in its entirety.

Please note that the attachment sent with the email which is the so called minutes of meeting is totally incorrect.

I would like to apprise you to the correct discussion that took place.

1. I clearly stated to you that the reconciliation only pertains to the Rajnandgaon Head end Account for which the Public Notice has been issued. Further, I also told you that you are unnecessarily trying to mix all the accounts when the agreements and boxes for all of them are different. You are accusing me of not wanting to settle accounts when it is you who said that either we settle accounts of all networks or we disconnect all you networks. I objected to the same and again requested you to reconcile the Rajnandgaon Head End as that is

the disputed account in the case filed by me in court.

2. With regards the downgradation for Zee agreement for the Rajnandgaon Head End, I offered to you that we should conduct a joint survey to see my actual connectivity and then we could negotiate. Like I told you, I have lost subscribers and without a downgradation I would be unable to run the channels. You have not conducted and survey and you are alleging false things in the minutes drafted by you. You never mentioned any such thing in our meeting. If you have proof as stated by you I would like to see it. I have returned the boxes on 18.01.2012 because you refused to accept them on 02.01.2012 and hence I am not liable to pay for the same as you have claimed.

3. With regards the other head ends I would like to say that they are completely separate and have nothing to do with the case that I filed before the Hon'ble TDSAT. Please note that you have not issued any letter notice to me for any of the other networks and you cannot disconnect these networks as per your

whims and fancies.

4. You have made an allegation in you e mail that I was to visit your office on 20th for the reconciliation but the same is not correct and I denied what has been stated by you in your email. Once again request you to reconcile accounts for the Rajnandgaon network and call me for a meeting in Raipur before the 30th of Jan as the case is listed before TDSAT.

5. Lastly, I would also request you to do a joint survey of my network so that the subscriber base can be found out and my Star agreement can be signed on that basis. ”

24. The Respondent in its Email, however, stated:

“Kindly note, you have failed to furnish SLR on monthly basis in terms of Clause 12 of the Interconnection Regulation dated 4th September’ 2006 issued by TRAI. Having failed to comply with the mandate to furnish true and correct SLR on monthly basis, you are now trying to blame us for not having conducted joint survey. Kindly refer to the emails sent to you on 9th September’ 11, 15th November’ 11 (in reply to your email dtd. 11th Nov.’11), 12th December’11, wherein we have

repeatedly requested you to furnish true and correct SLR. Admittedly, you have chosen neither to reply to our repeated requests nor have you requested us for conducting joint survey. Besides, in you emails sent from time to time, you have raised different issues to wriggle out of your onus to clear the dues and furnish true and correct SLR.

In Reply to you alleged plea that we are unnecessarily trying to mix all the accounts when the agreements and boxes for all of them are different, kindly note all the other accounts are also operational in Rajnandgaon District and you have failed to clear the dues in all you other accounts too. On one hand you are raising a plea that the dispute is pertaining to only Rajnandgaon headend, whereas the fact of the matter is that you have outstanding in all other accounts. Even though during the meeting held on 19th Jan'12, the undersigned has provided to you with network wise, headend wise & Media Pro IDs wise, headend wise & Media Pro IDs wise billing and outstanding and you have admitted the billing raised in the all the accounts are as per the erstwhile subscription agreement executed by you with both Zee Turner and Star Den. Hence, it is not a case of account reconciliation. Further in your email under reply you have not disputed the billing in your other accounts. Please find below once again billing and outstanding details network wise for you ready reference:

<i>MP id</i>	<i>Network</i>	<i>Headend</i>	<i>Billing</i>	<i>O/S (In Jan'12 billing)</i>
55522	Nandgaon Cable Network	Rajnandgaon	154999	712736
59363	Nandgaon Cable Network	Rajnandgaon	220033	740230
56130	Nandgaon Cable Network	Dongergaon	4533	13598
58374	Nandgaon Cable Network	Dongergaon	22050	62378
58570	Nandgaon Cable Network	Ambagarhchowki	33023	222461
<i>Total</i>			464638	1751403

You are immediately requested to clear the above dues in all the above accounts on or before 29th Jan'12 as agreed by you since the matter is fixed for hearing on 30th January' 12."

25. The Respondent however has sent another MOM held on 19.01.2012 which reads as under:

"1. Nandgaon has handed over cheque no. 143974 dated

16th Jan'12 of Rs. 4,00,000/- drawn Axis Bank, Rajnandgaon (Ist Instalment of Rs. 5,57,737/-) as per order of Hon'ble TDSAT to Media Pro today. Besides, Nandgaon has handed over original TDS certificates of Rs. 3,100 issued in favour of Zee turner for the period 1st April'11 to 30th June'11, Rs. 4,143/- issued in favour of Star Den for the period 1st July'11 to 30th September'11 and Rs. 12,000/- issued in favour of Media Pro today. Nandgaon has assured Media Pro that it shall clear the balance dues of Rs. 1,26,320/- out of Rs. 5,57,737/- on or before 29th Jan'12.

2. Media Pro has apprised the proprietor Nandgaon Cable Network that it has four accounts in the name of Nandgaon Cable Network and one account in the name of National Cable Network and one account in the name of National Cable Network (also proprietorship concern of Mr. Raghubir Bhatia). Media Pro Has furnished network-wise, headend wise & Media Pro IDs wise billing and outstanding in the accounts of Mr. Raghubir Bhatia as mentioned hereinafter:

MP id	Network	Headend	Billing	O/s (In Jan'12 billing)
55522	Nandgaon Cable Network	Rahmandgaon	154999	712736
59363	Nandgaon Cable Network	Rahmandgaon	220033	740230
56130	Nandgaon Cable Network	Dongergaon	4533	13598
58374	Nandgaon Cable Network	Dongergaon	22050	62378

58570	Nandgaon Cable Network	Ambagarhchowki	33023	222461
Total			464638	1751403

3. *Nandgaon has confirmed to Media Pro tha the billing done in all the above accounts are as per erstwhile subscription agreements signed with Zee Turner and Star Den.*
4. *Since, there is no diesprepancy in the billing and the same are in accordance with the erstwhile subscription agreements executed between Nandgaon & Star Den and Zee turner, accordingly, Media Pro has requested Nandgaon to clear the balance dues mentioned in the books (after taking into account the above cheques handed over to Meida Pro).*
5. *However, Nandgaon has agreed to reconcile the statement of accounts of only Rajnandgaon account & refused to reconcile the statement of accounts of remaining accounts of Nandgaon even though all the headends are operational in Rajnandgaon District.*
6. *Besides, Nandgaon has requested Media Pro to reduce the monthly subscription fee for Rajnandgaon Headend (MP id 555222) for Zee*

- channels billing for Rajnandgaon headend only.*
- 7. Media Pro has requested Nandgaon to furnish SLR to substantiate its claim for downgradation for Zee billing at Rajnandgaon. However, Nandgaon has not brought any SLR to substantiate its claim for reduction in subscription fee despite repeated requests and follow-ups in the past. Due to absence of evidentiary proof, Media Pro expressed its inability to consider Nandgaon's request for reduction in subscription fee for Zee billing.*
 - 8. Nandgaon has stated that since its request for downgradation is not be considered, hence refused to run Zee channels from its Rajnandgaon headend and returned 13 decoders and viewing cards of Zee Channels.*
 - 9. Media Pro has apprised Nandgaon that the Zee channels have not been deactivated by Media Pro till date, however post received of 13 decoders and viewing cards the same would be deactivated and accordingly dues till 19th January'12 is due and payable by Nandgaon to Media Pro for Zee channels.*
 - 10. As per Media Pro since there is no billing dispute, hence this is not a case for account reconciliation.*

Further, no SKR has been furnished by Nandgaon to consider its request for downgradation. Infact, Media Pro has pointed out to Nandgaon that as per its ground information, the subscriber base of Nandgaon has increased since last one year and no case of down gradation has been made out.

11. Since, Nandgaon has refused to reconcile all its account with Media Pro, the reconciliation could not be completed in terms of the direction of Hon'ble TDSAT. "

26. Response of the Petitioner thereto in terms of its Email dated 11.02.2012 reads as under:

"At the outset I deny all the contents of the minutes of meeting prepared and sent by you. Please note that I had told you that you are mixing up payments and that is why individual accounts have to be settled.

I further requested you to reconcile the accounts of the Rajnandgaon headend first as that is the biggest network and you have shown huge amounts of dues.

I seems to me that you are not willing to accede to any of

my requests and hence it is clear that you are trying to create outstanding only to prejudice me and my business.

Further, I requested you to please verify my SLR by conducting a joint survey and thereafter enter into an agreement on negotiated subscriber base.

You are however, asking for a 40% increase in the last paid subscription amount even though I have constantly been saying I have lost subscribers.

I cannot be put under pressure only because you have to meet some sales targets fixed by your company. I am losing my subscribers on a constant basis and further my cable operators are also not paying me my dues. I am losing my subscribers on a constant basis and further my cable operators are also not paying me my dues. I am in the process of giving them notices of disconnection. I request you to please see the ground situation and thereafter negotiate for a new agreement for both the Star and Zee channels. I have certain claims for the other account which cannot be mixed with the Rajnandgaon headend and that is also one of the reasons for separate reconciliation. From the above it is clear that you are not considering my request with an open mind looking at the ground realities failing which I will have no option but to instruct my advocate to mention that he reconciliation process has failed and request the court to proceed with the matter and I will abide by the

order passed by the court."

27. It is not in dispute that the Petitioner paid the aforementioned amount of Rs. 5,57,737/- in two installments; the first of which being for a sum of Rs. four lakhs had been paid on or about 21.01.2012

The Respondent herein, has produced a statement of account in respect of all the five different agreements, which reads as under:

CRN No. 10027556
Network Name NANDGAON CABLE NETOWORK

Month	Billing	Collection	Balance
Opening Balance			145,651
Jan-11	220,033	200,000.00	165,684
Feb-11	220,033	200,000.00	185,716
Mar-11	220,033	250,000.00	155,749
Apr-11	220, 033	150,000.00	225,782
May-11	220, 033	175,000.00	270,815
Jun-11	220, 033	490,848.00	(0)
Jan-12		4,143.00	(4,143)

Mpro ID 59363

Network Name NANDGAON CABLE NETOWORK

Month	Billing	Collection	Balance
Closing Balance as per SD Books			(4,143)
Jul-11	220,033		215,890
Aug-11	220,033		435,923
Sep-11	220,033	300,000	355,955
Oct-11	220, 033	300,000	275,988
Nov-11	220, 033		496,021

Dec-11	220,033	200,000	516,054
Jan-12		200,583	535,504

Closing Balance as on date 535,504

ZT Id 35016
Network Name NANDGAON CABLE NETWORK

Month	Billing	Collection	Balance
Opening Balance			116,857
Apr-11	154,999	354,115.00	(82258)
May-11	154,999		72,741
Jun-11	154,999		227,741
Jan-11		3,100.00	224,641

Mpro ID 55522
Network Name NANDGAON CABLE NETWORK

Month	Billing	Collection	Balance
Closing Balance as per ZT Books			224,641
Jul-11	154,999	300,000	79,640
Aug-11	154,999	300,000	(65,361)
Sep-11	154,999		89,639
Oct-11	154,999		244,638
Nov-11	154,999		399,638
Dec-11	154,999		554,637
Jan-12	110,000	557,737	106,900

Closing Balance as on date 106,900

ZT Id 39307
Network Name NANDGAON CABLE NETWORK

Month	Billing	collection	Balance
Closing Balance as pr ZT Books			(451)
Jul-11 to Sept-11	13,598		13,147
Oct-11 to Dec-11	13,598	27,196	(451)
Jan-12 to Mar-12	13,598		13,147

Closing balance as on date 13,147

24. The CRN No. 10027556 pertained to Star Channels whereas the one bearing No. 59363 was in respect of the Media Pro Enterprise Ltd. The Code No. 35016 appears to be pertaining to the Zee Group of Channels, whereas 55522 again is for Media Pro.

25. In respect of Dongergaon Zee Group of Channels the IRD No. is 39307. So far as the Media Pro's account is concerned, a sum of Rs. 13,147/- was said to be due as in March 2012.

26. Mr. Sharath Sampath would contend that even assuming that no subscription fee was paid for the month of January 2012, the amount of Rs. 5,35,504/- said to be due both for Zee and Star.

27. The learned counsel would contend that if the aforementioned statement of account is compared with the purported minutes of meeting dated 19.01.2012 as contained at page 140 of the paper book, it would appear, that a sum of Rs. 7,127.2736 has merely been shown as arrears for the network of Rajnadangaon having in MPID of 55522.

28. Mr. Sampath would urge that it is not a case where the petitioner used to pay in lump sum against all the accounts and thus each account has to be reconciled; the payments having been made against each of the agreements separately. As has been pointed out even the Respondents have accounted for the amount paid against each of the agreements separately.

29. Another meeting took place on or about 31.01.2012, the minutes of meeting of which, according to the Petitioner, is as under:

“After lot of waiting for the minutes of our meeting as directed by Hon’ble TDSAT I’m sending You the details of our discussion.

As per the direction of Hon’ble TDSAT, minutes of my discussion with you are as follows:

- 1. As per discussion regarding activation of Zee Channels where in you have asked me to activate and sign Zee channels and sign the agreements with growth for which I have refused to sign or activate the Zee channels as I am not in a position to pay the amount demanded by you.*

2. *Discuss regarding agreements for Star Channels for which you have demanded a huge amount of growth from the present revenue, which I refused due to inability to pay the said amount.*

3. *I had asked for the SOA from the company and which in have been requesting you and Mr. Manish Sinha for the same for over two month."*

30. Mr. Sampath would contend that whereas the Petitioner had been asking for down gradation, the Respondent had been asking for growth.

31. Mr. Sampath pointed out to the cross examination of RW-1 Manish Sinha to contend that it would appear therefrom that the Petitioner had asked for down gradation and the same had been approved in regard to certain areas and different reasons existed for different areas and in that view of the matter, the reconciliation process was required to be made in respect of each of the agreement separately and not together.

32. Attention of this Tribunal has also been drawn to the cross examination of Shri Manish Sinha which reads as under:

“Q. 15: As prayed that there were 5 different accounts with 5 different agreements, 5 different id’s and 5 different building, would it be correct to say that for all practical purposes of negotiations and accounting of all the 5 accounts were different.

A: It is correct.

Vol. All 5 accounts are run in the Rajnandgaon district and are owned by the sole proprietor of the petitioner.

Q. 16: I put it to you that the petitioner had no outstanding due towards Star Den for the Rajnandgaon account till June, 2011.

A: It is incorrect.

Vol. As on date on all 5 accounts network has an outstanding of approx. Rs. 20 lacs.

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

33. Attention of this witnesses also been drawn to a message which was forwarded by the Petitioner to RW-1 which reads as under :

“1. Now as you are aware that I have got down gradation for the Ambargarhchowki network and since the agreement of both Dongargaon & Ambagarhchowki for Star Den has expired

on 31st Dec.'11 and of Zee Turner for Dongergaon has expired on 31st Mar'11,. I have come many times at your Raipur office to negotiate and get my agreements signed but was never responded positively. I would request you to please call me and get my agreements of both Dongergaon & Ambagarhchowki signed before 31st Mar'12, failing to which I have to move to TDSAT for the same. I know that you're a purposely delaying the signing of the fresh agreement only to harass me and get more money out of me than what is actually payable to you as subscription charges.

I request you to please call me for a meeting at the earliest and settle the issue.

*2. Please find the below approval of downgradation approved by Star Den from 1st of June 11 onwards for my network of Ambargarhchowki and after deduction of the amount to be downgraded please let me know the rest of the outstanding till Mar'12 which I am required to pay, so that I can clear your accounts. As per you approval Rs. 21800*10= 2,18,000 has be credited in my account. Please do the need as soon as possible.*

3. Please look the below mention mail. As customer downgradation request already approved in July'11 (as per the below mention mail) but till date the below mention DG case is

pending & a large O/s showing in customer A/c."

34. According to the Petitioner the said information relating to approval of downgradation was given to it by M/s Global Communication which was the distributor of the Respondent, which is to the following effect:

"As per the below mention mail M/s Nandgaon Cable Network (Media Pro SMS ID 58570) CRN No. 10041234 billed Rs. 33023/- his downgradation amt. 22,000/- is pending from Ist June 2011 as per below mention mail.

*Till now billing is generated Rs. 33023/- & O/s showing amt. 110370. His Downgradation amt. @ 22000*4=88000 has pending from June to Sept. 11 the balance O/s is only 22370 till Sep. 11."*

35. When RW-1 was confronted with the said communication of the distributor of the respondent, he stated as under:

"Q No. 27: I put it to you that te Petitioner vide its email dated 25.03.2012 informed you about the down gradation acceptance given by Star Den for the area of Amba Garh Chowki?

(Ld. Counsel for the Respondent object that this question is beyond the pleadings as the question to be asked has to

be with reference to the document on the record.)

(Ld. Counsel for the Petitioner confronts the witness with the email dated 25.03.2012 sent by the Petitioner to the witness of the Respondent deposing before this Hon'ble Tribunal marked as 'Exhibit A')

A. It is correct.

Volunteers: We have called him various times to come forward and settle all the accounts and thereafter, pay the outstanding but he has not been supporting us for the same.

Q. 28: I put it to you that you have till date not considered the downgradation acceptance given by Star nor have you brought that email on record with your evidence affidavit filed in May, 2012.

A. It is incorrect.

Vol. We have called him various time to settle all 5 accounts.

Q 29. As you say that it is incorrect that you have not considered the down gradation acceptance, than have you revised your alleged statement of account of ascertain the dues of the petitioner in the Ambagarh Chowki account.

A. No.

Vol. The petitioner has not come forward to settle all

the accounts and we have asked the Petitioner to furnish the SLR in respect of all 5 accounts.A. No.

Q 30. Have you responded in writing to the emails sent by the Petitioner to you on 25.03.2012?

A. No.

Q 31. I put it to you that similarly assurances of down gradation were given by Mr. Somesh Bajpai and the petitioner was entitled to a down gradation of its subscriber base in respect of Zee Bouquet of channels for the Rajnandgaon account from June, 2011.

A. It is incorrect.

Vol. No such commitment was given by the Erstwhile Zee Turner.

Q 32. I put it to you that similarly assurances of down gradation were given by Mr. Punit Parekh and the petitioner was entitled to a down gradation of its subscriber base in respect of Star Bouquet of channels for the Rajnandgoan account form june, 2011.

A. it is incorrect.

Vol. no such commitment was given by the erstwhile Star Den. "

36. It was furthermore submitted that the statement of account has not been proved.

37. Mr. Thakur urged that pursuant to or in furtherance of the direction of this Tribunal dated 11.01.2012 the parties met and the Petitioner agreed to reconcile the accounts in respect of all the accounts and not for the Star Channel alone for Rajnandangaon.

The said direction was issued by this Tribunal on the aforementioned date so that the parties may settle all their disputes and differences. In the event however, the Petitioner had some reservations thereabout, it could have approached this Tribunal for modification of the said order and issuance of an appropriate direction in that behalf. No such step having been taken by the Petitioner, the question as to whether the all the accounts should have been reconciled or cannot be permitted to be raised at this stage.

Such a direction was issued having regard to the statement by the learned counsel appearing on behalf of the Respondent that not only a sum of Rs. 5 lakhs and odd was owing and due from the Petitioner but in fact a

sum of Rs. about Rs. 12 lacks was due

38. It, in our opinion, does not lie in the mouth of the Petitioner now to contend that it was not bound to enter into the reconciliation process for all the five agreements. It may be placed on record that only even on 26.03.2012, the Respondent gave an offer to the Petitioner pursuant where to the parties were to meet on 16.04.2012. However, the Petitioner contended that no settlement was possible to be arrived at the witnesses of the parties were thereafter examined and cross examined.

39. The Petitioner has drawn the attention of this Tribunal in this behalf to the Emails dated 08.12.2011 and 07.01.2012.

40. Mr. Sampath would contend that from a perusal of the said Email, it would be evident the Petitioner expressed its intention to enter into a new subscription agreement in respect of Zee Group of Channels.

It is of some significant to notice that the Petitioner has served a notice in terms of clause 4.2 of the Regulations stating that it did not intend to continue with the supply of signals thereof.

41. A public notice under clause 4.3 was also issued.

42. Whereas according to the Petitioner it had stopped obtaining supply of signals w.e.f. 2.01.2012 and offered return of the IRD boxes on 05.01.2012, the same was not accepted and only in the meeting held on 19.01.2012 return of the IRD boxes was accepted and in that view of the it is not liable to pay the subscription charges till that date.

43. So far as the Petitioner's prayer for a direction upon the Respondent to enter into a fresh agreement in respect of Zee groups of channel is concerned, suffice it to state that the Petitioner itself having brought an end to the relationship between the parties in respect of the said channels and having returned the decoders on 19.01.2012, it cannot ask for such a direction. It ought to have made a fresh request in terms of clause 3.2 of

the Regulations. The said prayer of the Petitioner is therefore cannot be exceeded to.

44. So far as the subscription fees payable for the Zee bouquet of channels is concerned, suffice it to point out that admittedly the Petitioner has returned the decoders on 19.01.2012; the difference in the subscription amount payable with regard thereto being limited to a few days. It is not necessary to enter into the said controversy between the parties as nothing substantial would turn therefrom.

45. If according to the Petitioner it has stopped taking supply of signals w.e.f. 02.01.2012, the relationship between the parties came to an end so far as the said bouquet of channels is concerned and, thus, in the opinion of this Tribunal , the Petitioner should have made fresh request for supply of signals thereof as is contemplated under clause 3.2 of the Regulations.

46. Mr. Sharath Sampath would contend that the negotiations were carried out for renewal of the agreement even on 11.12.2012 and the Petitioner had been supplying its SLR and in that view of the matter, this Tribunal can direct the Respondent to enter into an agreement in respect of Zee Bouquet of channel.

47. It is difficult to accept the said contentions. Two causes of action are separate and distinct

48. The Petitioner while inter alia praying for a direction upon the Respondent to enter into a subscription agreement, also made a prayer with regard to Zee Bouquet of channels upon grant of downgradation of its subscriber base. Suffice it to say that the said relief prayed for cannot be granted; the relationship of the parties having come to an end.

So far as the issue pertaining to submission of SLR is concerned the Petitioner would contend that it has not only supplied the SLR on or about 27.06.2011 but also offered that a joint survey be held, which has not been accepted by the respondent.

49. It was urged that in the meanwhile the Petitioner has lost most of its subscribers and therefor in respect of some of the areas there was a proposal for down gradation. In view of the specific stand taken by the respondent itself that this petition should be kept confined to Rajnangaon, this Tribunal need not enter into the said question

50. It is not correct to contend that the Petitioner on the one hand, shall ask for down gradation of its existing subscriber base and the same should form the basis for a direction upon the respondent to enter into a fresh agreement. Moreover, the question of down gradation would require separate consideration.

51. Mr. Sampath would contend that keeping in view the SLRs submitted by the Petitioner from time to time which in fact has been accepted by Mr. Manoj Kumar Sinha, requisite down gradation should have been granted.

52. Mr. Manoj Kumar Sinha in his cross examination stated as under:

“Q 53: Are you ready and willing to conduct a joint survey of the area of operation of the petitioner?”

A. Yes.

Vol. The true and correct SLR was furnished by the petitioner for the first time in January 2012.

(Attention of the witness is drawn to page no. 183 to 187 of the paper book)

Q. 54: I put it to you that thereafter the petitioner has vide his emails dated 13.03.2012 and 16.03.2012 again and furnished its latest SLR and requested you to come forward for a joint survey.

A. It is correct.

Vol. We have started to gather the true and correct connectivity of entire Rajnandgaon town.”

53. It is true that the petitioner has made a request for the joint survey and as per the said witness; it took recourse to its own survey not in actual terms but on the basis of a ground but all such steps were taken after this petition was filed before this Tribunal.

54. Attention of the Tribunal has been drawn to two of the Emails at pages 186 and 187 of the paper book where the Petitioner alleged that 25 of the LCOs have migrated to the network of one Sun TV which started its operation.

55. The Petitioner contends that its subscriber base has come down to 2010.

56. Mr. Thakur, on the other hand, would submit that the Petitioner did not annex the SLR with its Email sent in June 2011.

57. The Petitioner admittedly had supplied its SLR on or about 28.01.2012.

We may notice that by an Email dated 09.09.2011 the Petitioner was asked to supply the details of its subscriber base vis-à-vis its request for down gradation, whereto a reminder was sent on 15.11.2011. Another reminder was issued to the Petitioner by an Email dated 12.12.2011 the relevant part whereof reads as under:

"We acknowledge the receipt of your email dated 8th

December'11 regarding Zee agreement. At the outset, we deny the contents of your email. It is an admitted fact that your subscription agreement dated 27th December'10 with Zee Turner Ltd. stands expired on 31st March 2011 and despite our repeated requests and reminder vide email dated 9th September 11 & email dated 15/11/2011 till date we have not received any subscriber line report from your end.

Besides, it is denied that we have not sent invoices for Zee channels. Kindly note your customer code of Star & Zee channels are 59363 & 55522 respectively and accordingly separate monthly invoices are sent to you by Media Pro Enterprise India Pvt. Ltd. It appears you are only trying to raise new pleas in order to evade your onus to renew the subscription agreement for Zee channels at revised and upgraded subscriber base with Zee Turner for the period ist April'11 to 30th June'11 and thereafter enter into fresh subscriber base with Zee Turner for the period 1st July'11 to 31st March'12. Please note, your subscription agreement for Star Channels with Star Den Media Services Pvt. Ltd. is valid up to only 31st December'11.

Further it would be relevant to mention here that you have not been paying as per the invoices raised for either star channels (59363) & Zee channels (55522). Hence your plea

that all payments made by you till date is correct is contrary to our records. Kindly note payments made by you have been adjusted towards outstanding dues of above two customer codes of Media Pro and the Company reserves its right to claim the entire dues on account of both the accounts (Zee & Star channels customer codes).

As per our statement of accounts your outstanding to Media Pro (including the outstanding payable by you to Star Den, Zee Turner & Dec'11 billing in both customer codes) stands at Rs. 12,77,934- (Rupees Twelve Lakhs Seventy Seven Nine Hundred Thirty Four Only) as on date.

In view of above, you are required to clear the above outstanding dues, furnish true and correct SLR for verification and arriving at correct SLR for verification and arriving at correct subscriber base for the purpose of renewal of subscription agreement for Zee channels with Zee Turner for the period 1st April'11 to 30th June'11 and execution of subscription agreement with Media Pro for Zee channels for the period 1st July'11 to 31st March'12 and for Star channels for the period 1st January'12 to 31st March'12. You are requested to come forward and execute the subscription agreements for the periods indicated above and also clear the dues, instead of shooting false and frivolous emails."

58. According to the Respondent, the Petitioner had admittedly about 37 cable operators and according to the Petitioner 25 of them had left its network.

59. We may notice that total subscriber base of the Petitioner was 4582 so far as Star Group of channel is concerned and 3189 so far as Zee Group of Channel is concerned.

60. It is only with the rejoinder a purported letter has been annexed showing its subscriber base to be 2010 (Page 187).

61. Mr. Sampath would contend that RW-1 clearly admitted that another MSO being SUN TV has started its operation in the town of Rajnandgaon.

Attention of this Tribunal has further been drawn to the fact that the said witness has also accepted that one of the LCOs who had been taking supply from the Petitioner has now migrated to SUN being Mr. Sanjay Ghatode.

62. According to the Petitioner Sanjay Ghatode had merely a subscriber base of 137, whereas in cross examination a suggestion had been put that he had been paying a sum of Rs. 2.05 lakhs by way of subscription fee.

It has been pointed out that so far as Sanjay Ghotade is concerned although he was a local cable operator operating under the Petitioner but it has now become a multi service operator and had been running a network known as Sun TV.

63. It is therefore, not correct to contend that keeping in view that he had a subscriber base of 137 could not have been paying a sum of Rs. 2,50,000/- per month which amount is being paid in a different capacity.

I do not think that the said issue is of any significance.

64. RW-1 Mr. Manish Kumar Sinha stated:

“Q 44. Who is the other MSO in the area of Rajnandgaon town for which the Petitioner has the Rajnandgaon account?”

A. The Sun.

Vol. It has come up w.e.f. March 2012. Earlier the Petitioner

was the only operator in Rajnandgaon Town.

Q 49. I put it to you that the said MSO is paying the Respondent subscription amount of Rs. 2.5 lakhs per month for the Media Pro channels.

A. It is an internal document however, if the Hon'ble TDSAT requires the same, the same can be produced.

Q 50. I put it to you that more than 20 cable operators including Mr. Sanjay Ghatode attached to the petitioner' s network moved to the other MSO on 10.03.2012.

A. I am not aware.

Vol. As per the ground report the Petitioner is providing the signal to entire Rajnandgaon town.

Q 51. I put it to you that the Petitioner has filed separate recovery petition before this Hon'ble Tribunal against all its cable operators including MrSanjay Ghatode who have moved to the other MSO without clearing their outstanding dues.

A. I am not aware.

It is correct to suggest that the petitioner is entitled to down-gradation of subscriber base on account of the subscribers moving to DTH as also most of the cable operators moving to the other MSO."

65. It has been accepted at the Bar that the Petitioner has not been able to establish its case for downgradation for the Zee group of channels. The Petitioner along with an Email dated 20.01.2012 has annexed the names of the LCOs who were attached to its network; the total number of the subscriber being 4582 out of which 2010 was the direct connectivity of the Petitioner.

66. Attention of this Tribunal, however, has been drawn to the Email dated 10.01.2012 wherein the current SLR has been stated to be comprising of 2527 subscribers. In its Email dated 13.03.2012, the Petitioner expressed its inability to pay the sum of Rs. 2,20,000/- as per the agreement keeping in view the fact that a number of cable operators have moved to the new MSO Sun. Along with the said Email the names of 25 LCOs had been mentioned.

67. Mr. Thakur would submit that if the contention of the Petitioner is correct then there is absolutely no reason as to why the Petitioner would file only 20 recovery petitions and not 25.

68. Mr. Sampath would, however, contend that it cannot be said that all the 25 cable operators were defaulters. There is also a possibility, according to the learned counsel, that the amount due from them was so negligent and thus, it was not viable to file an independent Petition before this Tribunal.

69. The Petitioner's case is required to be considered keeping in view the second proviso appended to clause 10.2 of the Regulations.

The burden of proof therefor was on the Petitioner.

70. There was absolutely no denial the fact that the Petitioner has not produced its books of accounts.

71. If it's contention with regard to the payments made by it towards Star only is accepted, the Petitioner would be a defaulter in respect of the Zee TV.

72. It is furthermore not in dispute that the Petitioner paid the entire outstanding amount as mentioned in the Respondent's notice dated 19.12.2011 only in terms of the interim order passed by this Tribunal and not prior thereto.

73. Although this Tribunal in express terms did not direct the Petitioner to pay the monthly subscription amount in respect of the Star group of channels, in law it was bound to do.

74. Having regard to Clause 8.1 of the Regulations, the agreements having expired, the broadcaster was entitled to bring an end to the relationship between the parties by merely issuing a notice in the manner laid down under clause 4.3 of the Regulations.

No exceptional case has been made out to direct the Respondent to enter into an agreement with the Petitioner, both in respect of Star TV as well as Zee TV.

75. If according to the Petitioner while holding negotiations for renewal of the agreement, the conduct of the Respondent was not reasonable necessitating interference by this Tribunal, the Petitioner should have brought the relevant documents on record before this Tribunal.

Evidently it failed and/or neglected to do so.

76. I am, therefore, of the opinion that the Petitioner has not been able to prove that it is entitled to downgradation for the purpose of renewal of the agreement.

Sections 59 and 60 of the Contract Act are read as under:

“Section 59. Application of payment where debt to be discharged is indicated : Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying, that the payment is to be applied to the discharge of some particular debt, the payment if accepted, must be applied accordingly.”

Section 60. Application of payment where debt to be discharged is not indicated-

Where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitations of suits."

77. In support of its claim that it was for the Petitioner to notify the creditor as to how the debt should be appropriated, reliance has been placed by Mr. Sampath on *Pullock and Mulla's the Indian Contract Act and Specific Relief Act*, which reads as under:

"The appropriation by the debtor should be communicated to the creditor either expressly or impliedly so that the creditor knows that his rights of appropriation do not arise. The debtor may specify his

appropriation impliedly by showing other circumstances indicating that his intention at the time of payments was to appropriate to a specific debt or account. Where by a mortgage bond, the debtor agreed to repay the loan made to him by the creditor in kind by delivery of certain types of grain or at his option, in cash at a specified rate of interest, and the creditor applied several payments in grain made by the debtor to other stipulation to repay the loan by delivery of grain, combined with the absence of evidence to show that the previous debts were to be liquidated by payments of grain, was a circumstance only. Where crops were charged with a debt, the sale proceeds of the crops paid by the buyer to the creditor have to be appropriated to the hypothecation debt. It was held that appropriation to other bonds can only be made with the consent of the debtor."

78. Reliance has also been placed on a decision of the learned single Judge of the Patna High Court in *Shymalal Vs. Raghunath Marwari* reported in AIR 1937 Patna Page 432.

In that case the Patna High Court was dealing with a bailment issue. Keeping in view the facts and circumstances of that case the High Court upheld the view the appropriation of the amount was in proper head holding:

“3. I have read the section from which it is quite clear that although the stipulation may put the matter beyond doubt, the Court has got a further duty to see whether there was any intention of the parties to appropriate it to a particular debt. Rather there are instances indicating to which debt the payment is to be applied and from some points of view, there is a slight variation of the Common Law. At Common Law an appropriation may be held to have taken place although the proof of an express appropriation might be wanting. But in any event it would be necessary at Common Law to prove the actual

appropriation whereas the section rather indicates something short of that. It is contended here that the fact that the plaintiff demanded back the ornaments at the time of the payment of Rs. 300 is the circumstance from which it might be inferred that the plaintiff was appropriating the Rs. 300 to a particular debt. That is quite possible; and whether there are any other circumstances in the case I am quite unaware although the learned Advocate has not pointed out any to me at the moment"

79. The said provisions are required to be read in a holistic manner. There cannot be any doubt or dispute that a debtor has the first option. It must, however, exercise the same.

80. It is furthermore stated that the court should be entitled to look to the circumstances to find out as to how such an option, if not express but implied has been exercised.

It is to that effect only in Shyamlal (Supra) the question raised therein has been determined.

81. In the event however, it is found that an option has not been exercised, it is for the creditor to appropriate the amount paid to it in respect of any debt.

82. In this case it is not in dispute that the Respondent has started a joint venture with regard to the Star Group of Channels and Zee Group of Channels w.e.f. 1.07.2011.

83. In respect both the group of channels the Respondent has been maintaining a common account only. So far as the two group of channels are concerned any amount payable to Star Den or Zee Turner was to be appropriated. It is in the aforementioned situation, while making lump sum payments, the Petitioner should have stated as to how it intended to exercise its right of option as contained in Section 59 of the Indian Contract Act.

84. If it has not able to do so, Section 60 will come into the effect and, thus, if the Respondent has appropriated the same against the Zee Group of Channels no controversy with regard thereto can be raised at this stage.

85. It, moreover, appears that the Petitioner who was aware thereabout and only at a later stage it purported to have said so in clear terms.

86. When such an option had clearly been exercised from those months only the Respondent was bound to give effect to the intention expressed by the Petitioner to that effect.

For the foregoing reasons this Tribunal is unable to accept the contentions of Mr. Sharath Sampath, that the Respondent was not entitled to adjust the amount paid by it in respect of any other debt.

87. I have, therefore, no doubt that the Petitioner is a defaulter.

89. In any event, the Petitioner has not paid the monthly subscription fee during pendency of this Petition in terms of the existing commercial, in the event, clause 8.1 of the Regulation is held to be applicable.

For the reasons aforementioned, this petition is dismissed.

90. In the facts and circumstances of this case, however, there shall be no order as to costs.

This order shall not however preclude the parties from negotiating the terms of the contract afresh.

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

MM